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Practice before regulatory agencies and administrative bodies tends to be specialized and has seen considerable growth in recent years. The authors, Mr. Williams and Mr. Porter, examine in detail the highly specialized practice before the Wyoming Oil and Gas Conservation Commission. They review the practical aspects of an attorney's role in representing clients before the Commission and discuss the governing statutory and case law in depth.

PRACTICE BEFORE THE WYOMING OIL AND GAS CONSERVATION COMMISSION

*Houston G. Williams**

*George M. Porter***

INTRODUCTION

THE Wyoming Oil and Gas Conservation Commission has been given broad powers under Wyoming statutes in the field of regulation of oil and gas production. Decisions of the Commission necessarily affect the lives and activities of a large number of Wyoming people and involve large amounts of money. As a consequence, the role of attorneys practicing before the Commission has increased because of the importance of the Commission's decisions to oil and gas operators. Almost every decision of the Commission will involve an appearance by an attorney attempting to advance

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his client's best interests. Many complex legal problems are presented to an attorney practicing before the Commission, and the attorney who is to undertake such work must have a broad knowledge not only of the legal concepts but, also, geologic and engineering concepts. Therefore, it might be well to commence this article with a brief discussion of some of the geologic and engineering background of petroleum production.

It should be noted at the outset that petroleum occurs in nature in gaseous, liquid and solid states, usually as a gas or a liquid. Frequently the liquid (oil) has gas present in solution in it. Nearly all commercial oil and gas production is from some form of sedimentary rock. Sedimentary rock is formed by the accumulation of sediments in water or from the air. Many sandstones and limestones and some shales possess two physical properties necessary for the accumulation of petroleum in commercial quantities, *i.e.* porosity and permeability. Porosity relates to the void between the particles that compose the rock formation. Permeability of a rock is its capacity for transmitting fluid. Oil cannot be produced from reservoir rock unless the rock allows petroleum to move through it. Geologists look for reservoir traps which are underground formations favorable to the accumulation of oil and gas. A reservoir trap may be generally described as a tilted layer of sedimentary rock overlain by sand or shale and folded, broken or otherwise formed into a trap to stop the migration of petroleum upward. There are two fundamental types of reservoir traps—structural and stratigraphic. A stratigraphic trap results in a change in the character of reservoir rock (*e.g.*, from permeable to impermeable) or from a “pinchout” of the reservoir bed. An example of a simple stratigraphic trap is a lens of porous, permeable sandstone surrounded by impermeable shale. Oil and gas deposits have been found in such traps despite the absence of any structure.

These concepts are also important in the discussion which follows in that the testimony before the Commission invariably deals with the type of formation and its physical

characteristics. Usually, evidence is produced before the Commission through testimony of a geologist using maps and other documents illustrating the geologist's expert opinion as to the nature of the trap and formations involved, and such a witness will testify as to the physical properties of the particular formation as well as its manner of deposition and structural conformity. This testimony is necessary to apprise the Commission of the scientific facts upon which its decision ultimately will be based. Where reservoir characteristics and reservoir performances are important, and most frequently this is the case, a petroleum engineer will be called upon to testify before the Commission concerning the engineering aspects of the particular pool or formation involved, consisting largely of the various mechanisms which will affect production from the pool involved.¹

Three fluids may be found singly or in combination in a reservoir trap—oil, gas and water. If each is present in its natural state, the water will be at the bottom, the oil next, and free gas on top. The lines separating these fluids are called oil-water contact lines and gas-oil contact lines although these are not sharply defined. Also present in the typical reservoir will be connate water, which is a thin film of water around each grain of the stone, but very little of this is produced by the well. Free gas does not always occur in a reservoir, but some gas is almost always present in solution in the oil, most of which becomes free gas when the oil reaches the reduced pressure on the surface. Such gas is known as casinghead gas. The production of casinghead gas creates a problem for the producer for the reason that the Commission in most instances will not allow it to be vented to the atmosphere or flared. This necessitates some sort of treatment to separate the liquids and the dry gas into usable products. Producers desire to extract the oil at an early stage of production in order to recover the costs of drilling and completing wells. If the Commission enters a no-flare and no-vent order, oil production will be effectively curtailed until facilities are constructed by the operators to handle casinghead gas produced with the oil.

1. See 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §§ 101-04 (1972).

Both natural and artificial means are used to produce oil. During primary production, natural energy propels the petroleum to the well bore where artificial energy can then be used to lift it to the surface if necessary. Natural sources of reservoir energy are gas expansion, water encroachment and gravity. One of these forces is always present in a commercial oil field, and often a combination of all three. If some of the gas is free, what is known as a gas cap exists as opposed to a solution gas reservoir deposition. In either event, maximum ultimate recovery depends on conserving the gas pressure; thence it is as improper to indiscriminately produce gas from the gas cap as it is to produce oil from wells with high gas-oil ratios.

A water-drive field derives its energy from edge or bottom water in the formation, although gas expansion may give an assist. Water is only slightly compressible, but when tremendous volumes of it are present, as is frequently true in reservoir traps, the effect of the slight compression is greatly magnified. With the reduction of pressure, the water expands, pushing the oil ahead of it. Recovery of a very high percentage of oil in place can be achieved in water-drive fields because water has the effect of flushing out the oil and washing it toward the well bore, but recoveries depend upon use of proper production methods. Rate of production, gas-oil and oil-water ratios are the primary factors affecting recoveries.²

WELL SPACING PATTERN DEVELOPMENT

From a legal standpoint, the recovery of oil and gas by drilling began under the old "Law of Capture." Since oil and gas are transitory substances, it was possible to produce oil and gas not only from beneath the lands covered by the lessee's lease but also from adjacent lands. If a well was drilled on one lease which potentially could drain the oil and gas, or either of them, from beneath an adjacent tract of land, the landowner or his lessee of the adjacent land had only one remedy and that was to drill an offset well on the

2. *Id.*

adjacent land, which would protect that land from drainage by the initial well. Once the offset well was drilled, it might threaten drainage of an additional adjacent tract, and that landowner or his lessee would be forced to drill a well to protect his land from drainage, and so on. This was a wasteful practice, and while it might have been efficient, and while harm might not be done to reservoirs, many useless wells were drilled. It became a recognized fact that one oil well could efficiently drain a certain area and that it was not necessary to drill any additional wells to drain such an area. The extent of drainage depends, of course, upon the physical characteristics of the formation bearing the oil and gas and the reservoir characteristics of the pool.

In order to eliminate this wasteful practice, a system of well spacing was devised and an attempt was made to have a uniform pattern of wells drain a particular reservoir or pool. The states began to enact conservation laws under which a state regulatory officer or agency controlled such spacing of wells without regard to ownership of minerals and leasehold estates. Since control of well spacing became vested in a regulatory body and since well spacing inherently prevented dense drilling and abrogated the law of capture to a great extent, other rights came into focus and most conservation laws began to contain provisions which would assure that each mineral owner and his lessee or other types of interest owners would be entitled to recover their proportionate share of the oil underlying their tracts of land. For example, if it be assumed that the regulatory body determined that one well on an 80-acre tract of land would efficiently drain the oil therefrom, and yet the 80-acre tract was diversely owned, that is, one mineral owner owned the minerals under one 40-acre tract and another mineral owner owned the minerals under the other 40-acre tract within a given 80-acre spacing pattern, there had to be some method devised to assure that the 40-acre owner on whose tract a well was prohibited would be entitled to recover the oil underneath his tract. Since this was not to be done by his drilling of an unnecessary well, the conservation laws provided for pooling of the two 40-acre tracts and a participation

by all interest owners in the drilling of the one well which was allowed on the 80-acre tract. Normally this was done in proportion to surface acreage contributed, and in this example all of the interest owners would participate to the extent of one-half. This would require those paying the costs of drilling and production each to underwrite one-half of those costs. By the same token, they would participate in one-half of the production allocated to their interests. Participation in the production by royalty owners was also on an equal basis although they would not be responsible for the costs and expenses of drilling and producing the oil.

While the use of an acreage basis for participation in a pooled tract is the most common, it is possible that, due to variations in the formation characteristics, other formulae should be used. If an owner can show, for example, that the formation underlying his tract is thicker and more permeable, and contains a better porosity than the formation underlying other tracts, then more producible oil is in place beneath his tract and he should be allocated more oil than his neighbor in such event. It is possible by the use of engineering methods to determine the amount of producible oil in place under each tract.

Voluntary pooling by the parties generally follows a spacing order, but in those cases where it is not possible to negotiate a voluntary agreement, state laws generally provide for compulsory pooling.³ It is logical to assume that, in the beginning of the development of conservation laws relating to oil and gas, constitutional questions would be raised since private rights were being affected by the insertion of governmental controls on well locations and with respect to related matters. Suffice it to say, the courts consistently have upheld the concept of governmental control over conservation of natural resources so long as the statutes establishing such governmental control at the same time protected private rights.⁴ An examination of the development of oil and gas

3. WYO. STAT. § 30-221(f), (g) (Supp. 1973).

4. *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920). This was a case involving the conservation statutes of Wyoming making unlawful the use, consumption or burning of natural gas without the heat therein contained being fully and actually applied and utilized for other manufacturing pur-

conservation statutes in the state reveals a certain give and take between matters in the public interest generally and private rights which must be recognized and protected. This is a continuing conflict and the subject of many legal battles. Private industry resists any governmental control that seems not to be in its best interests, and there are many instances where private industry has determined to mount an attack upon oil and gas conservation statutes and adverse decisions of the Commission thereunder.⁵

poses or domestic purposes when a source of supply is located within ten miles of an incorporated town or industrial plant. The statute also prohibited the use, sale or other distribution of natural gas for the purpose of producing carbon or other resultant products without the heating being fully and actually utilized for manufacturing or other domestic purposes. Midland Carbon Co. attacked the statute on federal constitutional grounds. The Supreme Court of the United States upheld the statute, stating:

The determining consideration is the power of the state over, and its regulation of, a property in which others besides the Companies may have rights, and in which the state has an interest to adjust and preserve, natural gas being one of the resources of the state.

Id. at 319.

And again the Court stated:

And there is great disproportion between the gas and the product, and necessarily there was presented to the judgment and policy of the state a comparison of utilities which involved as well the preservation of the natural resources of the state, and the equal participation in them by the people of the state. And the duration of this utility was for the consideration of the state, and we do not think that the state was required by the Constitution of the United States to stand idly by while these resources were disproportionately used, or used in such way that tended to their depletion, having no power of interference.

Id. at 324.

See also *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900), involving a statute prohibiting waste of gas or oil defined as permitting the flow of gas or oil from any well to escape into the open air for a longer period than two days. In that case, the oil company contended that the act deprived it of property without due process of law and denied it equal protection of the law. The Supreme Court of the United States affirmed the state supreme court stating:

Possession of the land is not necessarily possession of the gas. . . [T]he property of the owner of lands in oil and gas is not absolute until it is actually in his grasp, and brought to the surface.

Id. at 204-05. The court in that case held that a state may interpose its power to prevent a waste or disproportionate use of either oil or gas by a particular owner in order to conserve the equal right of other owners and advance the public interest, and, further, that the power of the state "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."

Id. at 210.

5. See text pp. 364, 381 *infra*.

WYOMING LEGISLATIVE HISTORY

Since 1921 there has been some type of regulation governing the drilling, abandoning and producing of oil and gas wells within the State of Wyoming. Initially, the Commissioner of Public Lands was the sole authority in these matters, and he was required by statute to make rules and regulations governing these procedures.⁶ The Commissioner of Public Lands, with the approval of the Governor, was given authority to appoint the Oil and Gas Supervisor, whose duties were to oversee and enforce these rules and regulations.

The first comprehensive act establishing the Oil and Gas Conservation Commission is found in ch. 94 [1951] Wyo. Sess. Laws. The basic approach was the prevention of waste, and the initial statute, in Section 1 thereof, provided:

The waste of oil and gas or either of them in the State of Wyoming as in this act defined is hereby prohibited.⁷

Section 13 of the 1951 Act defined waste, in addition to its ordinary meaning, to include as to oil:

[U]nderground waste, inefficient, excessive or improper use or dissipation of reservoir energy, including gas energy and water drive, surface waste, open pit storage and waste incident to the production of oil in excess of the producer's above-ground storage facilities and lease and contractual requirements, but excluding storage (other than open pit storage) reasonably necessary for building up or maintaining crude stocks and products thereof for consumption, use and sale.⁸

The term "waste" as applied to gas in Section 13 of the 1951 Act included:

[T]he escape, blowing or releasing, directly or indirectly, into the open air of gas from wells produc-

6. WYO. COMP. STAT. §§ 57-1101 to -1107 (1945).

7. Ch. 94, § 1 [1951] Wyo. Sess. Laws 120 (now WYO. STAT. § 30-217(a) (1967)).

8. Ch. 94, § 13(a)(1) [1951] Wyo. Sess. Laws 128-29, as amended, WYO. STAT. § 30-216(a)(1) (Supp. 1973).

tive of gas only, or gas from wells producing oil or both oil and gas; and the production of gas in quantities or in such manner as will unreasonably reduce reservoir pressure or unreasonably diminish the quantity of oil or gas that might ultimately be produced; excepting gas that is reasonably necessary in the drilling, completing, testing and producing of wells and gas unavoidably produced with oil if it is not economically feasible for the producer to save or use such gas.⁹

Under this act, waste also included negligent operations causing contamination or potential contamination of potable underground water.

Surface waste was defined in this act as:

[T]he unnecessary or excessive surface loss or destruction without beneficial use, however caused, of gas or oil including evaporation, seepage, leakage, or hazardous handling or storage with respect to fire, and open pit storage of oil . . . ; and the drilling, equipping, operating or producing of oil or gas wells in a manner causing or tending to cause unnecessary or excessive loss or destruction of oil or gas¹⁰

Surface waste also included the escape or release of gas from gas wells or from wells productive of both oil and gas into open air except for drilling, completing and testing.¹¹ Likewise, waste included drilling of any well not in conformance with the well density and spacing program fixed by the Commission.¹²

Therefore, it can be seen that the basic purpose and mandate of the first comprehensive act in Wyoming was the prevention of waste as defined therein. In addition, the 1951 Act established the Wyoming Oil and Gas Conservation Commission and gave it authority over the physical activities involved in the drilling for and producing of oil and gas wells. In order to prevent waste, the Commission

9. Ch. 94, § 13(a) (1) [1951] Wyo. Sess. Laws 129, *as amended*, WYO. STAT. § 30-216(a) (1) (Supp. 1973).

10. Ch. 94, § 13(a) (2) [1951] Wyo. Sess. Laws 129 (repealed 1971).

11. Ch. 94, § 13(a) (2) [1951] Wyo. Sess. Laws 129 (repealed 1971).

12. Ch. 94, § 13(a) (3) [1951] Wyo. Sess. Laws 129 (now WYO. STAT. § 30-216(a) (3) (Supp. 1973)).

was given authority to establish drilling units "of specified and approximately uniform shape covering any pool."¹³ The Commission was admonished in this act that in establishing a drilling unit the same "shall not be smaller than the maximum area that can be efficiently drained by one well."¹⁴ This latter quoted language has caused lawyers, geologists, engineers and the Commission itself, much difficulty. The Act likewise provided that the order establishing drilling units shall direct that no more than one well shall be drilled and produced from the common pool or source of supply and at a location authorized by the order. If the drilling unit was found by the Commission to be located on the edge of a pool or field and adjacent to a producing unit, or for some other reason the well could not be drilled at the authorized location, the Commission could grant an exception and allow the well location to be moved. Likewise, the Commission was authorized to decrease the size of drilling units or permit additional wells to be drilled thereon in order to prevent waste, and the Commission could enlarge the area covered by the order fixing drilling units if the Commission determined that the pool was underlying an area not covered by the initial order. The Act then prohibited the drilling of wells at any location other than that authorized by the order.

Typically, the 1951 Act provided for pooling or communitization both on a voluntary basis and by the Commission if a voluntary agreement could not be effected. The pooling order was to be entered after notice and hearing. The statute likewise provided that the Commission could

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13. Ch. 94, § 3(a) [1951] Wyo. Sess. Laws 121 (now WYO. STAT. § 30-221(a) (Supp. 1973)).
 14. Ch. 94, § 3(b) [1951] Wyo. Sess. Laws 121 (now WYO. STAT. § 30-221(b) (1967)). This language is probably the most controversial in the entire statute. Geologists and engineers will testify that any one well will drain any pool—given enough time. As a consequence, the applicant will ask initially for drilling units larger than first indications may show to be ideal on the theory that if wider spacing is used, and it works, the drilling of unnecessary and expensive wells will be avoided. If the initial spacing is too wide, the Commission at a later hearing can narrow the spacing unit to permit "in-fill" drilling and thus avoid waste and capture all the producible oil and gas. Unfortunately, the Commission seems to interpret "maximum" in this context as "minimum" and tends to keep spacing units as small as possible.

determine costs and allocate the costs among the various owners of tracts within the drilling units.

Under the 1951 Act, the Wyoming Oil and Gas Conservation Commission was composed of the Governor, the Commissioner of Public Lands and the State Geologist, with the Governor as Chairman. Provision was made for a State Mineral Supervisor, who was, *ex officio*, the Director of Oil and Gas Conservation, and he was also made *ex officio* the Secretary of the Commission and was directed to keep all minutes and records of the Commission.

FEDERAL MINERAL LANDS

It is interesting to note that the first comprehensive oil and gas conservation law of Wyoming was made applicable to all lands in the State of Wyoming lawfully subject to its police powers, with a proviso that it applied to lands of the United States or lands subject to its jurisdiction "to the extent that control and supervision of conservation of oil and gas by the United States on its lands shall fail to effect the intent and purposes of this act . . ."¹⁵ The Act was also made applicable to lands committed to a unit agreement approved by the Secretary of the Interior or his representative. In practical effect, to the knowledge of the authors there has never been any serious dispute concerning jurisdiction of the Wyoming Commission under the Oil and Gas Conservation Act with respect to federal lands. This is due in a large measure to the cooperative efforts of the United State Geological Survey (U.S.G.S.) as the representative of the United States. Whether the Wyoming Commission would have jurisdiction over federal lands or oil and gas belonging to the United States if this issue were to be tested could be the subject of a separate article. It would appear to be sufficient to say that it has not been a problem in Wyoming. In practice, representatives of the United States Geological Survey attend all of the hearings of the Wyoming Commission, and, where federal lands are involved, it is the uniform practice of the Chairman during

15. WYO. STAT. § 30-230 (1967).

such hearings, if federal leases are involved, to inquire of the U.S.G.S. representatives if they have any opinion or statement to give. The authors advance the notion that the reason no conflict has occurred is that the U.S.G.S. is generally satisfied that the Wyoming Commission is performing its function properly from a conservation standpoint.¹⁶

INDUSTRY AND STATE GOVERNMENT

The 1951 Act was produced by a cooperative effort on the part of the oil and gas industry and the state government. It is apparent that an attempt was made to draft legislation which would be acceptable both to the industry and to the government. Since that time industry has participated to a large extent in the amendments of the original Act of 1951, and if some criticism of the Wyoming statutes is made, and this frequently occurs, the oil and gas industry must bear its share of the responsibility for the development and wording of our statutes. In some particular instances, the industry resisted attempts to change the law, but it is to the credit of the oil and gas industry in the State of Wyoming that it has participated actively in the formulation of the present conservation law even though it regulates many crucial facets of this industry. This is not to say that in given situations the individual operators and producers do not violently disagree with the Commission's decisions. Many appeals to the courts have occurred, although very few have reached the Supreme Court of Wyoming.

In 1967 the legislature added to the Conservation Commission:

[T]wo additional members from the public at large who shall be appointed by the governor, by and with the consent of the state senate and shall be citizens and residents of the State of Wyoming and shall

16. It should be observed that the United States, through the United States Geological Survey, may act independently in the matter of protection of the federal government's rights to oil and gas production on lands under which it owns the minerals. For example, the U.S.G.S. may order government lessees to pay compensatory royalty in those instances in which the government feels that it is being deprived of actual production for any reason, including those instances where wells are shut in by order of the Commission.

be qualified to serve the oil and gas industry of this state¹⁷

These members serve for two years. Therefore, the present composition of the Commission is five members: the Governor, Commissioner of Public Lands, State Geologist and two additional members appointed by the Governor.¹⁸ The legal adviser for the Commission is the Attorney General of the State of Wyoming, and in the past several years, a Special Assistant Attorney General has been assigned to the Commission on a part-time basis. This legal adviser attends all of the Commission hearings and participates in them as the legal adviser to the Chairman where necessary on questions of evidence, interpretation of the statutes or any other legal matters the Commission feels need attention.

COMMISSION PROCEDURE

With respect to procedure, it is to be observed that the 1951 Act authorized the Commission to prescribe rules and regulations covering the practice and procedure before it. The statute, in what is now Wyo. Stat. § 30-223 (1967), covers the giving of notice of hearings and requires one publication by the Commission in a newspaper of general circulation in Natrona County and one publication in a newspaper in the county where the land affected or some part thereof is situated at least fifteen days prior to the date of hearing. There are certain instances specified in the statute where additional notice is required, and as a matter of practice the Commission, although the specific requirements are not contained in the statutes or in the Commission regulations, has required specific notice to be given to parties who may have an interest which will be affected.¹⁹

17. WYO. STAT. § 30-218(a). (1967).

18. In recent years, due to the press of other duties, the Governor has attended very few Commission hearings. In his absence, the Commissioner of Public Lands has acted as Chairman.

19. In applications for spacing and for involuntary pooling, it is advisable that the applicant additionally notify, by certified mail, all persons who may have an interest in the area described in the application, both working and royalty interests owners. At least one district court has held void a spacing order entered without such notice, at least as to the royalty owner who was not personally notified of the hearing.

The Commission, in Section 6 of the 1951 Act, which has not been changed and which appears as Wyo. Stat. § 30-224 (1967), is granted power to summon witnesses, administer oaths, require production of records, books and documents for examination at any hearing or investigation conducted by it. In case of failure or refusal on the part of any person to comply with a subpoena issued by the Commission or refusal to testify if present, the Commission may apply to any district court in the state for an order compelling such person to comply with the Commission subpoena. The court is given power to punish for contempt for refusal to respond to a subpoena or to testify.

The office of the Oil and Gas Supervisor is located at Casper, Wyoming, and filings with the Commission are made with the Supervisor as Secretary of the Commission. The Commission has established a deadline for the filing of applications which the applicant desires to be heard at the next Commission hearing date. Hearings are held once a month, usually on the second Tuesday of the month. The Supervisor's office will provide a schedule for an entire year of the Commission hearings and the deadlines for filing, which are usually Friday noon, eighteen days before the hearing. This gives the Supervisor time to publish the requisite notices and gives the applicant's attorney time to serve additional notices if required. Also, the Oil and Gas Supervisor's office will furnish, upon request, a pamphlet containing the Commission rules, the statutes and the forms used for filing required reports, designations and applications for permits to drill. This pamphlet is a handy lawyer's tool since it contains all of the pertinent material in one place.

It is only fair to alert the novitiate-to-practice before this Commission that formal rules of evidence and of debate are seldom observed. It is the custom for the Chairman of the Commission, after the testimony of each witness, to ask if any member of the Commission might have questions of that witness. This privilege is usually accepted by the Com-

mission members who may cross-examine the witness indiscriminately. Their questions may relate to matters which were not covered in direct examination and the answer may be referred to a previous witness or one who has not yet testified. Questions may also be expected from the Commission staff who may have been witnesses themselves on behalf of the Commission. This may well devolve into an unregulated argument among Commission members, witnesses and attorneys, which may be broken up only by the plea of the reporter who is unable to identify the parties speaking.

Although Rule 507, of the Rules of Practice and Procedure Before the Wyoming Oil and Gas Conservation Commission, states that any person appearing before the Commission in a representative capacity shall be precluded from examining or cross-examining any witness in any hearing unless such person shall be an attorney licensed to practice law in the State of Wyoming, the Commission does permit and does consider unsworn statements which may be presented either orally or in written form by any person interested in that hearing. Generally, such statements are made by those supporting the application then being heard or in support of the views of one of the parties who has testified at a hearing called upon the Commission's own order. Undoubtedly, in many instances these unsworn statements have had considerable influence upon the decisions of the Commission.

The statutes also grant the right of appeal from a Commission decision. Such proceedings are now governed by the Wyoming Administrative Procedure Act ²⁰ and Rule 72.1, Wyoming Rules of Civil Procedure. The venue of such an appeal may be either the District Court of Laramie County or the district court of the county in which the lands affected by the order, or a part thereof, are located, or the county in which the Commission took action.

20. WYO. STAT. § 9-276.19 to -33 (Supp. 1973).

SECONDARY RECOVERY

Under the Wyoming statutes, the Commission is also granted authority to approve agreements for water flooding or other recovery operations, repressuring or pressure maintenance operations, cycling or recycling operations called "unit agreements" or "communitization agreements." We have seen that oil or gas, or both, accumulate in a reservoir or pool, and that a certain amount of the oil and gas can be recovered by what are called primary recovery methods, that is, by recovery through natural reservoir energy by flowing wells or by pumping. At such point as the reservoir energy is expended and production has declined as a result thereof, so-called secondary recovery methods are frequently found to be feasible. These consist of the injection of water into the producing formation to sweep the oil into certain selected well bores or injection of gas for repressuring or pressure maintenance operations, or both.

FIELD DEVELOPMENT

Typically, a field is developed by more than one operator, and all kinds of oil and gas leases, private, federal and state, are included within the limits of a pool. It is normal practice, upon the discovery of a new source of oil or gas, or both, by exploratory wells, that an immediate application for a spacing order is made by that operator to the Commission. The operator, in such instance, must express to the Commission his best judgment as to the areal extent or the limits of the pool. It is apparent that the most efficient method of spacing is to inaugurate it at the early stages of exploratory drilling so that orderly development may ensue. Also, operators are desirous of protecting their leases from drainage by offset wells placed off-pattern as direct offsets. Upon the filing of a spacing application, the Oil and Gas Supervisor will not approve any permits for the drilling of wells within the proposed spaced area until a hearing is held and an order entered by the Commission.²¹ Thus an operator

21. See Rule 305, RULES AND REGULATIONS OF THE WYOMING OIL AND GAS CONSERVATION COMM'N.

is afforded the necessary protection pending a hearing. It is to be observed that with but one well constituting a new discovery of oil or gas, or both, it is very difficult from a geological or engineering standpoint to define the limits of a pool. This fact is fully recognized by the Commission, and the desire for orderly development appears to dictate that spacing be done at the earliest opportunity.

At the spacing hearing the operator applying for the order will be required by his evidence to demonstrate, first, that a common accumulation of oil and gas, or both, exists as a pool and the extent to which he believes the pool extends under the surface of lands described in his application. It is also to be observed that lands are described in Wyoming by government survey. Tracts are bounded by lines generally running north and south and east and west, and there never has been a reservoir or pool that conforms in nature to government survey tracts. Nevertheless, an area outline is required as a starting point. The applicant must also specify the size of the drilling and spacing units he desires, and he must prove by competent engineering testimony that one well will efficiently drain the area of the drilling unit he has requested.²² Here again, it is foolish to state that one well in an 80-acre tract, for example, will drain a rectangular area included within the government surveyed 80 acres. Drainage never occurs in this fashion. On the other hand, there are rules of practicality which indicate that a certain density of drilling is proper, depending upon sand thickness, porosity, permeability, reservoir energy and related other technical considerations. One can see at this point that as a lawyer he must familiarize himself with many technical oil and gas terms and concepts before he can properly be prepared to present any matter before the Commission.²³ It has been the

22. In other words, that the spacing unit size requested ". . . shall not be smaller than the maximum area that can be efficiently drained by one well." WYO. STAT. § 30-221(b) (1967).

23. "Isopach map," "structure map," "squeeze job," "offset well," "D.S.T.," "communization," "pooling," "unitization," "participating area," "basic royalty," "working interest," "carried working interest," "overriding royalty," "porosity," "permeability," "reservoir," "swabbing," "split sand characteristics," "gas-oil ratio," "oil-water contact," "bottom hole pressure," "blowout preventer," "whipstock," "sonic log," "perforations," "choke," "tubing," "casing," "drill string," "correlative rights," "drainage," "I.P.," "BOPD," "MCF," "millidarcy," "sand bar," "channel," "strati-

experience of the authors that the quality of witnesses appearing before the Commission is higher than in almost any other type of legal proceeding. The attorney will have geologists and engineers who are not only experienced in their field but also, who have testified on previous occasions before the Commission as experts. These witnesses will be most helpful in the preparation of exhibits for introduction at the hearings.²⁴

Frequently there are contests before the Commission among various operators. For example, one operator may feel that the Commission should order 80-acre spacing, another operator 160, and another operator 320, and another 640. Particularly is this true where both oil and gas are involved. An attorney can expect, therefore, if he represents an applicant, that he may be faced with technical testimony contrary to his own witnesses, and he must be prepared to meet these contentions. Here again, the applicant's own witnesses can be most helpful in posing questions to the opposing expert witnesses. Much of the testimony involves geological or engineering interpretation of the data obtained by the drilling of a well or wells. It is unusual to find all witnesses agreeing in their interpretative opinions, particularly if there is a contest such as suggested above. Nevertheless, the Commission will hear all of the witnesses and must make a decision. It should be noted that, as an administrative agency, the Commission also is entitled to use its own expertise

graphic trap," "net pay," "datum," "psi," "psig," "bubble point," "water saturation," "gravity," "A.P.I.," "solution GOR," "load oil," "sand frac," "cement job," "D and A," "stock tank barrels," "primary and secondary recovery," "cumulative production," "current producing rate," "reserves," "injection well," "water-out," "fracturing," "core samples," "mud program," "water flood," "decline curve," "residual oil saturation," "mobility ratio," "areal sweep," "reservoir volume factor," "density," "clay-filled," "spurious S-P characteristic," "pore volumes," and "reservoir thickness" are terms noted by one of the authors in just one hearing before the Oil and Gas Conservation Commission. Most of them are strange terms to a lawyer or law student who has not worked in the oil and gas industry. There are many other terms used with which an attorney must have at least a speaking familiarity if he is going to practice before the Commission. See, e.g., H. WILLIAMS & C. MEYERS, *MANUAL OF OIL AND GAS TERMS* (1957); A. LEVORSEN, *GEOLOGY OF PETROLEUM* (1967).

24. It will save considerable time if all exhibits to be offered are marked prior to the hearing. Also, the better practice is to furnish the Commission members, the Commission staff, and protestants and other interested parties with copies of exhibits, reduced in size in those cases where the original exhibit is of large size.

and information from its own files or within its own knowledge, in addition to the evidence produced at the hearing. The Wyoming Administrative Procedure Act requires in such instances, however, that the Commission advise the parties of those things administratively noticed by it constituting any basis for a decision in the matter and that an opportunity to contest the same must be afforded.²⁵ This is a frequently overlooked provision of the Wyoming Administrative Procedure Act, but it is one thing that the lawyer must keep in mind, particularly if an appeal is to be taken and the rule was not followed. This rule prevents the arbitrary substitution of the Commission's own ideas without the basis being given. In the judgment of the authors this frequently happens, and the basis for some of the Commission rulings is not discernible in its orders. This is not a malady which is peculiar to the Oil and Gas Conservation Commission, but exists with other administrative boards and commissions as well.

The Commission, after a decision in any case which is heard before it, will issue an order and the statute requires that the order be issued within thirty days after the hearing.²⁶ All of the Commission files are open for inspection, and the Commission's records are a fruitful source of information for lawyers, geologists, engineers, brokers and others interested in the industry.

While lawyers are not usually requested to assist clients with the details of complying with the Commission requirements as to permits, reports, etc., it should be noted that no well can be drilled without a permit which can be issued by the Oil and Gas Supervisor. Rule 302 of the Rules of the Commission provides for statewide 40-acre spacing initially and until otherwise ordered, and specifies that each oil and gas well shall be located in the center of a 40-acre government quarter section with a tolerance of 200 feet in any direction from such center location if necessitated by topographic features; provided, that no well shall be drilled less than 920

25. WYO. STAT. § 9-276.26(d) (Supp. 1973).

26. WYO. STAT. § 30-223(f) (1967).

feet from any other well drilling to or capable of producing oil or gas from the same pool, and no oil or gas well shall be completed in a known pool unless it is located more than 920 feet from any other well completed in and capable of producing oil or gas from the same pool.

It might be well at this point to distinguish between "pooling" and "communitization." Sometimes these are used indiscriminately, but generally speaking a single drilling and spacing unit is "pooled," whereas an entire reservoir, embracing many leases and many wells, is "communitized" or "unitized."

In the event the Commission, after hearing, orders spacing other than 40-acre spacing, Rule 302, of course, is not applicable, but spacing and well locations must conform to that specified in the spacing order. Likewise, Rule 302 must be suspended when a unit agreement is approved for the reason that wells may be drilled within the unit area at locations determined to be best by the unit operator and the unit non-operators to more completely drain the reservoir and to protect the correlative rights of the several interest owners.

At this point another rule of the Commission should be mentioned which is not specifically contained in the Rules of the Commission. In order to assure orderly development, and in those cases where the Commission orders spacing within a defined area, a "buffer zone" is established, being an area extending one mile beyond the outer boundaries of the spaced area, in which zone well permits will be granted only upon the same spacing pattern as ordered by the Commission within the spaced area. This is done under authority of the second paragraph of Rule 302 of the Commission, which gives the supervisor discretion to determine the pattern location of wells adjacent to an area spaced by the Commission or under an application for spacing where there is sufficient evidence to indicate that the pool or reservoir spaced or about to be spaced may extend beyond the boundary of the area spaced or for which application has been made for spacing.

All Commission orders relative to spacing will contain a provision fixing the location of the wells upon a uniform pattern. For example, if 80-acre spacing is ordered, then the permitted well location will be established by the Commission either in a northwest and southeast quarter-quarter section or a northeast and southwest quarter-quarter section. Usually in 160-acre spacing, the well location is also within one of the quarter-quarter sections; however, the Commission, upon occasion, has allowed the drilling of a well at any point within the center 40-acre tract. As to wells already drilled when a spacing order is applied for and later entered which are not drilled on the pattern location, the Commission, under authority of the statute and its rules, will grant an exception to the location of these wells. Likewise, the Oil and Gas Supervisor may approve an exception location required by Rule 302, or an applicable order, if certain requirements are met, and the Commission may grant exceptions after hearing. Normally a hearing is held upon requests for exceptions to the spacing order and may be granted for various reasons.²⁷ It is to be noted that the statutory section, after stating that no more than one well shall be drilled to and produced from a drilling and spacing unit at a location authorized by the order, states that an exception may be granted:

[A]s may be reasonably necessary where the drilling unit is located on the edge of the pool and adjacent to a producing unit, or, for some other reason, the requirement to drill the well at the authorized location on the unit would be inequitable or unreasonable.²⁸

Exceptions have been granted where a pattern location well has been drilled and was a dry hole and where the drilling unit obviously is being drained by a pattern well located upon another spacing unit. Where the Commission

27. See Rule 303, RULES AND REGULATIONS OF THE WYOMING OIL AND GAS COMM'N. The Oil and Gas Supervisor, upon proper application, may administratively grant an exception where either written consents have been filed or proper notice has been given to all parties in interest and none has objected within fifteen days. WYO. STAT. § 30-221(c) (ii) (1967).

28. WYO. STAT. § 30-221(c) (1967).

refused to grant an exception in this situation, the District Court of Laramie County, on appeal, ordered the exception granted since the operator had drilled a dry hole at the pattern location on an 80-acre spacing unit and wanted to drill the center of the other 40-acre tract and the 80-acre unit was offset by a well producing more than 1,000 barrels a day and the testimony clearly showed that drainage was occurring. This was an application of the correlative rights statute which will be discussed hereinafter.

PROTECTION OF CORRELATIVE RIGHTS

The 1951 law did not refer to correlative rights, but in 1971 the following provision was added to Wyo. Stat. § 30-221 (1967):

When required, to protect correlative rights . . . the Commission, upon its own motion or on a proper application of an interested party, but after notice and hearing as herein provided shall have the power to establish drilling units of specified and approximately uniform size covering any pool.²⁹

The provision for an exception, while not expressly mentioning correlative rights, is involved in a correlative rights question. Very simply stated, "correlative rights" means a reasonable opportunity for the lessor and his lessee and other interest owners under a lease, as the case may be, to recover their proportionate share of the oil and gas underlying the tract of land owned by the lessor and covered by the lease. We have seen that the old law of capture was changed by spacing statutes, but at the same time the doctrine of correlative rights is recognized since under spacing orders a landowner or lessee may be prohibited from drilling a given tract and can only recover the oil under that tract by pooling, unitization, or by the granting of an exception to the spacing pattern. In other words, if the only way a lessor or lessee may recover the oil underneath a given tract is to allow a well to be drilled, then the Commission is authorized to grant such an exception to a spacing order, and this is

29. WYO. STAT. § 30-221(a) (Supp. 1973).

frequently done, depending upon the facts. An applicant for an exception must bring himself within the provisions of Wyo. Stat. § 30-221(c) (1967) and show why he is entitled to an exception. In the case mentioned above in the District Court of Laramie County, the reason was that the oil was being drained from under the 80-acre tract where a dry hole had been drilled on a pattern location on an adjacent 80-acre tract, and the only way the oil could be recovered under the 80-acre tract having a dry hole was to allow the drilling of an additional well. Also, Wyo. Stat. § 30-221(d) (1967) authorizes the Commission, "in order to protect correlative rights," to decrease the size of the drilling units or permit additional wells to be drilled within the established units.

It is to be observed that pooling protects correlative rights in that it allows those entitled to recover the oil under their tract within a spaced area, even though the well may be located on some other owner's tract within the spacing unit. Likewise, unitization is designed to protect correlative rights, and more will be said about this in the discussion on unitization.

EXAMINER HEARINGS

The present Wyoming statute authorizes examiner hearings "with respect to any matter properly coming before the Commission."³⁰ Examiners are to make reports and recommendations to the Commission with respect to any matter submitted to the examiners. It was thought that the addition of authority for examiner hearings in the 1971 amendment of the statutes would provide a widely used method to reduce the number of full hearings before the Commission. However, this has not been the case. Many matters result in a contest, and both the Commission and the contestant require the full Commission to hear the evidence submitted by all parties, although contests before the examiner are provided in the statute. Examiner hearings as of

30. WYO. STAT. § 30-219.1 (Supp. 1973).

this date are used only in those instances where the matter is more or less a formality and no contest is offered.

HEARINGS ON COMMISSION'S OWN MOTION

At the present time many of the hearings before the Oil and Gas Conservation Commission of Wyoming are called upon the Commission's own motion. These involve generally a desire upon the Commission's part to investigate flaring, venting, surface and underground waste and similar matters, as well as a periodic review of its own spacing orders. Most of the Commission spacing orders are not permanent from their inception, but are granted for a set period of time—from three months to one year. At the end of the temporary period, the Commission will call for a hearing for the purpose of reviewing its previous spacing order. These hearings often result in a decrease in the size of the spaced area depending upon what development has shown in the matter of delineating the size of the pool involved. In other words, as we have seen, an area may be spaced as soon as oil is discovered. Development wells are then drilled on the spacing pattern, and, as these proceed, the productive characteristics and the outer limits of the pool become more definite, and it can be seen upon a review by the Commission that the area is too large for the reason that the pool will not produce beyond a certain limited boundary and there would appear to be no reason to maintain a spacing pattern beyond the limits of the pool itself. In the matter of increasing the size of a spaced area, the Commission also may call for a hearing upon its own motion if it feels that the area should be increased. However, most often the owners and operators will apply for extensions of a spaced area when they discover oil or gas beyond the limits of the spaced area and can correlate such production as being from the same pool previously spaced. In this instance the Commission will require the applicant to show that the same pool extends beyond the limits of the previously spaced area in order that it may conclude that the area should be increased.

A CASE HISTORY

One example of hearings called by the Commission upon its own motion which ultimately resulted in a broad challenge of Commission authority arose in connection with the flaring and venting of gas from the Muddy formation from wells in the Grady, Jayson and Hilight Fields, which later became known as the Hilight Field. In this case, on December 31, 1969 the Commission entered an order in Docket No. 136-69,³¹ after a hearing called by the Commission on its own motion, to consider venting and flaring of gas from wells in the Hilight Field in order to determine whether waste existed or was imminent. The Commission found that approximately 30,000,000 cubic feet of gas per day was being vented or flared from the field, resulting in a release of nearly one billion cubic feet of gas per month, and that a total of approximately two billion feet of gas had already been vented or flared from the date of discovery to the date of hearing. As of December 16, 1969, there were 35 wells completed in the Hilight, Grady and Jayson Fields, and an additional 53 well locations in some stage of development. There had not yet been a dry hole drilled in the Hilight Field.

The Commission found that the gas being flared or vented contained an average of four gallons of liquid products per thousand cubic feet of gas. The Commission pointed out that McCulloch Oil Corporation of California proposed to install a gasoline plant in the area for the extraction of liquid hydrocarbons from the gas produced with the oil which was scheduled for completion on March 15, 1970, with a market for the residue gas (dry gas remaining after removal of liquids) to be available by July 15, 1970. The

31. In order to discuss Commission orders, it is necessary that the Commission's docketing system be explained. A cause number, order number, and docket number are assigned to each matter which comes before the Commission, whether on its own motion or upon application of someone else. The docket number contains two parts separated by a dash. The second number represents the year in which the matter was commenced, and the first number represents a serial numbered docketing system which starts each year with No. 1. For example, 136-69 indicates a matter instituted in the year 1969, and it is the 136th matter which came before the Commission in that year. The cause and order numbers are used to denote the number of times and the number of orders considered by and issued by the Commission pertaining to the same subject as the original docket number.

Commission, among other things, found that the flaring or venting of some 30,000,000 cubic feet of gas each day constituted waste, and that limits of 500 barrels of oil per well per day would allow a well to pay out in nine months, and said limits would cut by approximately one-half the amount of gas flared or vented. The Commission therefore ordered production from wells in the Grady, Jayson and Hilight Fields to be restricted to 500 barrels of oil per day and, where gas was produced with such oil, to 550 MCF per day calculated on a monthly basis. It was further ordered that any producing well having a gas-oil ratio higher than 1,100 cubic feet of gas to one barrel of oil would be restricted in its average production of oil to an amount which would permit no more than 550,000 cubic feet of gas per day to be produced with the oil. The Commission then retained exclusive jurisdiction over the matter after ordering a bottom hole pressure survey to gather data for a future order.

The matter again came before the Commission upon its own motion in Docket No. 28-70, and the Commission further restricted production to 250 barrels of oil per day and, where gas was produced with such oil, 275 MCF per day calculated on a monthly basis, and further provided that any producing well having a gas-oil ratio higher than 1,100 cubic feet of gas to one barrel of oil would be restricted to no more than 275,000 cubic feet of gas per day. Once again, upon the Commission's own motion and in Docket No. 87-70, the same restriction was continued as contained in Docket No. 28-70. Inexco Oil Company, in Docket No. 107-70, appeared before the Oil and Gas Conservation Commission and challenged the authority of the Commission under Wyo. Stat. §§ 30-216 to 30-231 (1967), to restrict production from Inexco's wells in the Hilight-Jayson Field in three circumstances, to-wit:

(1) where gas unavoidably produced with oil was saved and used by sale and delivery to the processing plant of McCulloch Oil Company;

(2) where other gas unavoidably produced with oil could not be economically saved and used at the time it was produced; and

(3) where oil could be produced and sold without waste, damage to correlative rights or release of gas in excess of amounts allowed other wells under general field regulations.

The Commission, in Docket No. 107-70, ruled adversely to Inexco Oil Company, and a petition for review to the District Court of Laramie County was filed, which case was argued October 5, 1970. On October 27, 1970, the District Court of Laramie County concluded that the Commission acted within its authority; that its order was not arbitrary, capricious or characterized by abuse of discretion, and that its findings were supported by substantial evidence. The matter was then appealed to the Wyoming Supreme Court by Inexco Oil Company.³² The sole issue before the Wyoming Supreme Court was whether the Commission had authority by law to restrict production from Inexco's wells on the facts before it. Inexco's attorneys took the position that the scope of the authority of the Commission must be found from the text of the entire Conservation Act, and thus the contention was made that the Commission and the district court distorted the plain meaning of the Act, usurped legislative functions and invaded Inexco's rights in an unbridled exercise of administrative and judicial discretion.

Inexco premised its challenge on the fact that the Commission's authority "to restrict production from wells" was consistently limited by the occurrence of waste as defined,³³

32. *Inexco Oil Co. v. Oil and Gas Conservation Comm'n*, 490 P.2d 1065 (Wyo. 1971).

33. The statute as it existed at the time of *Inexco* (WYO. STAT. § 30-216(a) (1967)) provided:

(1) The term "waste" as applied to oil shall include underground waste, inefficient, excessive or improper use or dissipation of reservoir energy, including gas energy and water drive, surface waste, open pit storage and waste incident to the production of oil in excess of the producer's above-ground storage facilities and lease and contractual requirements, but excluding storage (other than open pit storage) reasonably necessary for building up or maintaining crude stocks and products thereof for consumption, use and sale.

The term "waste" as applied to gas shall include the escape, blowing or releasing, directly or indirectly, into the open air of gas from wells productive of gas only, or gas from wells producing oil or both oil and gas; and the production of gas in quantities or in such manner as will unreasonably reduce reservoir pressure or unreasonably diminish the quantity of oil or gas that might ultimately be produced; excepting gas that is reasonably necessary in the drilling, completing, testing and producing of wells and gas un-

to protection of correlative rights³⁴ in situations where field-wide restrictions are necessary to prevent waste, and to avoidance of drainage to approved exception locations.³⁵ Inexco pointed to the specific statutory mandate³⁶ that the

avoidably produced with oil if it is not economically feasible for the producer to save or use such gas.

Negligent abandonment operations so as to cause contamination or potential contamination of potable under ground waters shall constitute waste.

(2) "Surface waste", being the unnecessary or excessive surface loss or destruction without beneficial use, however caused, of gas or oil including evaporation, seepage, leakage, or hazardous handling or storage with respect to fire, and open pit storage of oil (except for temporary purposes in case of a blowout or other emergency beyond control); and the drilling, equipping, operating or producing of oil or gas wells in a manner causing or tending to cause unnecessary or excessive loss or destruction of oil or gas; and the escape, blowing or releasing, directly or indirectly into the open air of gas from wells productive of gas only, excepting gas which is reasonably necessary in drilling, completing and testing such wells; and the escape, blowing or releasing directly or indirectly into the air of gas from wells productive of both oil and gas, excepting gas which is reasonably necessary in drilling, completion and testing such wells and gas unavoidably produced with oil when it is not economically feasible to save or use such gas.

The statute was amended by the 1971 legislature. See Wyo. STAT. § 30-216 (Supp. 1973).

34. Wyo. STAT. § 30-217 (1967) provides:

(a) The waste of oil and gas or either of them in the State of Wyoming as in this act defined is hereby prohibited.

(b) Whenever in order to prevent waste the commission limits the total amount of oil and gas which may be produced in any pool in this state to an amount less than that amount which the pool could produce if no restriction was imposed, the commission shall allocate or distribute the allowable production among the several wells or producing properties in the pool on a reasonable basis, preventing or minimizing reasonably avoidable drainage from each developed area not equalized by counter-drainage, so that each property will have the opportunity to produce or to receive its just and equitable share, subject to the reasonable necessities for the prevention of waste.

35. Wyo. Stat. § 30-219(d) (4) (Supp. 1973) states that the Commission has the authority:

When required, in order to protect correlative rights to restrict or limit the production of oil and gas from any well which is allowed, after the effective date of this act, as an exception to the location requirements of or as an additional well permitted under any order of the commission establishing drilling units for a pool or part thereof or of any general well spacing rule or order adopted by the commission for conservation purposes, upon such terms and conditions as the commission may determine, upon the commission's own motion or upon application of any interested person and after notice and hearing as provided by chapter 6, Wyoming Statutes 1957 [§§ 30-216 to 30-238], as amended, and by the commission's rules.

36. Prior to amendment, Wyo. STAT. § 30-229 (1967) provided:

It is not the intent or purpose of this law to require the proration or distribution of the production of oil and gas among the fields of Wyoming on the basis of market demand. This act shall never be construed to require, permit or authorize the commission, the supervisor, or any court to make, enter or enforce any order, rule,

Commission could not restrict production to less than wells can produce by sound engineering practices except in the exercise of specific authority with respect to exception wells.³⁷ These sections contain detailed standards regarding the conditions and procedures under which production restrictions might be imposed. Other regulatory standards, *not including restrictions*, were left to specification by regulation.

Relying on its argument that the regulatory authority of the Wyoming Oil and Gas Conservation Commission was limited by lack of reference to conservation measures in the statutes and express denial of regulatory authority in the broad interests of conservation,³⁸ Inexco maintained that the Commission was without authority to restrict production based on vague notions of conservation. The absence of a definition of "conservation", argued Inexco, suggests that it was at most a regulatory objective and not a standard like defined waste for restrictive action. Inexco also pointed out that the meaning of conservation in the oil and gas industry was established by text writers³⁹ as being the prevention of waste rather than the far broader meaning involving management and end-use allocation. Conservation was therefore postulated to be restricted by the definition as used in the sense of waste prevention.⁴⁰ No state oil and gas conservation statute was found which authorized the regulatory body to act solely in the general interest of conservation.

regulation or judgment requiring restriction of production of any pool or of any well to an amount less than the well or pool can produce in accordance with sound engineering practice.

In 1971, this statute was amended to WYO. STAT. § 30-229 (Supp. 1973) which states:

It is not the intent or purpose of this law to require, permit, or authorize the commission or supervisor to prorate or distribute the production of oil and gas among the fields of Wyoming on the basis of market demand. This act shall never be construed to require, permit or authorize the commission, the supervisor, or any court to make, enter or enforce any order, rule, regulation or judgment requiring restriction of production of any pool or of any well except to prevent waste and to protect correlative rights.

37. WYO. STAT. § 30-219(d) (4) (Supp. 1973).

38. WYO. STAT. § 30-229 (1967).

39. *See, e.g.*, H. WILLIAMS & C. MEYERS, *MANUAL OF OIL AND GAS TERMS* 46 (1957). Summers describes the term in the context of oil and gas conservation legislation as follows: "Legislation for the conservation of oil and gas, as ordinarily written, seeks to protect the interests of the public and the owners of land in the oil and gas pool through the prevention of waste." 1 W. SUMMERS, *OIL AND GAS* § 71 at 194-95 (2d ed. 1938).

40. WYO. STAT. § 30-216 (1967).

Rather, such statutes commonly cite conservation as a common goal and then empower a regulatory body to pursue such goal by acting to prevent waste, as such is defined, and to protect correlative rights.⁴¹

On behalf of the Commission it was argued that it had the additional authority to regulate the production of wells in the interests of conservation.⁴² In response, Inexco urged that if the statute were construed to allow the Commission to restrict production in the broad interests of conservation, it would be an invalid delegation of legislative authority due to insufficient standards or guidelines. As to this point, Inexco stated in its brief that it must be concluded that the statute upon which the Commission relied is limited to the day-by-day regulation of operational practices of producers at individual well locations necessary to prevent waste and protect correlative rights, and that it does not authorize pool-wide or individual well restrictions in the vague undefined interest of conservation. This argument was bolstered by the fact that in its rules and regulations the Commission adopted this interpretation wherein the only reference to standards for conservation goals is in the section entitled "Operational Rules, Drilling Rules" relating to safe and workmanlike operations on individual well sites.

The second main argument of Inexco was that gas sold for processing is beneficially used by the producer and that its acts did not constitute waste, pointing out that gas sold to processing plants does not "escape . . . from wells productive . . . of oil and gas."⁴³ It was noted that gas processing, as an end use, is not proscribed or regulated anywhere in the Wyoming Conservation Act, but the Act is directed to reservoir and production controls. As a consequence, Inexco took the position that Commission restrictions on production precluded the company from producing and selling 2,355 MCF of gas and 3,709 barrels of oil per day from wells that were connected to the McCulloch gas plant. Again, Inexco argued

41. See SECTION OF MINERAL LAW, ABA, CONSERVATION OF OIL AND GAS (1948); 1 W. SUMMERS, OIL AND GAS § 71 (2d ed. 1938); Will, *A Study of Conservation Acts and Practices*, 4 ROCKY MT. MIN. L. INST. 545 (1958).

42. WYO. STAT. § 30-219(d) (2) (A) (1967).

43. WYO. STAT. § 30-216(a) (1) (2) (1967).

that the Commission had made no findings that gas processing was waste and that gas produced and sold to the processing plant was subject to restrictions under the Act. This was based upon the fact that no gas from connected wells was being vented to the air by Inexco and that McCulloch was responsible by contract for disposing of all resulting products.

Arguing that none of its acts could be said to constitute waste, Inexco pointed to the statutory provisions that excepted from the definition of waste, "gas which is reasonably necessary in drilling, completing and testing such wells and gas unavoidably produced with oil when it is not economically feasible to save or use such gas."⁴⁴ The Commission and the court erred as a matter of law, in Inexco's view, in finding that economic feasibility existed from the fact that gas and oil could be left in the ground unless a gas market was present. The statute defining waste⁴⁵ clearly differentiates between waste from gas wells and waste of gas unavoidably produced from oil wells. In the former case a no venting or flaring from gas wells is allowed. In the case of gas produced from oil wells, the statute prohibits venting or flaring of gas only when it is economically feasible for the producer to save and use the gas at the time it is produced. It was noted that after defining waste, the statute,⁴⁶ made an exception for casinghead gas from wells productive of oil where such gas is unavoidably produced with oil and it is not economically feasible to save or use such gas. It was not disputed that Inexco's wells were oil wells and that the gas was produced unavoidably with the oil.

As to this last point, Inexco noted in its brief in the Supreme Court of Wyoming that to require the operator to keep casinghead gas in the ground until a market develops would place the same standards on casinghead gas (produced from an oil well) as on gas from gas wells and render the statutory distinction as to gas unavoidably produced with the oil wholly meaningless. The reason for this is that such

44. WYO. STAT. § 30-216(a)(2) (1967).

45. WYO. STAT. § 30-216 (1967).

46. WYO. STAT. § 30-216(a)(1), (2) (1967).

a construction imposes the same restrictions on gas produced from oil wells as is imposed on gas produced from gas wells, but with the severe consequence that such construction also will restrict production of oil where, in fact, no waste of oil is occurring.

In any event, as Inexco pointed out, no basis existed for the Commission to determine without any standards set by the legislature what quantity of gas could be flared, saying at one time 550 MCF is not waste and at another time in the same field that production in excess of 275 MCF is waste. At this point it is most interesting to observe that the Commission invented a new term not found in the statute or any court decision. That term is called "permissive waste." Either it is waste or it is not under the Wyoming statute, and yet the Commission limited gas production from time to time to 550 MCF per well per day or 275 MCF per well per day depending upon the size, number of wells and production in the field, and the amounts some producers indicated would be acceptable, all of which factors have no bearing on the presence or absence of "waste" as defined in the Act. There are no guidelines or standards for such action in the Wyoming statutes or even in the Commission regulations. Inexco contended that such action by a regulatory agency could not be upheld and must be characterized as arbitrary.

Inexco contended that the court erred in its conclusion that the venting of gas unavoidably produced with oil was an unsound engineering practice and, as such, could be restricted notwithstanding the statutory provision limiting the Commission's authority to prevention of waste and protection of correlative rights. It was pointed out that the undisputed testimony of the Oil and Gas Supervisor showed Inexco's operations had been prudent, had not dissipated reservoir energy, had not caused a reduction in ultimate production from the reservoir and were in accordance with sound engineering practices, and such conclusions were never questioned by the Commission or made a basis for its restrictive orders. As a matter of fact, Inexco argued that the Commission made no findings and there was no evidence in the

record which would support findings that oil was being wasted or that correlative rights would be impaired absent oil restrictions. Factually, it was demonstrated that in July of 1970, forty-four of Inexco's wells were restricted by the oil limit of 250 barrels per well per day and were not permitted to produce the gas allowable in the field. As a consequence, Inexco was precluded from producing 3,709 barrels of oil and 2,355 MCF of gas per day. The Commission justified imposing limits on gas production by a finding of waste of gas by flaring. Inexco contended that it should have been allowed to produce such oil up to the maximum gas allowable for each well and that to restrict oil production alone absent waste, impairment of correlative rights or drainage to exception locations was arbitrary and without authority.⁴⁷

The Supreme Court of Wyoming concurred with the lower court's affirmance of the Oil and Gas Conservation Commission in *Inexco Oil Co. v. Oil and Gas Conservation Commission*.⁴⁸ The supreme court did admit that Inexco's interpretation of the statutory limitations on the Commission's authority had merit.⁴⁹ The supreme court, however, found that Inexco's practices constituted waste, noting that the legislature of 1971 amended the definition of waste, excepting from that definition:

[G]as produced from an oil well pending the time when with reasonable diligence the gas can be sold or otherwise usefully utilized on terms and conditions that are just and reasonable.⁵⁰

The court was of the opinion that, with the completion of the pipeline, Inexco could with reasonable diligence sell the gas. In affirming, the supreme court made its decision subject to the right of Inexco, at its option, to require a

47. For the *Inexco* brief, the authors are indebted to Clyde O. Martz, Esq., and Brian T. Dolan, Esq., of Davis, Graham & Stubbs, Denver, Colorado, with whom the author, Houston G. Williams, was associated as counsel for Inexco in the case being discussed. Mr. Martz was a former Professor of Law at the University of Colorado and is a nationally recognized expert in oil and gas law. Mr. Williams was a student of former Professor Martz at the University of Colorado.

48. 490 P.2d 1065, 1069 (Wyo. 1971).

49. *Id.* at 1068.

50. Wyo. STAT. § 30-216(a) (1) (5) (Supp. 1973).

hearing before the Commission on this additional aspect added by the 1971 law.⁵¹ This was never done.

It seems to the authors that Inexco had made several arguments which should have been answered in order to settle the question of the Commission's jurisdiction in various areas of oil and gas activity. However, the rather summary treatment by the supreme court of Inexco's arguments and the supreme court's concentration on only one aspect of them still leave many unanswered questions. One wonders what the supreme court meant when it said:

Thus, whatever questions might previously have been raised, the 1971 amendment made it clear that in order to prevent waste conservation measures were permissible.⁵²

Inexco pointed out in its brief that such broad "conservation measures" were not authorized under any circumstances for the reason that the legislature has not defined "conservation" as an independent regulatory standard anywhere in the Act, and the term has not been defined in Commission regulations. The legislature has specified what constitutes waste and what the Commission may do about it, and yet the Supreme Court of Wyoming seems to grant *carte blanche* authority in the interest simply of conservation in a general sense. Used in the sense of waste prevention, "conservation" is defined by statute and is restricted by that definition.

OTHER WYOMING DECISIONS

We have seen that an appeal may be taken under the Wyoming Administrative Procedure Act from a final order of the Oil and Gas Conservation Commission of Wyoming, and that such an appeal is to a district court having jurisdiction. Frequently the district courts have returned the matter to the Commission for further findings of fact and conclusions of law in order that the district court will have a proper basis for review. One such case is *Pan American*

51. *Inexco Oil Co. v. Oil and Gas Conservation Comm'n*, 490 P.2d 1065, 1069 (Wyo. 1971).

52. *Id.* at 1068.

Petroleum Corp. v. Wyoming Oil and Gas Conservation Commission.⁵³ In this case, Pan American applied for a permit to drill an oil well in the northeast corner of an 80-acre tract in the Grass Creek Field, Hot Springs County, Wyoming. It appeared that oil was discovered in the Grass Creek Field in 1914 and that development over the years had established the confines and extent of the oil pool or reservoir. The field was developed through the drilling of wells by owners of interests therein without regard to any fixed spacing pattern, and prior to the Act of 1951 substantial development of the field had taken place. Pan American contended that in order to protect its correlative rights it should be allowed to drill the well at the location sought as an exception well. Marathon Oil Company resisted the application and, after hearing, the Commission denied Pan American's application on the basis that Pan American's existing wells would adequately drain the remaining oil in the tract. No appeal was initially taken from the Commission order. However, Pan American later filed an application for the same exception location. The matter was set for hearing before the Commission, and both Pan American and Marathon appeared and presented arguments on the validity of Rule 302, which establishes 40-acre statewide spacing, as applied to the facts in that case. The Commission again entered its order denying the application. In support of its order, the Commission made findings, among others, that Rule 302 was a valid regulation; that the evidence did not demonstrate present waste in the field; that the evidence was not sufficiently definite and certain to permit the Commission to enter an order for protection of correlative rights in terms of allocation of production of the parties' properties on a reasonable basis. It further found that the evidence submitted did not establish sufficient cause for the granting of an exception.

Pan American, on appeal before the supreme court, contended Rule 302 had no retroactive application to a field that had been substantially developed prior to the promulgation of such rule, and further charged that Rule 302 was

53. 446 P.2d 550 (Wyo. 1968).

adopted without notice or hearing, and, further, that if applied retroactively it would be unconstitutional. Pan American also contended that its correlative rights would be violated because of drainage by reason of the fact that under the order it was not allowed to drill a well and recover some of the oil under a tract owned by it. On appeal to the district court, the order of the Commission was affirmed. The supreme court returned the proceeding to the Commission for further consideration of the factual issues tendered pursuant to Rule 303.

The case is interesting from the standpoint of the supreme court's comment upon use of expert witnesses in such matters, stating:

Nevertheless, if the expertise of the witness is established, the evidence so presented is competent and the best available with respect to the conditions prevailing in oil "pools" or reservoirs underlying the surface. Its ultimate weight is for the commission, as the trier of facts, to determine in the light of the expertise and experience of its members in such matters. However, the subject matter of such expert testimony is highly technical; must receive careful consideration; and the courts will see to it that the acceptance or rejection of such evidence, in whole or in part, is on a reasonable and proper basis. (citations omitted).⁵⁴

The supreme court then stated the cardinal rule under the Administrative Procedure Act:

§ 10 of such act (§ 9-276.28, supra) wisely requires an agency in a contested case to include in its final decision "findings of fact and conclusions of law separately stated." Such requirement imposes upon an agency the duty to make findings of basic facts upon all of the material issues in the proceeding and upon which its ultimate findings of fact or conclusions are based. Unless that is done there is no rational basis for judicial review.⁵⁵

54. *Id.* at 554-55.

55. *Id.* at 555.

The supreme court went on to find that the Commission's order was deficient in that in its findings it made no more than ultimate findings of fact and conclusions of law and made no basic findings of fact. It is also interesting to note the supreme court's comment on burden of proof in a contested hearing before an agency under the Wyoming Administrative Procedure Act. The court said:

The term, however, is used in a dual sense and may mean the burden of establishing the case as a whole or the burden on a party to make out a prima facie case in his favor at a certain stage during the hearing. The sense in which the term was used here is not entirely clear, but if the conclusion of the Commission was predicated upon the view that Pan American did not, in the first instance, make out a prima facie case, which it seems to be, we think such a conclusion was in error. (citations omitted)⁵⁶

The matter was then reheard by the Commission, which reaffirmed its denial of Pan American's application and made additional findings of fact. The district court, on the other hand, upon Pan American's second appeal, vacated the Commission's action and directed the issuance of a permit to drill.

In *Marathon Oil Co. v. Pan American Petroleum Corp.*,⁵⁷ the supreme court affirmed the judgment of the district court directing the Commission to issue a permit to drill to Pan American Petroleum Corporation. The district court had held that Rule 302 was invalid as applied to the Grass Creek Field. However, the supreme court chose to review the merits of Pan American's contention, and in its opinion found, on the facts, that Pan American would not recover its full share of oil without an additional well, pointing out that the Commission would have statutory authority to limit production from such well, if necessary, in order to protect the correlative rights of Marathon. The court admonished the Commission, however, in such case, to give consideration

56. *Id.* at 556.

57. 473 P.2d 575 (Wyo. 1970).

to the production already lost by Pan American since the date of its application for a permit to drill.

As to Pan American's contention that Rule 302 was inapplicable, the supreme court found that, as far as the Grass Creek Field was concerned, a different well density and a different location pattern were already in existence when the Commission was created, and there was no special order of the Commission pertaining thereto. An excellent statement of the limitation of Commission authority is contained in this opinion as follows:

In our former decision, at 446 P.2d 554, we said Rule 303 is in effect an "escape hatch" to claimed infringement of property rights by Rule 302. It can serve as an escape hatch, however, only if properly administered, and that means the Commission cannot be arbitrary about allowing or refusing exceptions under Rule 303.

Administrative officers and boards will not be permitted to act in an arbitrary, capricious or fraudulent manner; and courts will restrain administrative agencies from becoming despotic. *Wyoming Department of Revenue v. Wilson, Wyo.*, 400 P.2d 144, 145, reh.den., 401 P.2d 960.

In 2 Am.Jur.2d Administrative Law § 229, p. 126, recognition is given to the proposition that an administrative agency may not lay down a general regulation which predetermines cases within the regulation in disregard of particular circumstances. Also, courts have sometimes said "arbitrary and capricious action" on the part of an administrative agency is wilful and unreasoning action, without consideration and in disregard of facts and circumstances. *Bishop v. Town of Houghton*, 69 Wash.2d 786, 420 P.2d 368, 373. See also *Olson v. Rothwell*, 28 Wis.2d 233, 137 N.W.2d 86, 89.

The Commission's Rule 302 utterly and completely disregards the circumstances present in a field which was developed prior to the adoption of such rule, where wells were not drilled at the center of 40-acre subdivisions of land. If it were not for

Rule 303, it would be unreasonable and arbitrary for the Commission to apply Rule 302 in the Grass Creek Field.⁵⁸

Another case which involved court review of Commission action is *Mitchell v. Simpson*.⁵⁹ In this case, after hearing, the Commission, on Mitchell's application for an order pooling all interests in an established drilling unit, granted such application. Simpson filed a petition for review, and both Mitchell and the Commission, by answer, urged that the petition for review was out of time. Simpson then amended his complaint and attacked the Commission's order collaterally on jurisdictional grounds, alleging it to be illegal, unconstitutional, and taking property without compensation. Both Mitchell and Simpson filed motions for summary judgment, and the district court granted that of Simpson, holding in a written opinion that the Commission had no jurisdiction over Simpson "insofar as the pooling order was concerned . . . since the Wyoming Statutes specifically excluded 'royalty and other interests not obligated to pay any part of the costs thereof' . . ."⁶⁰ and ordering that Simpson be paid one-half of the landowner's royalty by Mitchell. Mitchell appealed to the Supreme Court of Wyoming, urging both the propriety of the Commission's order and the impermissibility of the collateral attack allowed by the district court.

The matters which gave rise to this case commenced in 1967 when Union Oil Company of California asked the Commission for an order establishing 80-acre drilling and spacing units for the production of oil and associated hydrocarbons from the Muddy formation in a field in Campbell County, Wyoming, which included the lands in which Simpson had an interest. The Commission approved the application of Union Oil and found that one well would efficiently drain all the recoverable oil and gas from the Muddy formation underlying an area consisting of 80 surface acres and that 80 surface acres was not smaller than the maximum area that could be efficiently drained by one well. The Commission order pro-

58. *Id.* at 577.

59. 493 P.2d 399 (Wyo. 1972).

60. *Id.* at 400.

vided for 80-acre drilling and spacing units located either in a north-south or vertical direction or in an east-west or horizontal direction in a quarter section with the permitted well location in each drilling unit to be the center of the NE $\frac{1}{4}$ of a quarter section and in the center of the SW $\frac{1}{4}$ of a quarter section, with a 200-foot tolerance in any direction when surface conditions made such tolerance necessary. Mitchell received a permit to drill in the NE $\frac{1}{4}$ of a quarter section, having previously contacted all owners of interests in the E $\frac{1}{2}$ of the quarter section prior to drilling. All except Simpson signed a communitization agreement, and, therefore, it became necessary for Mitchell to apply to the Commission for compulsory pooling of all interests in the E $\frac{1}{2}$ of the quarter section.

The matter was heard, and the Commission entered an order allowing compulsory pooling as requested by Mitchell's application. Simpson did not appear at the original spacing hearing, nor did he appear at the subsequent hearing when the spacing was continued by the Commission. He did appear and protested Mitchell's application for compulsory pooling. Simpson contended that since he had deleted the pooling clause in the lease he executed, he alone could determine the direction of a drilling unit, and that the Commission could not order forced pooling unless it found that it was necessary to protect correlative rights or to prevent waste.

The supreme court found that Simpson's argument that a lessor or one having only royalty interests is not subject to the Commission's order was a position wholly untenable, since Wyo. Stat. § 30-221(f) (1967),⁶¹ applies to "all in-

61. WYO. STAT. § 30-221(f) (1967) provides:

When two or more separately owned tracts are embraced within a drilling unit, or when there are separately owned interests in all or a part of the drilling unit, then persons owning such interests may pool their interests for the development and operation of the drilling unit. In the absence of voluntary pooling, the commission, upon the application of any interested person, may enter an order pooling all interests in the drilling unit for the development and operation thereof. Each such pooling order shall be made after notice and hearing and shall be upon terms and conditions that are just and reasonable. Operations incident to the drilling of a well upon any portion of a unit covered by a pooling order shall be deemed for all purposes to be the conduct of such operations upon each separately owned tract in the unit by the several owners thereof. That portion of the production allocated or applicable to

terests" in the drilling unit. The supreme court then upheld the Commission's order and reversed the lower court which had granted Simpson's summary judgment motion. An interesting procedural question was involved in that the supreme court noted that if the Commission was arbitrary in finding that the lessee had the right under its prior orders to designate a drilling unit, this was a matter which Simpson could raise only by petition for review under Rule 72.1, Wyoming Rules of Civil Procedure, and not by a collateral attack.

APPROVAL OF UNITIZATION AGREEMENTS— VOLUNTARY AND INVOLUNTARY

One of the additional matters which is important to oil and gas operators and in which the Oil and Gas Conservation Commission is constantly engaged is the matter of approval of agreements for water flooding or other recovery operations, repressuring or pressure maintenance operations, and cycling or recycling operations and the establishment of units for these purposes under Wyo. Stat. § 30-222 (1967).⁶² We have seen that hydrocarbons accumulate in a pool and that, normally, the pool is delineated by development wells which recover hydrocarbons by the use of primary recovery meth-

each tract included in a unit covered by a pooling order shall, when produced, be deemed for all purposes to have been produced from such tract by a well drilled thereon.

62. The pertinent provision is WYO. STAT. § 30-222(1) (Supp. 1973), providing:

An agreement for waterflooding or other recovery operations involving the introduction of extraneous forms of energy into any pool, repressuring or pressure-maintenance operations, cycling or recycling operations, including the extraction and separation of liquid hydrocarbons from natural gas in connection therewith, or for carrying any other method of unit or cooperative development or operation of one or more pools or parts thereof, is authorized and may be performed, and shall not be held or construed to violate any of the statutes of this state relating to trusts, monopolies, or contracts and combinations in restraint of trade, and may be submitted to the commission for approval as being in the public interest or reasonably necessary to prevent waste or to protect correlative rights. Approval of such agreement by the commission shall constitute a complete defense to any suit charging violation of any statute of this state relating to trusts, monopolies and combinations in restraint of trade on account of such agreement or on account of operations conducted pursuant thereto. The failure to submit such an agreement to the commission for approval shall not for that reason imply or constitute evidence that such agreement or operations conducted pursuant thereto are in violation of laws relating to trusts, monopolies and combinations in restraint of trade.

ods, and that, toward the end of primary recovery, secondary methods are instituted such as water flooding or gas injection into the structure. Unit agreements result from the voluntary association of all interest owners in a pool, including mineral owners, overriding royalty owners and leasehold owners. Unit operating agreements are separate documents executed only by those working interest owners bearing the costs of drilling and operation, and, when executed by such interest owners, the entire spectrum of unit operations is fully covered. Occasionally, units are formed for the purpose of primary recovery, and frequently such agreements involve a "two-phase" recovery of hydrocarbons in which a certain amount of oil reserves is allocated under primary recovery, and the balance under secondary recovery. Different parameters are established for participation by the interest owners in the recovery of primary oil and in the recovery of secondary oil. Many Producers 88 forms of oil and gas leases used for leasing of privately-owned minerals contain a clause allowing the lessee to pool, communitize or unitize the mineral owner's interest where applicable. Notwithstanding such clauses in private leases, companies have uniformly taken the position that all interest owners should voluntarily execute unit agreements.

The function of the unit agreement, generally speaking, is to establish a basic legal document under which the parties agree to a unit operation and commit their interests thereto to satisfy the requirements of title and other matters. The unit operating agreement, on the other hand, is just what its name implies. It relates to the physical operations under which an operator is designated for the entire unit, and it provides for accounting procedures and other in-house regulations and control as well as payment for the costs of unit operations. Wyo. Stat. § 30-222 (1967)⁶³ covers approval by

63. WYO. STAT. § 30-222(6) (Supp. 1973) states:

No order of the commission authorizing the commencement of unit operations shall become effective until such plan of unitization has been signed or in writing ratified or approved by those persons who own at least eighty percent (80%) of the unit production or proceeds thereof that will be credited to royalty and overriding royalty interests which are free of costs, and unless both the plan of unitization and the operating plan, if any, have been signed, or in writing approved or ratified, by those persons who

the Wyoming Oil and Gas Conservation Commission of such agreements, both in those cases where a 100% voluntary agreement has been made, and in those cases where not all interest owners have voluntarily executed the agreements. This section specifies the contents of any such application for approval, as well as the requirements of those things which the Commission must find have been covered in the agreements themselves. The significant feature of this statute is that the Commission may approve, by its order, unitization of interests which have not been voluntarily committed to a unit. Subsection 6 provides that the Commission order authorizing commencement of unit operations shall not become effective until the plan of unitization has been signed or ratified or approved by:

[T]hose persons who own at least eighty percent (80%) of the unit production or proceeds thereof that will be credited to royalty and overriding royalty interests which are free of costs, and unless both the plan of unitization and the operating plan, if any, have been signed, or in writing approved or ratified, by those persons who will be required to pay at least eighty percent (80%) of the cost of unit operations⁶⁴

An attorney representing an applicant for approval of a plan of unitization covering a single pool for either primary or secondary operations, or a "two-phase" plan of operation,

will be required to pay at least eighty percent (80%) of the cost of unit operations; provided, however, to the extent that overriding royalty interests are in excess of a total of twelve and one-half percent (12½%) of the production from any tract, such excess interests shall not be considered in determining the percentage of approval or ratification by such cost-free interests. If such consent has not been obtained at the time the commission order is made, the commission shall, upon application, hold such supplemental hearings and make such findings as may be required to determine when and if such consent has been obtained. Notice of such supplemental hearing shall be given by regular mail at least fifteen (15) days prior to such hearing to each person owning interests in the oil and gas in the proposed unit area whose name and address was required by the provisions of section 3 (b) [subsection (3) (b)] of this act [section] to be listed in the application for such unit operations. If the required percentages of consent have not been obtained within a period of six (6) months from and after the date on which the order of approval is made, such order shall be ineffective and revoked by the commission, unless, for good cause shown, the commission extends that time.

64. WYO. STAT. § 30-222(6) (Supp. 1973).

must very carefully follow this statute since persons who have an interest being affected, and who have not voluntarily agreed to the plan of unitization, are to be "forced" into a unit plan, and it is obvious that the applicant's attorney must assure that proper jurisdiction is obtained over the non-consenting parties. This entails, under subparagraph 4, notice by certified mail at least fifteen days prior to the hearing to all persons "owning or having an interest in the oil and gas in such unit area or the production therefrom including mortgagees and the owners of other liens or encumbrances,"⁶⁵ and all owners, as defined in Wyo. Stat. § 30-216 (e) (1967),⁶⁶ of every tract not included within but which immediately adjoins the proposed unit area or corner thereon. The application must list all of these persons and give their addresses, and notice by certified mail given to them as indicated. If this is not done, it is apparent that the Commission will have no jurisdiction over the involuntary participants.

Additionally, the attorney for the applicant cannot rely upon the 80% figures contained in subparagraph 6. Experience has shown that the Commission will not necessarily approve a unit plan even if 80% or more of the categories of persons listed in subparagraph 6 have agreed to it. It behooves the applicant to make every effort to obtain as many voluntary consents or ratifications to the unit plan on behalf of mineral owners, overriding royalty owners and leasehold owners as possible.⁶⁷ The reason given by the Commission for this in past hearings has been that the Commission desires as broad a voluntary participation as is possible. Moreover, since it is being asked to issue an order substantial-

65. WYO. STAT. § 30-222(3) (b) (1) (Supp. 1973).

66. WYO. STAT. § 30-216(e) (1967) provides: "'Owner' means the person who has the right to drill into and produce from a pool and to appropriate the oil or gas he produces therefrom either for himself or others or for himself and others."

67. If the unit covers federally-owned minerals, it should be submitted to the United States Geological Survey at Casper, Wyoming prior to any hearing before the Commission. If the U.S.G.S. approves the inclusion of the federal minerals, it will issue a preliminary letter of approval which can then be presented as one of the exhibits at the Commission hearing. It is important to obtain such preliminary approval for the reason that the Commission will not approve a unit unless the U.S.G.S. has reviewed it as it might affect federal minerals.

ly affecting property rights of all interested parties, including those who have not already joined, the Commission wants to be certain that they are, first, aware of the application and the hearing on it, and, second, that they have been offered a chance to participate in the determination of two crucial points in the unit plan. The first of these crucial points is the amount of oil assigned to each tract by the use of the parameters selected by the engineering committee of the leasehold owners, and, second, whether the parameters selected are justified by the facts. In speaking of parameters we are referring to engineering methods used for determination of the several factors to be considered in allocating production to the various tracts within a unit, *e.g.*, cumulative production figures, current rates of production figures, factors showing sand volume, sand thickness, porosity and permeability. A combination of such factors is usually used, and the Commission will require the technical witness to justify the percentage of each of these factors assigned in the determination of the whole factor to be applied. Also, in computing primary recovery, a different combination of factors will be used than in computing secondary recovery.

OTHER WYOMING STATUTORY PROVISIONS

One of the provisions of Wyo. Stat. § 30-222 (1967) raises serious constitutional questions. Subparagraph 10 provides in part as follows:

Whenever the commission enters an order providing for a unit operation, any lease, other than a state or federal lease, which covers lands that are in part within the unit area embraced in any such plan of unitization and that are in part outside of such unit area shall be vertically segregated into separate leases, one covering all formations underlying the lands within such unit area and the other covering all formations underlying the lands outside such unit area, such segregation to be effective as of the anniversary date of such lease next ensuing after the expiration of ninety (90) days from the effective date of unitization; provided, however, that any

such segregated lease as to the outside lands shall continue in force and effect for the primary term thereof, but for not less than two (2) years from the date of such segregation and so long thereafter as operations are conducted under the provisions of the lease. If any such lease provides for a lump-sum rental and if rentals become payable under any segregated lease covering the outside land, such lump-sum rental shall be prorated between such segregated leases on an acreage basis.⁶⁸

The foregoing provision was inserted by the legislature at the request of some landowners in Campbell County, Wyoming. Under state and federal rules and regulations the commitment to a unit plan of a portion of a federal or state lease will segregate that lease into two leases, one covering the lands within the unit area, and the other covering the lands outside the unit area which were contained in the original lease, and the term of the lease as to the lands outside the unit is extended two years. Apparently the Wyoming legislature attempted to make the same provision with respect to private leases given by owners of minerals. We have seen heretofore that many Producers 88 leases contain clauses allowing unitization. These clauses will customarily provide that a lease from a fee owner, when committed to a unit operation, either as to the whole or part of the land covered by the lease, be conformed to the unit plan and be extended for so long as unit production continues. Where a lessor has agreed to this and a lessee has taken a lease in reliance upon it being a part of the lease contract, it is to be questioned whether the legislature constitutionally may change the contract between the parties and provide that the lessee must now have two leases, one of which will be conformed to the unit plan and will be extended for so long as unit production continues, and the other which may expire in two years unless he obtains production on the lease as to the lands outside the unit.

This is a radical amendment of the lease contract entered into between the parties, and it is to be questioned whether

68. WYO. STAT. § 30-222(10) (Supp. 1973).

the legislature can constitutionally do this. Particularly would this be true of leases in effect when this statute was enacted in 1971. As to leases taken after the effective date of the 1971 legislation, it is submitted that a mineral owner may voluntarily agree in his lease that it may be committed to a unit pan and not segregated. The legislature purports to take this right away from him, and there appears to be no justification constitutionally for this provision. To the knowledge of the authors it has not been tested in court, but a reader of this article may be the first to raise the issue and have it decided. He most certainly should be aware of it if he is representing a lessee who is faced with the dilemma created by the statute.

In a discussion of the compulsory unitization statutes enacted in Mississippi in 1964, one of the leading oil and gas texts⁶⁹ has this to say about the Mississippi act, which segregates lands within and without the unit area and gives the lessee ninety days to drill and develop the lands outside the area, failing which the lease as to said lands is stated to be void:

The second part of the second sentence of Section 106 is unique, and on first glance might seem to raise questions of constitutionality. In effect it seems to say that whatever the lease may provide to the contrary, the lease is terminated by force of the statute after ninety days from the date of the termination of the unit area, if the lessee fails both to "drill and develop" such excluded lands. There may be instances (though they will be rare, since Mississippi unitization applies only to develop fields) where the delay rental clause, or the drilling operations clause, or a shut-in gas royalty clause, or some other savings provision is still in effect under the lease. It is difficult to justify under the police power of the state, exercised in this instance presumably to conserve natural resources, this interference with the lessee's contract rights and the deprivation of his property. Apart from the due process clause and the contract clause of the Constitution, no ration-

69. 6 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 953 (1973).

al objective appears to be served by the exercise of the police power in this manner. While we think the Mississippi legislature can make the lease divisible upon unitization, we cannot see the justification for depriving the lessee of his bargain to continue the lease in effect by paying delay rentals or resuming drilling operations on the acreage excluded from the unit where the lease itself provides for such privilege.⁷⁰

Said text takes the position that the divisibility portion of the Mississippi statute makes good overall sense, and points out that what the Mississippi legislature has done is to try to accommodate two conflicting but legitimate interests—those of the landowner and those of the lessee. This text admits that there are other text writers asserting that the proviso is invalid.⁷¹ Williams and Meyers further point out:

If, however, the lease itself provides that unitization would result in the attribution of unit operations to all the leasehold acreage, whether the acreage is included in the unit or not, then, under the lease itself, the lease would probably be preserved. It is the lease itself that produces the result, not the unit plan or the unitization order of the Board.⁷²

STATUTORY PENALTIES

One of the problems confronting the lawyer in advising clients subject to the statutes being discussed exists because of the penalty provisions contained in the statutes. Wyo. State. § 30-231 (Supp. 1973) provides a forfeiture to the Commission fund of \$500 for "each act of violation." This is a civil penalty to be assessed upon order of the district court of the county in which the defendant resides or in which any defendant resides, or in the district court of any county in which the violation occurred, or in the District

70. 6 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 953 at 708.9 -10 (1973).

71. Brunini, *Important Elements in the Development of Oil and Gas Conservation in Mississippi*, 6 INTERSTATE OIL COMPACT COMM'N BULL. No. 2 at 1 (1964); Custy & Knowlton, *Compulsory Field-Wide Unitization Comes to Mississippi*, 36 MISS. L. REV. 123, 138-40 (1965).

72. 6 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 953 at 708.9 (1973).

Court of Laramie County, Wyoming. In addition, subparagraph (b) of said section provides for a criminal penalty for falsifying records up to a fine of not more than \$5,000 or imprisonment for a term not exceeding six months, or both, with the same penalty for any person aiding or abetting falsification of records.

In addition to the forfeiture provisions, Wyo. Stat. § 30-231.1 (Supp. 1973) provides that whenever a forfeiture or civil penalty is imposed for the flaring of gas in excess of the amounts permitted by an order of the Commission there shall also be imposed an additional forfeiture or civil penalty which shall be the greater of either (a) ten per cent of the amount of the forfeiture or civil penalty, or (b) six and one-quarter per cent of the value of the amount of gas so flared or vented. Also, there shall be paid to the Tax Commission of the State of Wyoming an amount equal to the mineral severance tax which would have been payable if the gas had been saved and sold. The authors are not aware of any instance in which the Commission has restored to the penalties provided by the statute herein discussed, but the fact that they exist constitutes a caveat to a lawyer who might otherwise feel obliged to advise his clients to defy the Commission because of the notion that its orders are not properly supportable. Therefore, if a lawyer wants to contest a Commission order, it would appear the better part of caution to advise his clients to comply with the order until such time as it can be tested in court. It would not take too much imagination for an assistant attorney general advising the Commission to suggest that each day is a separate violation, and this has, in fact, been threatened and probably would be the Commission position.

ECONOMICS

At times applicants who appear before the Commission on spacing applications attempt to have the Commission consider the economic position of the operators and producers in establishing the size of the drilling units. At one of the

hearings on the Spearhead Ranch Field in Converse County, the issue was raised and the Attorney General was asked for a legal opinion concerning whether or not such evidence is proper. The Special Assistant Attorney General assigned to the Commission gave as the Attorney General's opinion that, under the Wyoming Oil and Gas Conservation Act, the Commission is precluded from such economic consideration.⁷³ It will be noted from the opinion which appears in the Appendix I that, nevertheless, the opinion indicates that the Commission should have some flexibility in the matter and that so should applicants in applying this rule, and that the needs of the industry relative to spacing can be considered by the Commission. It appears to the authors that conservation and the economics of the operators and leasehold owners are so entwined that it is not possible to consider conservation without considering economics. This is not to say that we disagree with the said opinion of the Attorney General, but there might be selected instances in which the economic situation should be placed before the Commission, at least tangentially, as indicated by the opinion. In any event, the readers will be aware of this opinion and that the Commission follows it at the present time.

CONCLUSION

No article of this nature could cover all of the problems encountered in practicing before the Oil and Gas Conservation Commission of the State of Wyoming. However, an attempt has been made to cover this field in general. Hopefully, this article may assist a new practitioner before the Commission as this is its purpose rather than a substantive discussion of oil and gas conservation law. The cases cited are intended to be illustrative of practice before the Commission rather than substantive dissertations on conservation law. Many texts by more able authors are available on the substantive aspects of conservation law.

73. See Appendix I.

APPENDIX I

MEMORANDUM OPINION

TO: Wyoming Oil & Gas Conservation Commission

BY: William M. Sutton

Special Assistant Attorney General

QUESTION: Does the Wyoming Oil & Gas Conservation Act permit consideration of the economic* position of oil and gas operators and producers when establishing the size of drilling units or must principles of conservation be the sole determining factor.

ANSWER: Under the Wyoming Oil and Gas Conservation Act the Commission is precluded from such economic consideration.

Before dealing directly with the Act itself it is important to carefully consider the legislative history of our oil and gas legislation. The first time the State of Wyoming made any significant attempt to pass oil and gas conservation legislation was during the Thirty-first Legislature of 1951. During the legislative term comprehensive conservation legislation was offered and carefully considered. At the inception of any new concept it must be presumed that the legislative body gives careful consideration to the course which it desires that concept to take.

In the case of Wyoming's Oil and Gas Conservation Act it appears that the legislature did in fact carefully consider the very question which this opinion seeks to answer. The original conservation legislation was introduced January 25, 1951 as H.B. No. 130. Section 15 of this House Bill related to waste and provided

“(a) The term ‘waste’ in addition to its ordinary meaning, shall include: . . . (5) *the drilling of wells*

*In this opinion when referring to “economics” the reference relates to the economic position of oil and gas producers and their internal financial ability or inability to drill all of the well locations required by any given spacing order. Or stated differently, whether well spacing must be determined by the financial ability of producers to drill wells or by principles of conservation as defined by the conservation act.

not reasonably necessary to effect an economic maximum ultimate recovery of oil or gas from a pool: . . . the drilling of unnecessary wells creates waste, as such wells create fire and other hazards conducive to waste, and unnecessarily increase production costs and thus also unnecessarily increase the costs of products to the consumer.” (Emphasis added).

It is very significant to note that this language was rejected by the legislature and does not appear in the Act as it now appears in the statute books. This language involves directly the question to be answered by this opinion. The wording of H.B. No. 130 would have constituted an express mandate from the legislature to the Oil and Gas Conservation Commission that the Commission must take into consideration the economic situation existing in the oil and gas industry in its regulatory practices. The language of the original bill speaks directly to the economics of the oil and gas industry and the financial ability of producers to drill wells. Just as importantly the cited language relates directly to the spacing or number of wells, the same problem considered in this opinion. The rejection of this language indicates a very clear statement by the legislature that economic matters may not be considered by the Wyoming Oil and Gas Commission in spacing matters.

A consideration of the Act itself, exclusive of any legislative history, would also lead to the same conclusion. A reading of the Act in its entirety leads to the conclusion that the basic premise of our oil and gas legislation is that no oil or gas which would otherwise be recoverable may be wasted or left unrecovered in the ground. Section 30-221(a) Wyoming Statutes 1957 deals directly with spacing and the establishment of drilling units. This section authorizes the Commission to establish drilling units “When required to protect correlative rights or, to prevent or to assist in preventing any of the various types of waste of oil or gas prohibited by this Act . . .” Likewise, Section 30-221(d) authorizes the Commission to decrease the size of established units or permit in-fill drilling if necessary to prevent waste or to protect correlative rights. Both of these sections re-

late to the establishment of the size of drilling units but refer only to prevention of waste and protection of correlative rights. No reference is made to economic considerations or subjective financial situations. Indeed a reading of the Act as a whole indicates the paramount importance of conservation as a basic, general proposition.

For example, Section 30-216(b) of the Act defines the Commission as the "Wyoming Oil and Gas *Conservation* Commission". Webster's New World Dictionary defines conservation as "the official care and protection of natural resources . . .". Webster's Seventh New Collegiate Dictionary defines "conservation" as "a careful preservation and protection of something; planned management of a natural resource to prevent exploitation, destruction, or neglect." These are general definitions of waste and relate to the pure sense of preventing any physical waste of a natural resource as opposed to economic waste. A more helpful relation to the question at hand is found by seeking the definitions of "waste" and "conservation" as those terms are used in the contemplation of the oil and gas industry. Williams and Meyers, *Manua^l of Terms*, p. 74 defines "conservation" as "the prevention of the loss of natural resources without economic or beneficial use; the prevention of waste." Page 437 of the same text defines "waste" thusly:

"The prevention of waste is conservation. The term is best understood when broken down. There is physical waste and economic waste. Physical waste is the waste of oil or gas that could have been recovered and put to use. Examples of the former are flaring of gas and storage of oil in earthen pits. Examples of the latter are inefficient use of reservoir energy, excessive production rates resulting in channeling and by-passing. An example of economic waste is the sale of natural gas at too low a price at the well head."

Clearly these definitions speak solely to the concept of recovering the optimum amount of oil and gas without reference to the subjective financial ability of producers to recover such oil and gas. When considering economics as it applies

to spacing, however, some authorities do suggest that economics is an important factor:

“As a conservation matter, well spacing statutes and regulations are designed to prevent waste and protect correlative rights. However, the limiting factor in determining the size of drilling and spacing units is an economic one.” *Sullivan, Oil and Gas Law*, Sec. 158 (1955).

A general review of the above considerations would, therefore, suggest that waste and conservation principles are broken down into both physical terms and economic terms. Because of the legislature's removal of the express authority to regulate spacing pursuant to economic principles, however, it appears that the Wyoming Act may be applied only in the strict sense of preventing physical waste.

Nor would it appear to make any difference that in defining waste, Sec. 30-216(a) of the Act includes the “ordinary” meaning of the term. Again the express removal by the legislature of clear language which would have permitted economic considerations would appear to override any attempt to define “ordinary” waste as including economic references. In any event, the industry definition of economic waste cited above (Williams and Meyers at p. 437), clearly relates only to such economical acts as selling natural gas at too low a price rather than relating to the aspect of economics as considered in this Opinion.

A review of the law of other jurisdictions is also helpful in solving the question posed at the beginning of this Opinion. In the Oklahoma case of *Southern Oklahoma Royalty Owners Ass'n v. Stanolind Oil and Gas Co.*, 266 P.2d 633, a situation existed wherein an oil and gas operator faced the proposition of either drilling additional wells to various sands underlying a spacing unit or completing existing wells in the new sands. The Oklahoma Corporation Commission was affirmed by the Court in holding that requiring new wells would be so financially burdensome that the operator would

sustain a loss and thereby "economic waste" would result. In this case, the Oklahoma Commission clearly considered the subjective economic ability of the operator. Further investigation reveals, however, that 52 Oklahoma Statutes (1951) Sec. 86.2 provides:

"The term 'waste' as applied to the production of oil, in addition to its ordinary meaning, shall include *economic waste* . . ." (Emphasis added).

Accordingly, it is clear that the Oklahoma Statute expressly directs the Oklahoma Commission to consider economics, a situation which is not contemplated by Wyoming law, and which, in fact, has been expressly rejected by our legislature.

A practical consideration of this problem would also militate against the Wyoming Commission's consideration of economics in spacing matters. The Wyoming Commission is made up of members whose particular expertise lies in the area of oil and gas, and whose statutory function is to administer to the conservation of oil and gas. This Commission is not designed to consider subjective economic matters. If such economic matters came within the purview of the Commission's authority then a veritable Pandora's Box would be opened. Problems would arise as to which operator's economics could be considered. Some could afford to drill on a particular pattern and some could not. Would this problem be solved by a vote by the operators or by an averaging of the economics of all operators? Or would the Commission have to conduct an extensive examination of each operator's economics? In the Spearhead Ranch situation, for example, one operator desires 320 acre spacing while others desire 640. Whose economics will be considered? It would appear that such an obligation on the part of the Commission would require a new level of expertise on the part of the Commission and its staff.

The basis of this Opinion then, in summary, is this. The Wyoming Legislature has clearly omitted language from the Act which would have expressly required the Commission to

consider economics in its deliberations. Administrative agencies, such as the Wyoming Oil & Gas Conservation Commission, are purely creatures of statute and, as such, are limited solely to the powers given it by law. *Cont. Oil Co. v. Oil Conservation Comm's.* 373 P.2d 809 (N.M.) Since our legislature has expressed its intent concerning economics, it would appear the Wyoming Commission is accordingly bound.

In conclusion it might be noted, however, that Wyoming law can be interpreted in such a way that the needs of the industry relative to spacing can be considered. In orthodox spacing procedures a field is spaced at an early stage in its development. At this time a wider spacing might be desirable in order for an orderly development which would indicate the extent and nature of the reservoir. Then, as more information became available, the Commission may determine that smaller drilling units should be established. In fact, Section 30-221 (b) of the Act provides for such a procedure when it states that the area of a drilling unit "shall not be smaller than the maximum area that can be efficiently drained by one well." This language implies that the area of established drilling units can be larger than the maximum area which one well can drain at least on a temporary basis. In other words, when spacing is required for a newly discovered reservoir, then such larger units may be necessary as a practical matter since information as to the nature of the reservoir is incomplete. Then information and data obtained from the widely spaced wells can be used as a basis for determining that smaller units would be better. In fact, at least one authority has so stated:

"... dictates of economics, influenced at times by those of expediency are, and properly should be, the most important influence in fixing well spacing or density in any field.... The ends of conservation and the demands of economics would be fully served if fields or pools could be originally developed on wide spacing patterns to determine the field limits and the reservoir and fluid characteristics. Following the studies made, possible infill wells could be

located and drilled to provide adequate reservoir drainage and to meet the requirements of conservation, economics or expediency." Conclusions of Research and Coordinating Committee, X Interstate Oil Compact Quarterly Bulletin (Sept. 1951). Sullivan, *Oil & Gas Law*, footnote 6, Sec. 158.

While the Wyoming Commission is precluded from considering economics, the above procedure would allow some flexibility to the producers in developing newly discovered reservoirs."