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THE WYOMING OIL AND GAS CONSERVATION ACT

PRIVATE RIGHTS AND PUBLIC POLICY

PETER D. JUNGER*

Oil and gas are very important to the state of Wyoming. At the end of 1956 the state produced nearly one barrel of oil per inhabitant per day, 300,000 barrels per day.¹ During that year the petroleum industry spent nearly a quarter of a billion dollars within Wyoming, most of it on exploration.² Agriculture and the discovery, production, and refining of petroleum are the state's two major industries. Both depend upon the exploitation of natural resources. When this exploitation is conducted as a "stripping", buccaneering type of operation then part of the nation's potential energy will have been lost; or, more simply, we shall have allowed part of the country's wealth to be destroyed.

The danger of such waste of basic resources has long been recognized, and not only in the case of oil and gas. The federal government has assumed control over the production of radioactive materials,³ our most modern source of energy. In 1607 all the judges of England resolved, "una voce," that the King could mine the salt-peter necessary for the national defense without regard to private interests.⁴ In general it has always been recognized that the sovereign may have an over-riding interest in essential and irreplaceable resources.

The basic resources necessary for agriculture in the "Arid West" is water, and the state of Wyoming has, since its founding, claimed in its very constitution the ownership of the waters in its streams.⁵ But in 1890 the draftsmen of the constitution could not be aware of the coming importance of fluid hydrocarbons nor of the problems that would come with their production. Yet today we are certainly not faced with shortages of agricultural products, while the relative smallness of the nation's petroleum reserves threatens both our national defense and the future of our economy. The supply of water that is so jealously controlled by the state is, though limited, constantly replaced. Once consumed, oil and gas can never be replaced. Oil and gas left underground in uneconomical quantities or without potential energy sufficient to bring them to the surface will neither be consumed nor replaced.

Therefore the states that produce petroleum, and the whole nation, have a large interest in seeing that it is used efficiently and is produced in

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1. Interstate Oil Compact Commission, Compact Comments, Feb. 1957, p. 7.

2. Petroleum Information, Twenty-seventh Annual Resume, Rocky Mountain Oil and Gas Operations 11 (1956).

3. Atomic Energy Act of 1954, 68 Stat. 919, 42 U.S.C.A., §§ 2061-2112 (Supp. IV, 1957).

4. 12 Co. 12, 77 Eng. Rep. 1294 (All the Judges of England, 1607).

5. Wyo. Const. Art. 8, § 1.

a manner that will yield the greatest ultimate recovery. The federal government exerts a great deal of control over the methods of production used on the public domain and other federally controlled lands.⁶ It exerts control over the transportation of oil and gas in interstate commerce.⁷ But it does not exert any control over the methods of production on private and state lands. The chief reason for this restraint would appear to be the fact that the major producing states, and the industry itself, have long been aware of the necessity of conservation.

The Mineral Section of the American Bar Association has published two excellent volumes that give the history, and explain the importance, of the conservation of petroleum.⁸ The more recent book, *Conservation of Oil and Gas*, contains a chapter on Wyoming. The striking feature of this chapter is the fact that as late as 1948 Wyoming had, to all intents and purposes, no conservation law. It was not until 1951 that a comprehensive law was passed.⁹ Why this legal development came so late in Wyoming is a question beyond the scope of this paper: perhaps it was the far distance from markets that made the legislature avoid placing checks on the industry's development, perhaps it was the fear that states with more economic power would be the ultimate beneficiaries of any Wyoming regulations, perhaps it was merely the state's traditional attitude of *laissez faire*. Whatever the reason may be, this late development is in many ways fortunate, since Wyoming now has the experiences of many states to draw on.

So far no litigation has developed under the Wyoming statute. The industry apparently has been highly cooperative and the Oil and Gas Commission has undoubtedly been feeling its way carefully among its new powers. But the histories of other states have shown that grievous problems can arise under such statutes. Fortunately the same histories indicate possible solutions. If the state has a great interest in the way that petroleum is produced and used, so do a large number of private persons: lessors and lessees, royalty owners and stockholders, "major" petroleum companies and "independents." What seems best to the state will not always seem best to the owner of an oil well. The state is interested in the greatest ultimate recovery; the entrepreneur may well feel that he needs a rapid return of his capital for further development, or merely to meet his interest payments. A "major" may want to develop a reservoir with expensive secondary recovery techniques, a neighboring "independent" may claim that it can't afford such measures, and the state may be forced to decide between them. State regulations may change the relative amounts of

6. For the extent of this control see: Hoffman, *Oil and Gas Leasing on the Public Domain* (1951).

7. 52 Stat. 821 (1938), as amended, 15 U.S.C. § 717-717w (1952).

8. American Bar Association, Section of Mineral Law, *Legal History of Conservation of Oil and Gas* (1938) and *Conservation of Oil and Gas, A Legal History, 1948* (1949); hereafter cited as ABA, *History of Conservation* and ABA, *Conservation of Oil and Gas*, respectively.

9. Wyo. Comp. Stat. §§ 57-1111-57-1126 (Supp. 1957).

production allotted to different wells, and the state may have to face the charge that it is giving one man's "property" to another. Cases may even arise where the state cannot subject land to its regulation until it can determine who, what minor or contingent remainderman, has an interest in the land. Certain of these problems are recurrent, and it is with them that this paper deals.

The basic problem is the attempt to reconcile the desire of the state for the greatest possible recovery from its resources with the divergent interests of a multitude of private parties. The law recognizes that many parties may have property interests in a reservoir of oil and gas; but the petroleum engineers describe such a reservoir as a single mechanical unit and insist that it can be efficiently developed only as a whole.¹⁰ It is in this area where the two professions come into conflict that the most frequent problems of petroleum conservation occur. It is also this area that has been described as the habitat of those strange beasts, the "law-gineers," members of one profession who speak with the tongue of the other. It would be unfortunate if we were to add to the number of such creatures—surely no more attractive than the cockatrice or basilisk of old. Yet a short statement of the engineer's side of the problem is necessary before we can discuss the powers that the state has assumed over the industry.¹¹

Oil and gas occur in reservoirs underground. These are areas of porous and permeable rock that are sealed on the top and sides by an integument of impermeable rock such that the petroleum cannot escape upwards, and sealed on the bottom either by rock or by water which will not allow the lighter hydrocarbons to escape. The oil itself contains little energy that could drive it through the pores in the rock to the bottom of an oil well and through the well to the surface. But almost always there will be gas with it in solution and under pressure. Often there will be a "gas cap" of compressed gas above the oil. Often there will be water below the oil that is connected with other pools of water above the level of the oil which would force the petroleum upwards if it were permitted to escape; and even the water, though only slightly compressible, is often under considerable pressure. The expansion of gas, either out of solution or downward from the gas cap into areas vacated by the oil, and the drive of water upwards into such vacated areas supply the energies by which oil can be produced.

And these energies, if not properly controlled, can easily be lost with the result that oil which could have been recovered will remain beneath ground forever. For example, it has been claimed that a well produced

10. Interstate Oil Compact Commission, Engineering Committee, Report 9 (1941).

11. The three paragraphs that follow this note are, of necessity, very general. For more information on the engineering problems, see: ABA, Conservation of Oil and Gas 3-15 (1949); Interstate Oil Compact Commission, Engineering Committee, Oil and Gas Production (1951); Interstate Oil Compact Commission, Engineering Committee, Report (1941); Interstate Oil Compact Commission, Engineering Committee, Principles of Petroleum Conservation (1955).

under "gas drive" would produce fifty per cent more under "water drive."¹² But a water drive requires that the oil be removed no faster than it can be replaced by water; otherwise some gas will escape from solution so that the oil will become more viscous and will require more energy to be brought to the surface; the water will "flood" areas containing oil and pockets of petroleum will be cut off and lost forever. Likewise more oil can be recovered if the drive comes from a gas cap than if it comes from gas in solution.

Even more production can be obtained if "secondary-recovery" techniques are used. Gas or water can be injected into the ground to supply a drive for the oil. "Wet gas," gas containing valuable hydrocarbons that would be liquid at atmospheric pressure, can be removed from a stratum by injecting or reinjecting "dry gas," gas from which the liquids have been removed. This method of producing wet gas is known as "cycling" or "recycling." All secondary recovery techniques are expensive and complicated. They require "input" wells and often necessitate special processing plants to separate the materials that will be sold from those that will be reinjected. They also make it advisable that a reservoir be treated as a single engineering unit; it does no good if one well injects gas that a neighboring well immediately removes.

So much, for the moment, of petroleum engineering.

The development of the common law of oil and gas has done much to make the problems of waste prevention more complex. The history of this law has been traced in many articles and it is not necessary to treat with it here. The explanations that have been given for the form this development has taken have often been more confusing than helpful; "minerals *ferae naturae*," "the rule of capture," "correlative rights" and such are phrases that, by themselves, explain little. The Wyoming court has attempted to avoid explaining its results in these terms.¹³ That court generally treats interests in oil and gas in place as being interests in real property.¹⁴ But petroleum has a fugitive, "fugacious" quality that has led the courts to develop special rules applying only to oil and gas. The person who owns the land, or his grantees or lessees, may remove any petroleum he can through wells bottomed within his property lines; and this is true even though the oil and gas were once under someone else's land or even though the energy used to produce the oil is lost forever to neighboring landowners who otherwise could have utilized it themselves.¹⁵ This concept has been carried so far that there is generally considered to be a duty on the part of a lessee to protect his lessor's interests by drilling a well on his land to counterbalance any neighboring wells that

12. Interstate Oil Compact Commission, Engineering Committee Report 9 (1941).

13. Oregon Basin Oil and Gas Co. v. Ohio Oil Co., 70 Wyo. 263, 269, 248 P.2d 198, 199 (1952).

14. Oregon Basin Oil and Gas Co. v. Ohio Oil Co., 70 Wyo. 263, 248 P.2d 199 (1952).

15. 1 Summers, Oil and Gas §§ 62-63 (perm. ed. rev. repl., 1954).

might "capture" petroleum or energy from the common pool.¹⁶ Naturally such a rule tends to lead to overproduction and wasteful practices. Gas without a market is flared in order to obtain marketable oil. Wells are produced more rapidly than can be justified by good engineering practices. Far more wells than necessary are drilled, and the extra wells represent pure economic loss. A few courts have held that there are limits to the amount of havoc one party who shares an interest in a pool of oil may cause,¹⁷ and all courts would undoubtedly be willing to enjoin an operation that constitutes a nuisance in the common law sense. But almost all legal restraint on methods of production has come from legislation rather than adjudication.

The form the legislation has taken varies in each producing state. During the early period there would frequently be simple statutes forbidding certain specified practices determined by the legislature to be wasteful, *e.g.*, flaring gas or burning it not for its energy but for some relatively valueless byproduct such as carbon black. Today there is generally a complex system of regulations administered by an agency created or adapted for that purpose. Sometimes the legislature makes most of the regulations; sometimes it merely gives broad "quasi-legislative" powers to the agency.

The model act developed by the Legal Committee of the Interstate Oil Compact Commission¹⁸ gives relatively detailed descriptions of the powers and duties of the agency, and this draft has influenced much of the recent legislation. The Interstate Compact to Conserve Oil and Gas was created in 1935 and was ratified by Colorado, Illinois, Kansas, New Mexico, Oklahoma and Texas. The purpose of the Compact is to "conserve oil and gas by the prevention of physical waste thereof from any cause."¹⁹ The Interstate Oil Compact Commission created by this Compact has no authority to make rules; it may merely give advice and distribute information to the member states. But when states join the Compact they must agree to enact or keep in force laws forbidding certain types of waste. Wyoming joined the Compact in 1955.²⁰ Thus the state became bound to have laws that would prevent:

- (a) the operation of any oil well with an inefficient gas-oil ratio.
- (b) the drowning with water of any stratum capable of producing oil or gas or both oil and gas in paying quantities.
- (c) the avoidable escape into the open air or the wasteful burning of gas from a natural gas well.

16. 2 Summers, Oil and Gas § 399 (perm. ed., 1938).

17. 1 Summers, Oil and Gas § 63 (perm. ed. rev. repl., 1954).

18. Interstate Oil Compact Commission, Legal Committee, A Form for an Oil and Gas Conservation Statute (1950).

19. The text and background of the Compact may be found in: Interstate Oil Compact Commission, A Summary of the Background, Organization, Purposes, and Functions of the Interstate Compact to Conserve Oil and Gas (1954).

20. Wyo. Comp. Stat. §§ 57-1201-57-1204 (Supp. 1957); 19 Oil and Gas Compact Bulletin 149.

- (d) the creation of unnecessary fire hazards.
- (e) the drilling, equipping, locating, spacing or operating of a well or wells so as to bring about physical waste of oil or gas or loss in the ultimate recovery thereof.
- (f) the inefficient, excessive or improper use of the reservoir energy in producing any well.²¹

The Compact does not prohibit a state from preventing other forms of waste, but it does contain a major *caveat*:

It is not the purpose of this compact to authorize the states joining herein to limit the production of oil or gas for the purposes of stabilizing or fixing the price thereof, or create or perpetuate monopoly, or to promote regimentation, but is limited to the purpose of conserving oil and gas and preventing the avoidable waste thereof within reasonable limitations.²²

The Compact Commission has drafted a model statute that is intended to expedite the purposes set forth in the Compact.²³ It presupposes the creation of a commission with jurisdiction to enforce its provisions. Its declared policy is both to prevent waste and to preserve "correlative rights," that is, the right of each owner of land overlying part of a reservoir to recover his proportionate share of the oil and gas. Briefly, it gives the commission general authority to require that reports on wells be made, that wells be drilled so as to prevent escape of oil or damage to any stratum, that bonds be furnished to insure the plugging of abandoned wells, and that wells be operated with efficient gas-oil ratios. It gives the commission broad powers to regulate the ways wells are drilled and operated and to make rules and regulations to carry out the purposes of the statute.²⁴ It requires that the commission limit production to the amount that can be produced without waste and does not exceed reasonable market demand.²⁵ The commission has the power to control the spacing of wells, and, where two or more separately owned tracts of land are included in a space to which only one well is allotted, it may make an order "pooling," that is, combining, all the interests so that each owner may recover his share from the well.²⁶ The commission has the power to approve an agreement by various persons to pool their interests in a field so that they can conduct secondary recovery techniques, and it may require that all the interests in a field be pooled and operated as a unit.²⁷

The Wyoming statute is not so comprehensive. It forbids the waste of oil and gas, but it makes no mention of the preservation of correlative rights.²⁸ It puts jurisdiction and authority in the Wyoming Oil and Gas Conservation Commission. This Commission has general powers similar

21. Interstate Compact to Conserve Oil and Gas art. III.

22. Id. art. V.

23. Interstate Oil Compact Commission, Legal Committee, A Form of an Oil and Gas Conservation Statute (1950).

24. Id. § 2.

25. Id. § 4.

26. Id. §§ 5-6.

27. Id. §§ 7-8.

28. Wyo. Comp. Stat. § 57-1111 (Supp. 1957).

to those granted by the model statute.²⁹ It has the power to create spacing units and may compel the pooling of any interests that are separately owned and within the spacing unit.³⁰ It is customary in the state to describe the pooling of such a one-well unit as "communitization." It may allow all the interests in a whole field to be pooled,³¹ this process usually being termed "unitization," but it does not have any express authority to require such unitization. It is not given any authority to regulate production in terms of market demand. In fact, the act contains a very important provision restricting the commission's powers:

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, regulation or judgment requiring restriction of production of any pool or of any well (except a well or wells drilled in violation [of an order creating spacing units]) to an amount less than the well or pool can produce in accordance with sound engineering practice.³²

It has been claimed that the quoted section contradicts the rest of the act since many types of waste, such as the flaring of gas, can be committed though the well itself violates no practice of good engineering.³³ As will be seen, this section makes it more difficult for the Commission to protect all the owners of a reservoir.

There are five major groups of problems that could arise under this Wyoming Act, problems that have arisen in other states. Their solutions are not contained in the act or in any decisional law of Wyoming. These problems will be discussed in this paper, and the solutions adopted by other states will be compared. In some cases it will be seen that the best answer is fairly clear, in others the courts would be hard put to find a satisfactory solution and a legislative clarification would seem desirable.

The power to order drilling units and to compel communitization raises one group of these problems. They are centered mainly around the effect of communitization on pre-existing contractual and proprietary relationships. Does a communitization order give the operator of the drilling unit the right to enter and drill on the land of a person who does not agree to the unit? Does a lessor whose land is included in such a unit get his royalty on all the oil produced from his land or only his pro rata share? Does production in such a unit extend a lease (of the type that is extended by production) on all the land subject to the lease or just the land in the unit? Does a clause in a lease permitting voluntary communitization with the consent of the Commission violate the rule against perpetuities?

29. Id. § 57-1112.

30. Id. § 57-1113.

31. Id. § 57-1114.

32. Id. § 57-1124.

33. 1951 American Bar Association, Section of Mineral Law, Proceedings 100.

There are problems raised by the absence of any express authority to order unitization of a whole field. Can such an order be made under the general power to control the operation of wells? Can unitization be compelled by an order saying, in effect, either unitize or close down your wells?

The problems raised by the lack of express authority to order the use of secondary recovery techniques are similar to those raised in the preceding paragraph. And, furthermore, there are more problems that arise if the Commission cannot, or does not, order their adoption. If some producers are permitted by the Commission to adopt secondary recovery techniques can those producers enjoin dissenters from producing the petroleum that otherwise would not have been available? Can dissenting producers or lessors enjoin the injection of valueless gas or water under their lands?

The most important set of problems is nowhere adverted to in the Wyoming Act. These are the problems raised by the existence of what are usually called correlative rights. Is the Commission to look after only the interests of the state and let the chips fall where they may, or does it have the power, and, perhaps, the duty, to protect all who have an interest in a pool of oil? It may not regulate, in terms of market demand, the amount of oil a whole field produces; but may it limit the individual producer to no more than his "ratable" share of the petroleum?

Finally, there are problems raised by the administrative procedures created by the Wyoming Act. It provides that all matters, including regulations, can be retried *de novo* in the courts. Does this mean that an order or regulation can be effectively destroyed by procedural delays? The Commission must often make determinations affecting title to land. What power does the Commission have to pass on questions of title?

Such are the problems with which this paper deals. Since they have arisen elsewhere they may, and very likely will, come before the Wyoming courts. Thus it may be useful to have them analyzed in the light of the Wyoming Oil and Gas Conservation Act.

I. COMMUNITIZATION

Under the Wyoming statute the primary incentive for communitization (*i.e.*, the pooling of interests in oil and gas in an area to be drained by one well) is the power of the Commission to issue spacing orders that establish drilling units uniformly over an oil field and that allow only one well to be drilled on each such unit.³⁴ Obviously, if several different owners have tracts included in a drilling unit they must either merge their interests or run the risk of owning land in an oil field on which they cannot drill a well. The statute gives authority for the pooling of the various interests for the "development and operation" of the drilling unit.³⁵ Since this part

34. Wyo. Comp. Stat. § 57-1113, pars. (a) - (e) (Supp. 1957) .

35. *Id.* § 57-1113, par. (f) .

of the statute refers to separately "owned" interests and tracts and since the word "owner" is defined in the statute as "the person who has the right to drill into and produce from a pool and to appropriate the oil and gas he produces therefrom either for himself or others or himself and others"³⁶ this may mean that the persons who have the right to drill for petroleum in an area included in a drilling unit have the power to pool their interests without the consent of their lessors and other royalty owners. Even if the participle "owned" does not refer to the definition of "owners" there is nothing in this section that negates the existence of a power to pool only part of the interests in the unit. This leaves open the question as to whether or not a voluntary pooling of operating interests can in any way alter the producers' duties to non-consenting royalty owners. In the absence of a voluntary agreement the Commission may order the pooling of "all interests in the drilling unit."³⁷ This power has never been exercised by the Commission. This means that in the case of a compulsory order all those owning interests in the unit, and not just the operators, would have their interests pooled.³⁸

One problem that might arise as a result of these provisions is that a voluntary agreement, which would be relatively ineffective if the lessors of the unit were not parties to it, might be held to prevent the Commission from ordering a pooling of all the interests. A literal reading of the statute might reach this result since the absence of a voluntary agreement appears to be a condition precedent to an order by the Commission. However, if all the interests, both operating and royalty, are not pooled it would seem that there would be sufficient lack of agreement to support the Commission's jurisdiction to issue a pooling order.³⁹ As will be seen, if the lessors are not bound by a communitization agreement or order there may be unfortunate results, ranging from extensive litigation to highly inequitable divisions of royalties.

It is not to be argued that the operators should be able to make a voluntary agreement that would deprive any lessor of his right to his royalty on oil and gas produced from, or attributable to, his lands or to his right to reasonable efforts on the part of his lessee to produce from the leasehold. But if the lessee's agreement is reasonable, if the lessor loses nothing by it, then the lessee has not violated his duty.⁴⁰ This argument should apply equally well to the duty to other types of royalty owners; hereafter, unless other types of royalties are mentioned, "lessors" will be used to refer to all royalty owners.

36. Id. § 57-1123, par. (e).

37. Id. § 57-1113, par. (f).

38. Hereafter the word "operators" will be used to refer to those whom the statute refers to as "owners."

39. Under similar statutes the Commission has exercised the power to approve voluntary units, though there apparently was no express authority for it either to approve or disapprove; e.g., *Smith Petroleum Co. v. Van Mourik*, 302 Mich. 131, 136, 4 NW.2d 495, 497 (1942).

40. 2 Summers, *Oil and Gas* §§ 414-416 (perm. ed. 1938). This argument will appear again in Part III of this paper in relation to the similar problem that arises when a lessor objects to his lessee's entry into a pressure maintenance plan.

If one well is drilled in a drilling unit, any covenant, express or implied, that would normally require an operator to drill another well within the unit is made void by the provision of the statute prohibiting other wells.⁴¹ Thus no lessor should be able to object that his lessee did not drill offset wells.⁴² But the effect of these provisions on other rights and duties is less clear.

One objection may arise when the surface owner objects to the use that is made of the surface by owners of the mineral interests. There is contained in the grant or lease of the right to produce petroleum from a tract of land the right to use the surface to the extent that is reasonably necessary for such production; but this right does not allow the operator to use the surface of one tract to facilitate production from another.⁴³ For example, the operator may build roads that are needed to transport oil produced from the tract they transverse, but oil from neighboring lands cannot be carried across a tract to the detriment of the surface owner's interest.

If the owner of the right to take oil and gas does not have any right to use the surface, he might not be considered the "owner" in the sense of the Wyoming statute because he has no right to go on the land to drill.⁴⁴ The "owner" in that sense would have to be both the mineral and the surface owners. Apparently such a situation could arise only if there was an express reservation or conveyance of the exclusive right to use the surface.⁴⁵ The oil and gas rights under such circumstances would not be without value since a well could be bottomed within the tract even though the well-head was on a neighboring parcel. In any case, the owners of the oil and gas interests will seldom find themselves in such a predicament.

If communitization is compulsory, an owner of land included in the drilling unit may object that, though the interests in petroleum are pooled, that does not mean that the operator of the unit can use the surface of his tract for roads and storage tanks and bunkhouses and all the other paraphernalia of an oil well. This view has been expressly rejected in at least one jurisdiction,⁴⁶ and it would seem properly so. The surface owner usually will be a lessor and will receive a royalty on the production allotted to his share of the land; if he receives this benefit he should not be heard to object to the use made of the surface. Even if this is not so, the surface owner must have expected the person with the operating rights to make some use of the surface; and therefore he is not damnified when

41. Wyo. Comp. Stat. § 57-1113, par. (e) (Supp. 1957).

42. Cf., *Everett v. Phillips Petroleum Co.*, 218 La. 835, 51 So.2d 87 (1951).

43. See *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302 (1944); 4 *Summers, Oil and Gas*, § 652 (perm. ed. 1938), § 652.1 (cum. pocket part 1957).

44. See note 36.

45. See, e.g., *Rhumberg v. Texas Co.*, 379 Ill. 430, 40 N.E.2d 526 (1942) (right to mine coal, but no right to break the surface).

46. *Grayson v. Lyons, Prentiss & McCord*, 226 La. 462, 76 So.2d 531 (1954); but see 4 *Summers, Oil and Gas* § 652.1 (cum. pocket part 1957).

the unit operator makes use of it. Perhaps in the rare case where the surface owner's right is exclusive the Commission might have to authorize an exception to the order stipulating where the well may be drilled and to permit directional drilling. Of course, the operator's use of the surface must not be excessive; but at least one case in Wyoming, though distinguishable since the oil rights were reserved to the Federal Government rather than a private party, suggests that the operator can go quite far in his use of the surface.⁴⁷

A similar problem might occur if no one owns a present interest that would permit him to drill for oil on the land. The typical situation would be the existence of a life estate and contingent remaindermen. The remaindermen would have no right to any present use of the land and the life tenant would commit waste if he opened a well.⁴⁸ This type of situation should not prevent an order by the Commission pooling all interests in a drilling unit. The Commission might have difficulties determining how to allocate production attributable to land divided into such complex interests. But that problem could presumably be solved, as could the problem of finding someone with the authority to subject the land to a voluntary communitization agreement, by taking appropriate action under the Wyoming statutes which allow the sale or lease of such "qualified fees" under the supervision of a district court.⁴⁹

The problems most likely to arise under the communitization provisions are, however, not those just discussed, where the primary question is who is affected by the provisions, but rather, where the question is what is the effect of the provisions on the relationship between the operators and the royalty owners. There are no sections in the Wyoming Act that deal with the interests of royalty owners in the case of voluntary communitization. The paragraphs relating to such interests in the case of a compulsory pooling are not very comprehensive and, as they stand, are hopelessly confused. The version of these provisions that appears in the 1957 Supplement to the Wyoming Compiled Statutes, 1945, is misprinted and is grammatically meaningless.⁵⁰ The version that appears in the Wyoming Session Laws, 1951, apparently contains at least one serious misprint.⁵¹ The general "drift" of these provisions is that an order must be "just and

47. *Holbrook v. Continental Oil Co.*, 73 Wyo. 311, 218 P.2d 798 (1955).

48. 1 Summers, *Oil and Gas* § 33 (perm. ed. rev. repl. 1954).

49. Wyo. Comp. Stat. §§ 3-6401, 3-6409 (1945). See also *id.* § 8-201; Wyo. Comp. Stat. §§ 8-202-8-205 (Supp. 1957); 1951 Wyo. Session Laws c. 25; 1957 Wyo. Session Laws c. 97, which deal with sales and leases of real property in the hands of fiduciaries and specifically permit joinder in a unit.

50. Wyo. Comp. Stat. § 57-1113, par. (g) (Supp. 1957). The effect of provisions in the Wyoming Compiled Statutes, 1945, is to supply prima facie evidence of the laws of the state; apparently the current supplements do not have even that much authority. Wyo. Comp. Stat. § 16-606 (1945).

51. Wyo. Session Laws, 1951, c. 94, § 3, par. (g). In the seventeenth line of that paragraph the word "non-consenting" apparently was intended to mean "consenting." This misprint also occurred in *Colo. Rev. Stat. § 100-6-4, par. (7)* (1953), was pointed out in *Hardwicke, "Unitization Statutes: Voluntary Action or Compulsion," 24 Rocky Mt. L. Rev. 29, 30 n. 4*, and has since been amended. *Colo. Rev. Stat. § 100-6-4, par. (7)* (Supp. 1957).

reasonable."⁵² Operators who agree to share the costs of the communitized well may receive, subject to the rights of their royalty owners, their ratable share of the production. Operators who do not agree to the plan may receive their share of the production less the amount of their share of the costs. Apparently no costs are to be taken out of the interests of those who are by contract entitled to share in the gross, rather than the net, production from a well.⁵³ If the last sentence is a fair reading of the statute, a fee owner could grant a friend a normal oil and gas lease reserving a 99/100 (rather than the more usual 1/8) royalty to himself and receive ninety-nine per cent of the oil attributable to his land from a communitized well without paying a cent for the well. It is suggested that when the legislature gets around to clearing up this section, it should also put in a provision which would allow part of the royalty interests to be liable for costs.⁵⁴

The most important provision affecting the relations of lessor and lessees in the case of compulsory communitization is:

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 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.⁵⁵

This passage should make it clear that operations and production allocated to a tract in a drilling unit should be treated exactly as if the well were actually on that tract, actually producing the amount allocated to it, and as if the drilling unit did not exist. Only production allotted to a tract subject to compulsory communitization should be subject to the claims of the royalty owners of that tract. Production anywhere within a drilling unit subject to compulsory communitization should extend the entirety of any lease that would be extended if there were actual production on a specific tract included in the unit. Though the statute does not say so, it would seem that the same result should occur if the operators voluntarily communitize their interests in lands included in a drilling unit. But lessors have, in other states, brought actions to obtain their royalty on all oil produced from a well on their land but included in a drilling unit. They have brought suits to cancel leases even though there was production from a drilling unit allotted to part of the leased lands.

52. Wyo. Comp. Stat. § 57-1113, par. (f) (Supp. 1957).

53. *Id.* § 57-1113, par. (g).

54. See, e.g., Okla. Stat. tit. 52, § 87.1, par. (d) (under this statute only 1/8 of the total production is free from contributing to costs; and, even if one person owns all the interests in a tract, still only 7/8 of the production attributable to his land can be applied to costs). Interstate Oil Compact Commission, Legal Committee, A Form of an Oil and Gas Conservation Statute (1950) §§ 6, 9 and 18, par. H seem to lead to the same result as the Wyoming statute.

55. Wyo. Comp. Stat. § 57-1113, par (f) (Supp. 1957).

Apparently no lessor has succeeded with the argument that he should get his agreed royalty on *all* the oil produced from a well on his land if the well is subject to a compulsory communitization order. But when the pooling was done voluntarily, and without the lessor's consent, there have been cases that have held that the lessor should get his full royalty although the well on his land produced petroleum attributable to acreage owned by other lessors. In some cases this type of decision seems fair enough, but these were cases where no limit had been set on the amount of oil that can be produced on the lessor's land. For example, in *Bogges v. Milam*⁵⁶ the plaintiff owned an undivided interest in the oil and gas under tract A and the lessee of the other owners of tract A and the owners of tract B offered to treat the two tracts as a unit. The plaintiff refused to agree to this plan, but, after a good gas well was brought in on tract B, he sued for a share of the royalties from tract B on the ground that the two tracts were a unit and that by the pooling he had become a tenant in common with the other lessors of both tracts. The court held, quite correctly it would seem, that the plaintiff had no interest in the production from tract B. Apparently the pooling was not pursuant to any conservation statute. The plaintiff could have drilled on tract A and kept his share of the gas. If his co-tenants, or their lessee, had drilled on tract A, he could have kept his full share of the gas under no obligation to the lessors of tract B.⁵⁷ The fact that his co-owners transferred a share of their interest in tract A in return for an interest in tract B in no way increased or diminished the plaintiff's rights.

But other cases have reached the same type of result when the effect of the holding was to give some royalty owners a share in production attributable to other owners who could not legally produce their share through their own wells. These cases usually involve "allowables," the amounts of production each unit is limited to so that no well receives more than its share of the total production allowed from a field or from the whole state. Statewide, "market demand" proration is definitely beyond the power of the Wyoming Commission.⁵⁸ It is an open question whether or not the Commission has the power to limit production from a single field so that each well may produce its ratable share.⁵⁹ This type of case may be exemplified by *Smith Petroleum Co. v. Van Mourik*.⁶⁰ There was an order allowing only one hundred barrels per day to be produced from each ten-acre tract. There was no reference to the number of wells that could be drilled on a tract, apparently there could be any number. The disputed well was on a two-acre tract and therefore its allowable would have been only twenty barrels per day, too little to pay for the costs of production. The operator agreed with the owners of a

56. 127 W.Va. 654, 34 S.E.2d 267 (1945).

57. See 1 Summers, Oil and Gas § 37. (perm. ed. rev. repl. 1954) for a discussion of the rights of tenants in common of oil and gas lands.

58. Wyo. Comp. Stat. § 57-1124 (Supp. 1957).

59. See Part IV of this paper.

60. 302 Mich. 131, 4 N.W.2d 495 (1942).

neighboring eight acres to produce their allowable for them and his lessor claimed royalties on a full one hundred barrels. The court held for the lessor since he had not agreed to pool his interests. It is suggested that this holding is incorrect. It would force the owners of the eight acres to drill a well on their own land and would leave the lessor of the two acres with an unprofitable well producing twenty barrels per day at the most.⁶¹ Strangely enough the owner of an overriding royalty granted by the operator was limited to royalties on only twenty barrels on the ground that the override was, by its terms, on the two acres rather than the well.

In the *Bogges* case each tract could be produced without limitation, but in *Van Mourik* the well could produce one hundred barrels only if the owners of the eight acres did not insist on their right to produce their own oil; unlike the plaintiff in *Bogges* they could, at any time, reduce the production from the well on the other tract. Therefore the lessor of the two acres was not damnified, and should not have been heard to complain that he received a royalty on only twenty barrels.⁶²

A case similar to *Van Mourik* is *Republic Natural Gas Co. v. Baker*,⁶³ but it can be distinguished on the ground that the Kansas Commission insisted that its order was not forcing the compulsory pooling of the lessors' interests.

In Wyoming the problem is not likely to arise in relation to allowables since there has never been a proration order in the state. But in the case of a voluntary pooling of operating interests a lessor who did not agree to the communitization, and on whose land the well happened to be drilled, might demand a royalty on all the oil produced from the well. If the well was drilled pursuant to a spacing order no other well could be drilled within the drilling unit. Therefore, if the lessor's contention was accepted, either the other royalty owners would get no share of the production, though their lands were being drained of "their" oil, or else a royalty would have to be paid on all the oil and then another royalty would have to be paid on the oil attributable to tracts not having the well. The first possibility would not benefit lessors as a class; the second would give one lessor an undeserved windfall and might often make the cost of a well prohibitive. In the case of drilling units it would seem that most courts agree that the fortuitous circumstance of the well being on one tract of land should not affect the division of royalties among the various lessors of the unit.⁶⁴

61. In fact, the well was shut in while the litigation was going on and it would no longer flow when it was reopened after the litigation. *Thurmes v. Gruenbauer*, 320 Mich. 507, 17 N.W.2d 732 (1945).

62. The lessor of the two acres might argue that he should be compensated for the use of his surface; but, in the instant case, allowance apparently was made for this since twenty barrels were allocated to his tract which contained, in fact, only 1.7 acres.

63. 197 F.2d 647 (10th Cir. 1952).

64. See, e.g., *Griffith v. Gulf Refining Co.*, 215 Miss. 15, 60 So.2d 518 (1952); *Placid Oil Co. v. North Central Texas Oil Co.*, 206 La. 693, 19 So.2d 616 (1944) (taking a rather civilian approach to the problem). The Texas cases are not pertinent. The

It has not seemed necessary to discuss at any length the question of the constitutionality of the Wyoming Oil and Gas Conservation Act. It has been discussed elsewhere.⁶⁵ Such statutes are generally held constitutional,⁶⁶ though specific applications may raise "due process" or "equal protection" questions at times.⁶⁷ It would seem, however, that a grave due process problem might arise if the courts should hold that a lessor, whom the Commission's spacing order will not let drill a well on his tract, must sit helplessly by and watch his land being drained of petroleum for the benefit of his neighbors. This type of inequity is very close to presenting one man's property to another. If, before the Commission issues a spacing order, each owner has the right, the interest in real property,⁶⁸ to take what oil and gas he can from his land, it would seem that, after a spacing order, the Commission, and the courts, should preserve this right even though he obtains the petroleum through a well not on his land. The right of each owner of part of a common pool to obtain his share has long been recognized by the courts under the name "correlative rights"; this subject is discussed in Part IV of this paper. It suffices to say here that in the case of an order requiring compulsory unitization these rights are apparently to be protected.⁶⁹ There seems to be no reason why a lessor's right to share in the production from a pool underlying his land should be destroyed merely because his lessee submitted to communitization voluntarily.

It seems no more equitable to say that operators of a drilling unit should be forced to pay double royalties if they develop the land in the only manner that a spacing order will allow. Furthermore, lessees are under no obligation to operate an unprofitable well⁷⁰ and double royalties are not conducive to profitability. It is not the purpose of a pooling order to make production more expensive.

For the best results, the discouragement of litigation if nothing else, the Commission should allow the voluntary pooling of operating interests, but, if the lessors object to the proposed distribution of royalties, it should then find that all the separately owned interests were not pooled and exercise its power to order pooling. The Commission that allowed the voluntary pooling by the operators in the *Van Mourik* case apparently learned this lesson and decided that in the future it would place its approval on only those units in which all interests were pooled.⁷¹

situation there under the R. R. Comm'n's Rule 37 is not comparable to drilling units; each tract, no matter how small, is allowed to have a well unless a tract was divided after a well was drilled on it.

65. Fillerup, "The Constitutionality of Wyoming's Oil and Gas Compulsory Pooling Provision," 6 Wyo. L.J. 300.

66. See *Hunter v. McHugh*, 320 U.S. 222, 227 (1943).

67. See, e.g., the dissent in *Palmer Oil Corp. v. Phillips Petroleum Co.*, 231 P.2d 997, 1013 (1951).

68. *Denver Joint Stock Land Bank v. Dixon*, 57 Wyo. 523, 122 P.2d 842 (1942).

69. See notes 51 and 52.

70. 2 Summers, *Oil and Gas* §§ 306-307, § 398, § 416 (perm. ed. 1938).

71. 302 Mich. 131, 136, 4 N.W.2d 495, 497 (1942).

The duration of an ordinary oil and gas lease is for a fixed period and for as long thereafter as oil or gas is produced in paying quantities from the leasehold.⁷² This fact raises another problem about the effect of communitization on lessee-lessor relations. If there is a leasehold, only part of which is included in a drilling unit, and there is no production on the leasehold, but there is production in the drilling unit, then the lessor may argue that the lease is not extended and the lessee, of course, will argue that it is.

The statutory language quoted above⁷³ seems to make it clear that the effect of production from a compulsorily communitized drilling unit should be to extend all leases (that are extendable by production) which are, in whole or in part, represented in the unit. The reasoning that supports the payment of royalties only on the production allotted to each tract, no matter where the well might be drilled, also supports the contention that even in cases of voluntary communitization all such leases should be extended by production anywhere within the unit. If only one well can be drilled, the fact that it is on a particular tract of land is quite fortuitous, and, if the arguments presented above are accepted, the royalty holders will receive the same royalties no matter where the well may be.

There is one possible cause of confusion in this area that should be put to rest. A lease is usually extended so long as there is production in paying quantities.⁷⁴ But there is usually a separate duty on the lessee to develop the lease for both his lessor's benefit and his own.⁷⁵ These are distinct concepts. The lessee's failure to drill on the land of the lessor, if there is land not included in the drilling unit, may well be a violation of the covenant to develop. If the lessee has bargained for the right not to be obligated to develop the lease, then the lessor has no grounds to complain if he receives royalties only from the drilling unit. Non-development is a separate ground for avoiding the lease or collecting damages; it is not an argument for saying that production from a drilling unit allocated to a leasehold should not be treated "for all purposes" as actual production from the lease itself. If one argues that the lessee would have produced more oil if he had drilled the well himself, the answer is that he could have drilled it, if it were not for the spacing order, on land that was included in the unit. If he had done so he would not have produced more oil (in theory at least) because neighboring lessees would have had a duty to drill "offset" wells.⁷⁶ On the other hand, it is very likely that no well would have been drilled but for the spacing order. It is often profitable to drill one well and spread its cost among the various operators who own interests in the pool when it would not be profitable for each operator to drill a separate well that could drain no more than a portion of the pool.⁷⁷

72. 2 Summers, Oil and Gas § 292 (perm. ed. 1938).

73. See p.12 and note 54.

74. Note 70.

75. 2 Summers, Oil and Gas § 398 (perm. ed. 1938).

76. Id. § 349.

77. Cf., *Smith Petroleum Co. v. Van Mourik*, 302 Mich. 131, 4 N.W.2d 495 (1942).

This is the primary justification for the creation of spacing orders and drilling units; if each well is allowed to produce the maximum it can without competition, more oil will be produced because more wells will show a profit. And, of course, even if it would be profitable to drill duplicate and competing wells there would still be a great deal of capital wasted in what would amount to superfluous holes in the ground.⁷⁸

But, in spite of these arguments, one court has held that production from a drilling unit, but not from a well on the leasehold in question, did not extend the term of the whole lease, but only that part of the lease included in the drilling unit. *Texas Gulf Producing Co. v. Griffith*.⁷⁹ Surprisingly enough the same jurisdiction has interpreted its statute as requiring that the royalty owners of each separate tract in a unit should receive only their pro rata shares.⁸⁰ The drilling unit has originally been communitized voluntarily, but later all interests in it were pooled by an order of the State Oil and Gas Board and apparently it was treated as a compulsory unit. The court argued that it would be inequitable for a lease of a large amount of land to be kept in force when only a small part of it was pooled in a drilling unit and the lessee had no duty except to pay the royalties due from the drilling unit and to prevent drainage from the rest of the lease. But this is, in fact, no more inequitable than allowing one well on a large leasehold to have the same effect. The argument confuses the extension of the lease with the duty to develop. The court even suggested that any other rule would entail a "taking" in violation of the due process clause. However, in the second hearing of the case, there is a concurring opinion that suggests that this decision would not necessarily be controlling in a case arising under Mississippi's 1948 conservation act that contains language similar to that in the Wyoming statute.⁸¹ *Humble Oil and Refining Co. v. Hutchins*⁸² has a holding similar to that in *Texas Gulf* but there the result was based on an express agreement between the parties. It would seem then that there is no strong authority for extending the lease only on the land included in the drilling unit.

There is authority the other way.⁸³ As has been pointed out above, the justification for drilling units is that they allow at least the same amount of production that a laissez faire system would and that this production is obtained at less cost. It should seldom make a difference to a lessor whether the production is from a well on his land or not; the oil

78. One might remember the story that Paul Bunyan once pulled up a dry hole, cut it into sections, and sold it for post holes.

79. 218 Miss. 109, 65 So.2d 447, 65 So.2d 834 (1953).

80. *Griffith v. Gulf Refining Co.*, 215 Miss. 15, 60 So.2d 518 (1952).

81. 218 Miss. 109, 147, 65 So.2d 834 (1953). The Miss. statute now reads: "The portion of the production allocated to the owner of each tract included in a drilling unit formed by a pooling order shall, when produced, be considered as if it had been produced from such tract by a well drilled thereon." Miss. Code Ann. § 6132-22 (Supp. 1956).

82. 217 Miss. 636, 64 So.2d 733, 65 So.2d 824 (1953).

83. See, e.g., *Hunter Co. v. Shell Oil Co.*, 211 La. 893, 31 So.2d 10 (1947).

allotted to him from a communitized well is indistinguishable from the oil produced through a well on his own lands. He is not liable for the only item that is changed by communitization, costs. Often he will not benefit from communitization, though he may sometimes receive production from a well that would not have been profitable under the "offset" drilling rule and he may sometimes receive a royalty though the surface of his land is not used in the operation. It is hard to see how he could ever suffer because of communitization. He should not be put in a position where he can terminate a lease because his lessor was either compelled or chose to use the most economic system of production.

It may be objected that the arguments in this section of this paper are based on the assumption that each tract of land pooled in a drilling unit will have allocated to it exactly the same proportion of the production from the lands in the unit that would have been produced from the tract if there had been a well on each separate tract, and that this assumption does not correspond to the facts. Admittedly, the allocation will never be exactly accurate and no account can be taken of the fact that some tracts might be developed while others might be left without wells and that then their subjacent petroleum would be produced by neighboring operators. The problem of determining the actual value that a lessor loses or gains when his lands are pooled in a unit might constitute a strong argument for not allowing pooling without his consent if it were possible for the land to be developed in any other manner. But there is no way excepting communitization that separate tracts subject to a spacing order can be developed. Only one well can be drilled; no one can say exactly how the petroleum would be divided if there were a number of wells. A pooling agreement or order, to be "just and reasonable," should try to approximate this undeterminable division. If it does so a lessor has no grounds for complaint; he may be better off, or he may be worse off, but no one can tell. In any case, a lessor will be receiving royalties on production from, or allotted to, his land, the petroleum under his land will be captured, and he will no longer have a property interest of purely speculative value,⁸⁴ but rather a definite interest in a producing well. In other words, the lessor receives exactly what he hoped to get.

As long as a lessee develops the land reasonably, and for the benefit of all parties, his lessor has no grounds for complaint. If joinder in a unit is reasonable, then production from the unit, whether voluntary or compulsory, should be treated, for all purposes, as production from each separate parcel of land in the unit.

But, until there is a body of decisional law dealing with communitization pursuant to the Wyoming Conservation Act, a lessee would be well

84. Just how speculative the Wyoming Court considers an interest in oil and gas in unproven land is shown by *Martel v. Hall Oil Co.*, 36 Wyo. 166, 253 Pac. 862 (1927) where it was held that the defendant-trespasser did not have to pay for drilling a dry hole that destroyed the land's value for petroleum leasing purposes on the ground that damages were too speculative.

advised to get permission from his lessor, in advance, allowing him to pool his interest and to pay royalties only on production actually allocated to the leased lands. A clause of this type in the lease, or in a separate contract, would allow the lessee to join in a unit without fear of complicated litigation with his lessor. Such a clause might also be used to allow the lessee to join larger units of the type considered in Part II of this paper.

But such a clause cannot completely destroy the danger of future disputes between the parties to a lease, because the clause itself might be subject to attack on the ground that it violates the rule against perpetuities. There have been two cases in which this argument was made; in both of them it eventually failed.⁸⁵

In Wyoming the American common law version of the rule against perpetuities is in force by statute.⁸⁶ There are no cases within the jurisdiction discussing the rule. Presumably the only effect of the statute would be to make judicial modification of the rule more difficult.

The usual term for an oil or gas lease is a fixed period, five or ten years, and so long thereafter as oil or gas is produced in paying quantities.⁸⁷ Obviously this term has no relation to a period of twenty-one years plus lives and it may easily extend beyond that period. Of course, the term of the lease, or, more practically, the clause permitting pooling, might be drafted in terms of six healthy babies and twenty-one years, but such a provision would add an element of uncertainty to the transaction and it is doubtful if many leases contain such a limitation. The term of a normal oil and gas lease is not effected by the rule since it is presumably vested,⁸⁸ and the reversionary interest of the lessor is all right because it is a possibility of reverter and therefore vested.⁸⁹ The typical case of an interest in an oil and gas lease being avoided as a perpetuity involves the attempt to create interests in personalty that will not vest until the termin-

85. *Phillips Petroleum Co. v. Person*, 218 F.2d 926 (10th Cir. 1954), noted 27 *Rocky Mt. L. Rev.* 361 (a large unit for secondary recovery purposes); *Kenoyer v. Magnolia Petroleum Co.*, 173 Kan. 183, 245 P.2d 176 (1952) (a 640-acre drilling unit for a gas well).

86. *Wyo. Comp. Stat. § 66-138-A* (Supp. 1957). No interest in real or personal property shall be good unless it must vest no later than twenty-one years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous nor so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this statute to make effective in this state the American common law rule against perpetuities.

87. Note 72.

88. I.e., "vested for the purpose of the rule against perpetuities." But cf., *Boatman v. Andre*, 44 *Wyo.* 352, 12 P.2d 370 (1932), indicating that an oil and gas lease does not "vest (for the purpose of avoiding the possibility of abandonment) until oil or gas is produced. Even if that use of the word "vest" were to be translated to cases dealing with perpetuities the lease would still have to vest within the primary term, and it would satisfy the rule if that term were for less than twenty-one years.

89. *Gray, The Rule Against Perpetuities § 13.3* (Fourth Ed. 1942). There are apparently no reasons why possibilities of reverter should be vested, they just are. However, proposed statutes that would make these possibilities subject to the rule might cause havoc in petroleum producing states. Cf., *Leach, "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,"* 54 *Harvard L. Rev.* 248 (1940).

ation of the lease.⁹⁰ The argument made against a clause permitting the lessee to pool his interest is based on the theory that such a clause is either a power to appoint an interest in property to a limited class (*viz.* neighbors) or an option by which the holder can increase the quantum of his estate.

The two courts that have considered the question in the reports have held that such a clause does not violate the rule.⁹¹ Their reasons, however, were slightly different, and both courts failed to give what would seem to be the strongest answer to the objection. In *Kenoyer v. Magnolia Petroleum Co.*⁹² the Kansas court simply held that all the interests were vested, including those created by the clause in question. This would seem, to mean, necessarily, that the clause merely provided an alternate method for determining the lessor's royalty, but did not provide for any extension or contraction in the lessor's estate; that is, that it created contract, not property rights.

The Federal court in *Phillips Petroleum Co. v. Person*⁹³ held that the clause did not violate the rule because it created contract rather than property rights, because it had to be exercised within a reasonable time, and because it was a power coupled with an interest. To take these arguments in reverse order: it is not clear why the fact that a power is coupled with an interest should make it immune from the rule against perpetuities. Apparently the court felt that it had to be exercised for the benefit of both the lessee and the lessor and therefore it spoke in agency terms. The argument is that the lessee is merely an agent; but, if in fact the power is irrevocable there seems to be no reason to treat it as differing from the normal power of appointment. A power is a necessary concomitant of an agency relationship,⁹⁴ but the reason that we seldom consider the rule against perpetuities in the normal agency situation is simply that the power is revocable. If an interest is revocable by the grantor it cannot violate the rule.⁹⁵ The fact that the power must be exercised in a "reasonable" time is not enough in other situations to defeat the operation of the rule.⁹⁶ The holding that the power to pool interests was contractual and that it gave no power to transfer property interests was certainly easy for the court to reach because the clause had been very carefully drafted in

90. E.g., *Lathrop v. Eyestone*, 170 Kan. 419, 227 P.2d 143 (1951).

91. The lower federal court (D. Utah) in an unreported decision held that the clause was invalid.

92. 173 Kan. 183, 245 P.2d 176 (1952). It is interesting to note that in an earlier case, *Lathrop v. Eyestone*, 170 Kan. 419, 227 P.2d 136 (1951) the same court held that a "perpetual non-participating royalty" (i.e., an interest in oil and gas created by a landowner; the grantee receives the right to royalties on production from the land but no right to conduct drilling operating himself, was an interest in personality and therefore it could not vest until reduced to possession, and therefore, since it existed in perpetuity, it violated the rule. This analysis of the court's at least indicates that it will not go out of its way to avoid applying the rule to oil and gas leases.

93. 218 F.2d 926 (10th Cir. 1954).

94. 1 Restatement, Agency §§ 6-7 (1933).

95. Gray, *op. cit.* § 524.1.

96. *Id.* § 491 (there would be nothing unreasonable about a lessee exercising the power after twenty-one years. Apparently the reasonable time exception applies only when that time is, as a matter of law less than the period of the rule).

the particular leases under consideration: all the court had to do was accept it at its face value. But there is a danger that there have been, and, even after this decision, that there will be clauses drafted that allow, by their terms, the lessee to effectuate the pooling by exchanging cross conveyances with the other lessees. If such, admittedly unsophisticated, clauses were to come before the courts, there would seem to be no reasons of policy that would justify invalidating them, when "contractual" provisions, reaching exactly the same factual and economic results,⁹⁷ are held to be perfectly all right.

The courts would seem to be in a stronger position if they would just hold that such a clause does not fall into the general class of transfers to which the rule applies. Perhaps the *Kenoyer* case could be read that way; when the court held that all interests were vested it may merely have meant that no interests were created that could fall within the ambit of the rule. The rule is one of policy.⁹⁸ It may have its justifications when family settlements are concerned, but it should not be applied so as to make procedures that have legislative sanction difficult or impossible. In passing the sections in the Wyoming statute that permit, or require, pooling, the state legislature obviously did decide that communitizations, and approved unitization plans, were "good things." In the *Person* case the clause was to be operative only if the plan were approved by some governmental authority. Surely it would be an odd result for the courts to hold that a plan for operating an oil well, based on express legislative authority, should be invalid because it violated a court developed rule limiting the possible extent of family settlements.

The legislature could easily provide that the rule against perpetuities does not apply to clauses permitting pooling. But, until such a provision is enacted, the draftsmen of a pooling clause would be well advised to use the language of contract, to specify that there is no intent to authorize an exchange of property interests, and to make the power exercisable only after there has been some express governmental approval of the plan.

II. COMPULSORY UNITIZATION AND SECONDARY RECOVERY

Some of the problems discussed in the preceding section might also arise under the provisions that allow the unitization of a large area so that secondary recovery techniques can be effectual. For instance, a clause allowing a lessee to join such a unit may be attacked as violating the rule against perpetuities; the arguments that could be made for either side would not differ from those made in the case of a communitization clause.

The question of the effect of production from a unitized pool on the division of royalties and the extension of leases also arises when operators

97. The only effects that this distinction between property and contract might have, besides the possible effect on the rule against perpetuities, would be procedural (e.g., the availability of trespass).

98. Gray, op. cit. § 203; Leach, "The Rule Against Perpetuities and Gifts to Classes," 51 *Harvard L. Rev.* 1329, 1330 (1938).

unitize a whole field. But there are differences between the arguments that can be made in the case of communitization and those that can be made in the case of unitization. One is the lack of any express authority allowing the Commission to compel unitization. Another is the fact that there is no obvious statutory authority that would allow the Commission to present an operator with the choice of joining a unit or not producing, that there is no power that corresponds to the power to create spacing regulations. As in the case of voluntary communitization, there are no provisions relating to the effect on royalty holders of the operators' voluntary joinder in an area unit. There are cases in which the lessor has been able to enjoin his lessee from joining in a pressure maintenance plan when the land could have been developed in a manner the lessor considered more beneficial.⁹⁹ This situation obviously differs from that of communitization where the lessees cannot drill at all unless they join the unit. Still it would seem that a lessor might be entitled only to the royalties on the production actually allocated to his lease if there is a valid order by the Commission either limiting each lease represented in the field to its ratable share of the total production¹⁰⁰ or preventing any production from the field until secondary recovery is undertaken.

The major problem in relation to unitization and secondary recovery is presented by the lack of any express power on the part of the Commission to require their adoption in a field. Voluntary plans are allowed, but the agreement is only binding on those who execute it.¹⁰¹ This apparently would mean that operators could enter into a pressure maintenance plan for a whole field only if their lessors agreed or if their lessors would not be damaged in any way. But there may arise cases where the owners of some interests that must be pooled if a pressure maintenance plan is to be workable will not join the unit and yet the adoption of the plan would be the only non-wasteful method of developing the pool.

A good example of this problem would be a field producing a little oil and a large amount of wet gas. Production from a well in such a field that resulted in the "flaring" of the gas would seem to fall within one of the specific statutory definitions of waste:

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 both oil and gas; and the production of gas in quantities or in such manner as will unreasonably diminish the quantity of oil or gas that might ultimately be produced; excepting gas that is reasonably necessary in the drilling, completing, testing of wells and gas unavoidably produced with the oil if it is not economically feasible for the producer to save or use such gas.¹⁰²

99. These cases are discussed in Part III of this paper.

100. *Dobson v. Oil and Gas Comm'n*, 218 Ark. 160, 235 S.W.2d 33 (1950), discussed *infra*, is a case that allowed a lessor only the share he would have received if there had been no unit; the share equaled the amount he could have received as an allowable under a proration order. The court did not consider the lessor's interest as pooled.

101. Wyo. Comp. Stat. § 57-1114 (Supp. 1957).

102. *Id.* § 57-1123, par. (a) (1).

This would seem to mean that the Commission could order that the wells in our hypothetical field be shut in until provision is made to reinject the gas or to use it for non-wasteful purposes. If there is no pipe line nearby, reinjection might be the only economic alternative to shutting down the field; if reinjection would keep the wells from showing a reasonable profit apparently the flaring would have to be permitted.

If a well is produced by water drive, the Commission might attempt to order that either the wells be shut down or water be injected into the strata. Such an order might be justified by the definition of "waste" as applied to oil which includes "excessive or improper use or dissipation of reservoir energy, including . . . water drive."¹⁰³

But it is not clear that the Commission has the power to make "black-mailing" orders of this type. And even if such power exists there might be a great deal of difficulty in enforcing such an order. Even if the order could require secondary recovery measures as a condition to production, it would be difficult for the Commission to find authority allowing it to make an order requiring the unitization of the field. If the owners of interests in the field could not agree on how to share the expenses and profits of the pressure maintenance plan and could not agree where to place injection wells or the plants necessary for the recovery of "natural gasoline" the Commission's order would not be very effective. If some of the operators agreed to adopt secondary recovery techniques and some decided to stop production it would be impossible to secure proper placement for input wells and much energy might be wasted because pressure differentials would develop between areas where there were operations and areas where there were not.

These problems might be used by the Commission as a reason for ordering compulsory unitization; without such an order there would be waste. The necessary authority might be found in the provision that "the Commission shall make rules, regulations, and orders, and shall take other appropriate action, to effectuate the purposes and intent of this act."¹⁰⁴ But this argument is double-edged; the persons who object to the Commission's original order might well claim that the Commission has no power to compel unitization, that there cannot be effective pressure maintenance without unitization, and that therefore the Commission cannot require the adoption of secondary recovery techniques or condition its approval of production upon such adoption.¹⁰⁵ The objectors might also argue that secondary recovery would be uneconomical without unitization and that the Commission cannot order them to join a unit.

There might also be fields where only some of the wells produce gas in excessive quantities, or, more troublesome, where some of the producers

103. *Ibid.*

104. *Id.* § 57-1112, par. (b).

105. *Union Pacific R.R. Co. v. Oil and Gas Conservation Comm'n.*, 131 Colo. 528, 284 P.2d 242 (1955).

have a market for their gas and some do not. In such cases an order that could compel only part of the operators to reinject would seem to be both inefficient and inequitable. Producer A might have to spend large sums in injecting gas that would be captured by producer B and B would also be able to recover more oil because of the energy that A had injected into the field.

If the Commission has the power to limit each well to its pro rata share of the production from a field, then limits on the production from the wells in a field that do not have markets for their gas might justify limits on all the wells in the field.¹⁰⁶ Thus the Commission might be able to limit the production from those wells that do not violate any of the waste provisions and thus force their owners to adopt a pressure maintenance plan. If the lessees were willing to join in a unit but the lessors were not, the power to order proration might be used to prevent lessors from getting royalties from production not properly attributable to their lands.¹⁰⁷ Lessors who do not have wells on their land because of the plan will not be damnified if they are paid royalties on the maximum amount of production that would have been prorated to their lands.¹⁰⁸ In other words, only the operators would have to join a unit if they were willing to pay royalties on the amount of production they would have received under a proration order. But it must be remembered that it is not clear that proration can exist under the Wyoming statute.

The cases decided under statutes similar to Wyoming's suggest that the power to order unitization or pressure maintenance as a condition precedent to continued production does not exist. One case holding such an order invalid was decided under an almost identical statute, *Union Pacific R.R. Co. v. Oil and Gas Conservation Comm'n.*¹⁰⁹ In that case the important clause in the order attacked was: "On and after January 1, 1953, no gas shall be produced from the Weber Sand Reservoir unless all gas so produced shall be returned to said reservoir. . . ."¹¹⁰ Only gas required for operations or local domestic needs was exempted from the order. The order was intended to prevent the waste of reservoir energy. The field produced sixty thousand barrels of oil and thirty-nine million cubic feet of gas daily; twenty million cubic feet were wasted each day by being flared into the open air. Testimony that was apparently accepted by the court showed that secondary recovery would increase the field's ultimate production by a minimum of thirty and a maximum of eighty-seven million barrels of oil (to say nothing of the gas that might later be marketable).

The statutory scheme in Colorado had, at the time, provisions almost

106. But see *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) (holding an order intended to force producers to share their markets unconstitutional, but doing so on the ground that the order was intended neither to prevent waste nor preserve correlative rights).

107. See note 100 supra.

108. Cf., *Carter Oil v. Dees*, 340 Ill.App. 449, 92 N.E.2d 519 (1950).

109. 131 Colo. 528, 284 P.2d 242 (1955).

110. 131 Colo. 528, 531, 284 P.2d 242, 243 (1955).

identical with those in the Wyoming Act.¹¹¹ The Colorado court held that the statute forbade use and dissipation of energy, but said nothing about restoring it. It pointed out that only excessive or unreasonable flaring of gas was prohibited, and it objected to the fact that the order was directed to all producers, not just those that might have a high gas-oil ratio.

But the argument the court seemed to consider most persuasive was the general contention that the Commission was given no power to issue "affirmative orders." In context "affirmative orders" seems to mean orders requiring extensive capital outlays and other actions that go beyond merely decreasing production. The court held that, since an order requiring reinjection involved very complex activities, including, in the court's opinion, unitization, and entailed such an extreme change in the "common law" policies that had been developed around interests in oil and gas, and since the legislature obviously could have given the Commission express authority, the order exceeded the authority granted to the Commission.

This result seems sensible since the Commission would have trouble enforcing the order if the persons subject to it could not come to an agreement as to unitization, if some of the parties preferred to shut in their wells, if some of the wells did not produce excessive amounts of gas, or if water, rather than gas, injection were necessary to conserve the field's energy. Certainly, to be effective, such an order would have to be very complex.

The only cases that have been found that would support an order like the one in *Union Pacific*, without express statutory authorization, came from Texas,¹¹² and there the problem the courts were faced with was very different. The Texas R.R. Commission was given only the general power to prevent waste, and has had to develop its "law" case by case. The facts that the Wyoming legislature had, on the other hand, granted specific powers to the Conservation Commission and, having had the experiences of many years and many states to draw on, that it could easily have enacted a section giving the Commission the power to order pressure maintenance and unitization tend to make the Texas cases of little relevance to the problem of determining the powers of the Wyoming Commission.

Perhaps the most interesting case among those denying the power to compel unitization and secondary recovery is *Dobson v. Oil and Gas Comm'n.*¹¹³ There the court said that the Commission had not been granted the authority to order area unitization, but held that if the lessees joined in a unit voluntarily their lessors could not demand royalties on more than the amount of oil their wells would have been allowed to

111. Session Laws of Colo., 1951, c. 230, § 5.

112. R.R. Comm'n. v. Shell Oil Co. (1947), 146 Tex. 286, 206 S.W. 235 (1947). (Authority found in provisions now in Tex. Rev. Civ. Stat. arts 6023 and 6029 which contain no definition of waste.)

113. 218 Ark. 160, 235 S.W.2d 33 (1950).

produce under the proration orders that would have been in force but for the unitization. When the case came to trial all the operators and ninety-six per cent of the royalty owners had agreed to the unitization plan, and the Commission had ordered the compulsory adoption of the plan. The court rested its decision that the order was *ultra vires* on the lack of any express authorization in a conservation statute that had a broader definition of waste than that in the Wyoming Act.¹¹⁴ The effect of the court's holding would seem to be that, though the lessors might get royalties on more oil than they would if they were subject to the unitization plan, they could in no case get royalties on oil that might be produced in excess of the share of the total production that their wells would have been allowed to produce under a proration order. It is interesting to note that after the *Dobson* case the Arkansas Legislature amended the powers of the Oil and Gas Commission, and that the Commission now has express power to order unitization.¹¹⁵ Such a power has been held constitutional.¹¹⁶ This history should indicate the ease with which legislation allowing compulsory unitization and pressure maintenance could be drafted and suggests that the absence of such legislation is a strong indication of an intent not to grant the Commission such powers.

It appears that the Wyoming Oil and Gas Conservation Commission does not have any general power to order the adoption of secondary recovery techniques and unitization. It might have the authority to order injection as a condition of continued production, but it apparently does not have the power to make the order effective by compelling unitization. Without unitization pressure maintenance could only be conducted haphazardly; input wells would be governed by boundary lines, not by the principles of petroleum engineering. The Commission might try to shut down a whole field until a satisfactory "voluntary" pooling is adopted; but one or two stubborn operators could destroy the effectiveness of such a threat. Even if the Commission has the power to fix allowables in order to preserve correlative rights it is doubtful that they could be used in conjunction with an order requiring pressure maintenance in order to obtain a fair distribution of the production unless, at least, all of the lessees were willing to pool their interests.

III. PROBLEMS OF VOLUNTARY PRESSURE MAINTENANCE

If the Wyoming Oil and Gas Conservation Commission lacks the power to compel unitization or secondary recovery, it does have the power to approve their adoption.¹¹⁷ But in a large field with many different operating and royalty interests it is almost impossible to get all the parties to agree to such a plan. As long as there are dissenters there is likely to be litigation. In *Hunter v. Hussey*,¹¹⁸ for example, a complicated dispute

114. Ark. Stat. § 53-109 (1) (1947).

115. Ark. Stat. Ann. § 53-115, par. (c) (Supp. 1957).

116. *Palmer Oil Corp. v. Phillips Petroleum Co.*, 204 Okla. 543, 231 P.2d 997 (1951).

117. Wyo. Comp. Stat. § 57-1114 (Supp. 1957).

118. 90 So.2d 429 (La. Ct. App., 1956).

arose because one and one-half per cent of the operators and five per cent of the lessors would not agree to the unit plan. The possible cases in this area fall into three categories: the members of the plan may object to the operations of dissenters who produce their wells in such a manner that there is drainage away from the lands included in the plan; the owners of lands bordering on those included in the plan may object if the injected water or gas penetrates their strata and causes drainage away from their lands; and the lessors or operators who have adopted such a plan may object if the injected substances force more valuable hydrocarbons away from the leaseholds and toward wells from which the lessors do not receive royalties.

In the case of the first type of objection, it would naturally be the tendency of those who have joined in the plan to seek compulsory unitization or compulsory adoption of secondary recovery techniques. But, by hypothesis, these remedies are not available. The members of the plan might achieve some degree of protection if the Commission would set low gas-oil or water-oil ratios for the dissenters' wells. Such an order would close down inefficient wells that produce large quantities of gas or water with the oil. Of course, if the well is a gas well only, or if it is far enough away from the injected area not to produce large amounts of gas or water, such a remedy may not be available to protect the interests of the members of an agreement. The Commission could also require that the dissenters limit production from their wells on the theory that too rapid production is wasteful because it tends to destroy the effectiveness of a water or gas drive and because it tends to cause a large pressure differential to arise between the lands subject to the plan and those that are not. The flow of oil from a high to a low pressure area wastes a great deal of energy that could otherwise be utilized in bringing the oil from the high pressure area to the surface. Finally, in order to prevent the dissenters from getting more than their just share, the Commission might simply order that they produce only their pro rata portion of the petroleum in a reservoir.

The Commission has the power to require "the operation of wells with efficient gas-oil and water-oil ratios, and to fix these ratios."¹¹⁹ The Commission also has the power to make rules, regulations, and orders that will prevent waste;¹²⁰ and waste includes "excessive or improper use or dissipation of reservoir energy."¹²¹ These provisions would appear to give the Commission the power to protect members of a pressure maintenance plan by setting low gas-oil and water-oil ratios and a low maximum efficient rate of production for the dissenters' wells. It would also seem that different, and higher, ratios and production rates could be set for wells subject to the plan on the ground that pressure, and therefore energy, was being preserved by the input wells and that the maintenance of pressure

119. Wyo. Comp. Stat. § 57-1112, par. (d) (1) (e) (Supp. 1957).

120. Id. §§ 57-1111, 57-1112.

121. Id. § 57-1123.

obviated the necessity for low ratios and rates in that part of the reservoir. It is not clear that the Commission has the power to limit production solely to make sure that each party gets his ratable share of the petroleum in a reservoir; this question is part of the larger problem of the Commission's power or lack of power to protect correlative rights and it will be discussed in another section of this paper.

It would seem that if the Commission cannot require secondary recovery or unitization it could not require such low gas-oil or water-oil ratios or such low maximum production rates that the dissenters would have to "shut-in" all their wells. If such requirements were valid the Commission could "black-mail" dissenters into accepting a plan for secondary recovery. The whole basis of cases like *Union Pacific RR. Co. v. Oil and Gas Comm'n.*¹²² is the holding that the Commission lacks the power to prevent all production. But some limitation on the amount dissenters may produce would seem to be within the Commission's power. The courts should be liberal in allowing the Commission to fix low gas-oil and water-oil ratios and low production rates for the wells of those who do not choose to maintain the reservoir pressure. There is a legislative determination that agreements for secondary recovery are enough of a good thing to exempt approved ones from the anti-trust laws, and, if the Commission approves of the plan, there is also an administrative determination that that particular plan is desirable. It could be argued that such an order is forbidden because it would restrict "production . . . of . . . [a] well to an amount less than the well . . . can produce in accordance with sound engineering practice."¹²³ But the production of excess gas or water or the waste of energy is not in accordance with sound engineering practice, and it should make no difference that the gas or water or energy was injected and not native to the reservoir. Dissenters might argue that they own any oil or gas that pressure maintenance might drive under their lands.¹²⁴ But this argument goes too far, for, if it were valid, the Commission could not limit the production of any oil or gas under any circumstances.

There appear to be no cases that deal directly with the power of a Commission to regulate gas-oil and water-oil ratios and maximum efficient production rates so as to protect members of a secondary recovery plan. Where members of such a plan have attempted to restrain those who did not agree to it the cases have turned either on the lack of power to compel unitization¹²⁵ or on the power to fix allowables for wells.¹²⁶ *Western Gulf*

122. 131 Colo. 528, 284 P.2d 242 (1955).

123. Wyo. Comp. Stat. § 57-1124 (Supp. 1957).

124. Cf., *Texas v. Texas Co.*, 298 S.W.2d 666 (Tex. Ct. App., 1957). The Texas Court treats oil and gas in place as subject to "absolute ownership." *Texas Co. v. Dougherty*, 107 Tex. 226, 176 S.W. 717 (1915). Wyoming does not go so far. *Denver Joint Stock Land Bank v. Dixon*, 57 Wyo. 523, 122 P.2d 842 (1942).

125. E.g., *Western Gulf Oil Co. v. Superior Oil Co.*, 92 Cal.App.2d 299, 206 P.2d 944 (1949).

126. E.g., *Hunter v. Hussey*, 90 So.2d 429 (La. Ct. App., 1956).

*Oil Co. v. Superior Oil Co.*¹²⁷ is a startling example of the amount of petroleum that can be saved by secondary recovery techniques. The plaintiffs alleged that adoption of their cycling plan would save 61,000,000 barrels of liquid hydrocarbons worth, at that time, \$166,000,000. The court's refusal to grant relief in that case has been criticized on the ground that the bill merely requested that the court exercise its power to preserve correlative rights, to make sure that the defendants would take no more than their fair share from the common pool.¹²⁸ But, since the bill apparently requested that the court order the unitization of the field and alleged that even an order requiring the defendants to reinject dry gas would be insufficient, the decision seems quite proper. The court merely held that it would take express legislative authority to supervise such a complex order. *Hunter v. Hussey*¹²⁹ is slightly more helpful, for it at least holds that persons not party to a pressure maintenance agreement would have no standing to complain of an order approving the plan. This would seem to be true in Wyoming since the Act specifically states that "such agreements shall bind only the person who execute them [and their privies]."¹³⁰ But the real question in that case was whether or not the Commission had the power to allow members of the plan to transfer the allowables of wells they had shut in to wells more advantageously placed. This problem could not arise in Wyoming unless there is a power to fix allowables. The court apparently thought the Commission had the power to make such an order, but it held the particular one invalid because it did not contain a finding of certain "jurisdictional facts."

Perhaps the most helpful case is *Delaney v. Osborn*,¹³¹ and it does not even deal with secondary recovery. In that case part of a field had a gas-oil ratio set and another part, originally believed to be a separate pool, had been allowed a higher ratio. The Corporation Commission was held to have the power to fix the lower ratio for the whole field on the ground that flow from the high pressure to the low pressure areas would cause waste. But the decision was also based on the power to the Commission to protect correlative rights and on the court's limited power of review.

Thus it would seem that if the power to protect correlative rights is vested in the Wyoming Oil and Gas Conservation Commission the members of a secondary recovery plan could get some protection against excessive production by dissenters, though the latter could not be forced to contribute to the cost of the plan. If that power is not available an order setting limitations on the dissenters' production that is ostensibly based on the powers to prevent waste may be open to challenge as an attempt to limit those who will not join the agreement to their ratable share of pro-

127. 92 Cal.App.2d 299, 206 P.2d 944 (1949).

128. 1 Summers, Oil and Gas § 76, n. 70.29 (perm. ed. rev. repl., 1954).

129. 90 So.2d 429 (La. Ct. App., 1956).

130. Wyo. Comp. Stat. § 57-1115 (Supp. 1957).

131. 265 P.2d 481 (Okla., 1953).

duction. This would be unfortunate, for, though there may be good reasons for not subjecting unwilling producers to the expensive burdens of a pressure maintenance plan, there appears to be no reason to allow them to recover so much petroleum, which they would not have been able to recover except for the plan, that they can destroy the effectiveness of the secondary recovery operations.

The second class of objections does not warrant so much discussion, if only because it is not so likely to come before the courts. If A injects water or gas into his land he is likely to force only the more valuable hydrocarbons under his neighbors' lands. Presumably in the case of water injection he could flood the strata of those who are "down-dip," those who produce from the deepest wells, but such a flooding of beds containing oil would seem to be wasteful and it is doubtful that the Commission would allow such an operation. If A injects gas in order to form a gas-cap or if he cycles gas the producers in other parts of the reservoir might complain that "their" hydrocarbons would be replaced by the less valuable gas. Apparently such a case has never come before the courts. The fact situation in *Corzelius v. Harrel*¹³² might have supported such a complaint by Corezelius, but in fact the action was instituted before the Railroad Commission by Harrel in an attempt to limit Corzelius' production while recycling operations were being conducted.

It has been suggested that the courts have shown a trend toward the development of a "negative rule of capture" that would allow one to inject gas or water into a common pool as freely as one can remove petroleum.¹³³ But the only case that is suggested as supporting this contention is one that deals not with the objection of neighbors but of lessors.¹³⁴ This theory would seem quite logical when it is gas that is injected. In the case of a recycling operation the end result will be that the "natural gasoline" is removed from the reservoir and the residue of the gas remains in the pool. In other types of gas injection the gas may wander under another's land; and in such a case the landowner has the right to "capture" it, he "owns" it to the extent that gas in place can be owned. If the gas replaces more valuable oil there still should be no objection; if one has the right to "pull" oil out from under another's land there is no logical reason why one should not also be allowed to "push" it. But injecting water could raise more serious problems. The "rule of capture" does not pertain to water, and the situation might seem analogous to the flooding of a neighbor's mine.¹³⁵ But, at least in a case where the Commission has approved of the pressure maintenance plan, there is a public policy in favor of secondary recovery and it would seem that there should be no liability

132. 179 S.W.2d 419 (Tex. Ct. App. 1944), *rev'd* 143 Tex. 509. 186 S.W.2d 961 (1945).

133. Williams, Maxwell, and Meyers, *Oil and Gas* 20 (1956).

134. *Tide Water Associated Oil Co. v. Stott*, 159 F.2d 174 (5th Cir. 1946), *Cert. den.* 331 U.S. 817.

135. See, e.g., *Spadra Creek Coal Co. v. Eureka Anthracite Coal Co.*, 104 Ark. 359, 148 S.W. 644 (1912). For a discussion of the possible objections to water injection, see Brown and Meyers, "Some Legal Aspects of Water Flooding," 24 *Texas L. Rev.* 456.

as long as the operations are not conducted wastefully.¹³⁶ Summers has pointed out that courts often refuse to grant injunctions against mining operations that cause this type of injury on the ground that the public interest in the mining far exceeds the amount of damage.¹³⁷ It would seem that this would be a wise policy for the courts to adopt if they do hold that injection can create liability; the injectors may have to pay damages, but in some cases these might be negligible and the public should not lose the advantage of operations that can save so much petroleum.

It can also be argued that if the law of oil and gas owes much to the analogy the early courts made between petroleum and animals *ferae naturae*, in the case of the injection of water or gas an analogy might be drawn to the rules governing *boves domestici*. In Wyoming a man may overstock his lands and those who own range that forms a common pasturage with his cannot collect damages for the injury caused by the wanderings of his cattle without showing that the overstocking amounted to a "taking of possession" of their lands.¹³⁸ Such a rule would seem even more appropriate when applied to persons who share in a common pool of petroleum. Secondary recovery should be encouraged because it increases the ultimate recovery of oil and gas. It is far more difficult to control the wanderings of oil and gas than those of range cattle.

A person who desires to use secondary recovery techniques cannot, as the law stands now, be sure that any "damnum" he may cause will be "absque inuria," and the fact must inhibit the use of such processes. If the legislature feels that secondary recovery should be encouraged it could easily provide that no liability will arise when injected substances pass under another's land. Such a provision would certainly encourage the adoption of this type of waste preventive measures. If, on the other hand, the legislature desires to protect the interests of those whose lands might be invaded it could provide for express liability. In any case, there seems to be no reason why the present uncertainty should be allowed to continue.

Litigation about the use of secondary recovery techniques has most commonly been raised by lessors who object to injection wells on their lands. In cases of this type the state's policy of encouraging secondary recovery should carry less weight than it does in the two categories of objections that have just been discussed, for, when the objection is made by a lessor, its resolution should be controlled by the terms of the lease. Lessors and lessees are in privity and, though the lessee actually controls the development of the land, he has a duty to protect his lessor's interests. The whole purpose of an oil and gas lease is to have land of speculative value developed for the benefit of both parties; if the lessee fails to develop the lease his interest lapses.¹³⁹ One of the most important of the lessee's duties is to prevent the drainage of oil and gas away from the leased land; if a neigh-

136. Cf., *Dudding v. Automatic Gas Co.*, 145 Tex. 1, 193 S.W.2d 517 (1946).

137. 4 Summers, *Oil and Gas*, § 656 (perm. ed., 1938).

138. *Haskins v. Andrews*, 12 Wyo. 458, 76 Pac. 588 (1904).

139. *Boatman v. Andre*, 44 Wyo. 352, 12 P.2d 370 (1932).

bor drills a well near the boundary of the leasehold the lease contains an implied covenant, unless it is expressly denied, that the lessee will drill another well to "offset" it, provided that the offset well would reasonably seem to be profitable.¹⁴⁰ If a lessee puts an input well on his leasehold he is likely to increase drainage to neighboring lands. Naturally his lessor will object. If the lessee converts a productive well into an input his lessor will also object.

Lessors have obtained injunctions in such cases.¹⁴¹ But the lessee's duty is to operate the lease in a prudent manner that will protect both his lessor's and his own interests. If the lessee's actions satisfy this standard, courts have allowed pressure maintenance operations to continue over the lessor's objections.¹⁴² This appears to be the reasonable rule, since, if the lessor is not damnified by the injection, that is, if it is reasonable considering the interests of all the parties, the policy in favor of secondary recovery should be strong enough to prevent the lessor from imposing an arbitrary restraint on the lessee's operations. If the lessor wants the power to prevent secondary recovery he can spell it out in the lease; he has no reason to expect the courts to imply a covenant that would be of little advantage to him and would be disadvantageous to the interests of the public.

The possible objections to secondary recovery plans are all founded on the fact that that type of operation not only reduces waste, but may also vary the amounts of petroleum that various people can "capture." As has been true with many of the other questions discussed in this paper, a determination that the Commission has the power to preserve correlative rights would do much to solve the problems. If the Commission has that power, it can limit production from a reservoir so that those who do not contribute to a pressure maintenance operation could not produce the petroleum that became available only because of the operation. And it might be able to adjust the rates of production of the various wells in a field so that any neighbors or lessors who were damnified by drainage away from their lands could be compensated by increased production on other parts of their holdings. The next section of this paper will discuss the necessity of this power to protect correlative rights and the crucial question of the existence of such a power under the present act.

IV. CORRELATIVE RIGHTS

One theme that appears again and again throughout this paper is that of the doctrine of "correlative rights." The doctrine can be stated simply:

140. 2 Summers, Oil and Gas § 399 (perm. ed., 1938).

141. *Ramsey v. Carter Oil Co.*, 74 F.Supp. 481 (D.C. Ill., 1947), *aff'd* 172 F.2d 622, *cert. den.* 337 U.S. 958.

142. *Carter Oil Co. v. Dees*, 340 Ill.App. 449, 92 N.E.2d 519 (1950) (stipulation that as much oil would be forced under the leasehold as would be forced out); *Tide Water Associated Oil Co. v. Stott*, 159 F.2d 174 (5th Cir., 1947), *cert. den.* 331 U.S. 817 (lessors given opportunity to join reasonable plan and lost nothing since the lessee would not have been required to drill an offset well on the part of the land that was drained).

the owner of land overlying a pool of oil or gas has the right to produce the petroleum, and this right is limited by the fact that all other landowners over the pool have the same right. In its crudest form each landowner is allowed to reduce whatever petroleum he can "capture" to personal property. In Wyoming this inchoate right to the petroleum *in situ* is an interest in real property.¹⁴³ By the "common law" rule each party could protect his interests by drilling a well on his lands, and the devil take the hindmost. As was pointed out in the Introduction, such a system of production is generally very wasteful, and it was this wastefulness that necessitated the passage of conservation statutes.

But when these statutes, and the agencies administering them, limit production from certain wells, and limit the number of wells that can be drilled, one result is that the landowners lose their power to protect their interests by producing as rapidly as possible. Since the power, the "right" to capture petroleum has always been considered as a property interest, there were at one time serious doubts about the constitutionality of conservation statutes.¹⁴⁴ These doubts have long since been put to rest. Constitutional problems still appear when a statute is attacked as arbitrary or discriminatory in a particular application,¹⁴⁵ but it is doubtful that anyone now believes that a properly administered conservation statute is unconstitutional.

However, one of the two grounds for holding such statutes constitutional is the fact that though they modify "the rule of capture" they do not change the landowners' correlative rights. The right of each owner to share in the common field is preserved. The leading case on the constitutionality of oil and gas conservation statutes is *Ohio Oil Co. v. Indiana*¹⁴⁶ and there great stress was laid on the fact that correlative rights were preserved, that it was only the means of protecting them that was altered. The one case that the United States Supreme Court considered that involved the constitutionality of a Wyoming conservation statute was decided on the same pair of grounds.¹⁴⁷

It may be important to note that in *Ohio Oil* the Court said that fee owners could not be absolutely deprived of the right to take oil and gas. Such a limitation would not destroy the effectiveness of a conservation statute, but it does put emphasis on "waste" in the common law sense. There is some analogy between surface owners with "correlative" interests in a pool of oil or gas and tenants in common in a more old-fashioned free-

143. *Boatman v. Andre*, 44 Wyo. 352, 12 P.2d 370 (1932).

144. *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 Pac. 993 (1922).

145. See, e.g., *Palmer Oil Corp. v. Phillips Petroleum Co.*, 204 Okla. 543, 558, 231 P.2d 997, 1013 (1951) (dissenting opinion).

146. 177 U.S. 180 (1900).

147. *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920). (This case concerned an "end-use" statute that outlawed the wasteful burning of gas and particularly the use of gas to make carbon-black. The Court stressed the fact that production by one owner diminished the possibility of use by another. This case arose in the Federal courts; there are no Wyoming decisions).

hold. The argument in *Ohio Oil* might be read as saying that the states may limit each petroleum owner to his reasonable share just as co-tenants were made accountable to each other by the Statute of Anne.¹⁴⁸

Generally, absent conservation statutes, operators have been allowed to produce exactly as they wish without any regard to their neighbors' interests.¹⁴⁹ But at least one case may be read as forbidding unreasonable use of the land so as to deprive neighbors of their chance to capture the petroleum.¹⁵⁰ Summers, in his treatise, argues that, properly speaking, "correlative rights" means that each landowner may not take an "undue proportion" of the oil and gas in a common source of supply. He apparently believes that there is a common law duty not to produce in a manner that infringes on the neighboring owners' right to their share of the petroleum.¹⁵¹

Both the possible constitutional limitation that a landowner must be allowed some opportunity to produce oil and gas from a pool subjacent to his land and Summers' theory that each owner has a property right to a fair share of the production from a common source suggest that a conservation statute must be administered so as to protect the correlative rights of those having an interest in a field.

Many of the conservation statutes specifically give the Commission the power to preserve correlative rights.¹⁵² The Wyoming statute does not. Furthermore, there is a specific limitation in the Wyoming statute that might keep the Commission or the courts from entering orders intended to protect these rights:

It is not the intent or purpose of this law to require the production 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, regulation or judgment requiring the restriction of production of any pool or of any well (except a well drilled in violation [of a spacing order]) to an amount less than the well or pool can produce in accordance with sound engineering practice.¹⁵³

There have been holdings that, under a statute which gives only the power to prevent waste to the Commission, an order intended solely to protect correlative rights is invalid.¹⁵⁴ This fact plus the restrictive

148. 4 & 5 Anne, c. 16, § 27 (1705).

149. See, e.g., *Jones v. Forest Oil Co.*, 194 Pa. 379, 44 Atl. 1074 (1900). (Plaintiff could not enjoin neighbors from using vacuum pumps).

150. *Ross v. Damm*, 278 Mich. 388, 270 N.W. 722 (1936).

151. 1A Summers, *Oil and Gas* § 103.1 (perm. ed. rev. repl., 1954).

152. E.g., *Colo. Rev. Stat. Ann.* § 100-6-3, par. (12) (c) (1953) (includes the destruction of correlative rights in the definition of waste). This provision was not in the original version of the Colorado statute which was passed in the same year as the Wyoming statute to which it was very similar.

153. *Wyo. Comp. Stat.* § 57-1124 (Supp. 1957).

154. E.g., *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) (construing Texas statute; case also involved question of constitutionality of the particular application of the R.R. Commission's powers).

language quoted in the preceding paragraph suggest that the Wyoming Commission does not have the power to issue such an order. Apparently, it is the opinion of the members of the oil industry in the State that the Commission does not have the power to limit operators to their ratable share of the potential production from a field.¹⁵⁵

At least in the case of compulsory communitization the statute makes specific provision for the preservation of the interests in a common source that might otherwise have been destroyed by a spacing order creating a drilling unit. As was pointed out in Part I of this paper, the order must be "just and reasonable" and the interests of all the parties are protected.¹⁵⁶ It is unfortunate that the statute does not expressly provide the power to protect individual interests in other cases. It would be very easy for the legislature to follow the lead of other states and to grant such a power.

But, even though the Wyoming Oil and Gas Conservation Act does not advert to correlative rights, three strong arguments can be made that would justify the Commission or the courts in granting relief against a producer who takes an undue portion of the petroleum from a common source.

In the first place there is an argument based on the due process clauses of the Federal and Wyoming Constitutions. Since the right to take oil and gas is a property right it should not be limited more than is necessary to carry out the purpose of the statute, in the instant case, to prevent waste. This argument suggests that the Commission, in making its orders, must consider correlative rights. If it limited production from one well in a pool on the grounds that more production would be wasteful, it would seem that it should also limit the other wells in the same field. Of course, the limitation would not have to be the same on all parts of the field; if one well can produce only near the gas-oil interface and another produces farther down-dip, the second well is not only less wasteful than the first well, but, under common law *laissez faire* rule, the second well could actually produce larger quantities of oil. But this does not mean that all the oil should be produced by the second well.

Under this argument the Commission might not have the power to issue an order not intended to prevent waste. But, when it made an order to prevent waste, it would have to adjust the order so that each party would still be able to obtain a fair share of production. To treat with one possible situation as an example, if A and B both own lands overlying a common pool and their wells produce both oil and gas, but only A has a market for his gas, then it would seem to be inequitable for the Commission to order in the alternative that the wells be shut in, that the gas be reinjected, or that the gas be marketed. Such an order would place

155. In conversation with W. H. Curry, Casper, Wyo., July, 1957.

156. Wyo. Comp. Stat. § 57-1113, pars. (f) - (g) (Supp. 1957).

grave economic burdens on B and none on A. If B reinjects, the added energy would benefit A as well as himself, if B shuts down he cannot produce from the land; yet A's operations would in no way be affected. In such a case it is suggested that the proper order would be one limiting production from all the wells so that A and B would be able to share in the market.¹⁵⁷

The second argument is based on the physical fact that an oil field is a single mechanical unit. If one well is allowed to produce more than another a pressure differential is likely to develop between them. Such a differential leads to the waste of energy because the oil tends to migrate from the high to the low pressure area, rather than from the reservoir, to the top of the ground. This situation would obviously justify an order limiting production from the well that has been used to take more than the share attributable to it. This argument would support an order limiting each operator to his pro rata share; but, on the other hand, such an order could only be made if the facts indicated physical waste.

The third argument is more comprehensive. The Wyoming Act was intended to prohibit the waste of oil and gas. It makes no mention of, and arguably, it is not concerned with, the general problem of correlative rights. The courts are still perfectly free to develop rules regulating production so that each party may receive his fair share of the petroleum in a common reservoir. If there is a common law duty that each landowner not produce more than his share, as is suggested by Summers,¹⁵⁸ then the courts, at least, should be able to grant relief against any person who violates this duty. Moreover, it would be anomalous if the courts would enforce this duty, but the Commission would not be allowed to recognize its existence. If the Wyoming common law is found to give each owner a right to the opportunity to produce his share, the first argument that was made for the existence of correlative rights would suggest that the Commission would have to recognize these property rights in orders intended primarily to prevent waste. On the other hand, the Commission might not be empowered to grant a proration order if its only basis was the protection of correlative rights; in such a case the aggrieved party might have to seek his relief only in the courts.

The limitation against restriction of production would not seem to destroy the validity of these arguments. It says that "This *Act* [emphasis supplied] shall never be construed to require, permit or authorize . . .;" it does not say that other sources of law may not permit limitations on production not based on waste; no one would argue that it denies the

157. But cf., *Corzelius v. Harrel*, 143 Tex. 509, 186 S.W.2d 961 (1945) (court refused to force the R.R. Commission to enter such an order, but recognized the Commission's power to make orders protecting correlative rights); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) (order unconstitutional for forcing one producer to share his market with another; but it was found that the order was not based on waste and not necessary to give each party a chance to capture his share of the petroleum).

158. 1A Summers, *Oil and Gas*, § 103.1 (perm. ed. rev. repl. 1954).

courts the power to enter an injunction against a well that is a common law nuisance, or the power to hold a life tenant liable for waste if he drills a well on his estate, and it is difficult to find any logical distinction between such cases and the case of an injunction against excessive production to the detriment of neighboring producers' rights. The provision is intended to prohibit market demand proration;¹⁵⁹ it should be quite easy for a court to find that it was not intended to outlaw limitations preserving the correlative rights of owners of a common source of supply. And these arguments are bolstered by the fact that an interpretation denying the power to the Commission or the courts to protect correlative rights would raise serious constitutional questions.

Of course, the arguments for judicial recognition of each owner's right to be able to produce his share of the petroleum in a pool in which he owns an interest apply with equal force to the legislature. The problem of administering decrees based on the theory of correlative rights would be a difficult one for the courts to deal with. This is an area where expertise is valuable, and, if the Commission lacks the power to order ratable taking, the courts might not be willing to undertake the job. On the other hand, the question of fair allocation of production from a pool would surely be easier for courts to decide than many other questions that they might be called upon to try *de novo* under the provisions that will be considered in the next section. In any case, it is suggested that the wisest solution would be for the legislature to grant specific authority to the Wyoming Oil and Gas Conservation Commission to issue orders intended to preserve correlative rights.

V. ADMINISTRATIVE PROBLEMS

The problems of administrative review that may arise under the Wyoming statute are limited. It is not proposed that this paper should discuss at length either the general problems of administrative law or the exact procedures that are prescribed by the Wyoming Act. On the other hand, it is impossible to discuss the legal relationships between private parties without adverting to the procedures by which these relationships are established and their concomitant rights and duties are enforced. In considering the effect of the Wyoming Oil and Gas Conservation Act it is not enough to mention the substantive rules that create new rights and duties and powers; it is also necessary to mention the manner in which these rules are effectuated.

Perhaps the most potent power the Commission has is that of persuasion. It certainly is the power most frequently used. Rather than challenge an order of the Commission's, the practice so far has been to

159. I.e., statewide limits on production in order to prevent an oversupply of petroleum. Wyo. Comp. Stat. § 57-1124 (Supp. 1957) obviously forbids such limits in Wyoming. Since the arguments relating to the desirability of market demand proration seem to be primarily determined by their advocates' political and economic presuppositions they are not discussed in this paper.

comply; there has been no litigation. For example, the power to order communitization has never been exerted because the existence of that power is enough to "persuade" people to pool voluntarily.

But this paper has been written from a litigious viewpoint and the question remains: if a party is obdurate, how is the "law" created by the act to be effectuated? One could make a strong argument that, if a person were willing to spend a great deal of money and time on litigation, he could avoid complying with any rule or order of the Commission's. Of course, the very expense of litigation is one of the items that lead people to comply with the Commission's orders; it is a very effective sanction. Perhaps we should postulate an "ornery" and wealthy old "wildcatter" who has been drilling in creek-bottoms for fifty years and then ask, what can the Commission do to him?

Procedural provisions constitute the largest section of the Act.¹⁶⁰ The provisions relating to practice before the Commission closely follow those of the model act of the Interstate Oil Compact Commission,¹⁶¹ but the provisions relating to review are more liberal than those either in the body of the model act or those in the appendix, though the later are more like the Wyoming statute since they provide for trial *de novo* in some cases. The penalties for violating a regulation or order issued by the Wyoming Oil and Gas Conservation Commission are severe: one thousand dollars per violation per day.¹⁶² But the procedures that the Commission must use before it can issue a regulation or order are time-consuming and the review provisions would seem to allow almost endless delays. Except for emergency orders which cannot remain effective for more than fifteen days,¹⁶³ all rules, regulations and orders must be made only after a hearing.¹⁶⁴ All orders must be based on, and include, written findings of fact.¹⁶⁵

So far so good. But it must be remembered that very complicated facts must be considered by the Commission at the usual hearing; determining the structure and mechanics of a pool of oil and gas thousands of feet beneath the ground is not an easy task. In such a hearing our hypothetical old codger could insist on presenting the testimony of geologists, seismologists and other geophysicists, petroleum engineers, chemists, geo-chemists, and civil engineers. He could raise questions, not just of "fact" but of hydrodynamics and stratigraphy. He could present in evidence maps of geological structures, seismograms, electrologs, and records of tests for porosity, saturation, and capillarity. And, having lost his argument, he could apparently bring the whole circus into a trial court and start over again, for the statute says:

160. Wyo. Comp. Stat. §§ 57-1115—57-1122 (Supp. 1957).

161. Interstate Oil Compact Commission, Legal Committee, A Form of an Oil and Gas Conservation Statute §§ 10-11 (1950).

162. Wyo. Comp. Stat. § 57-1118, par. (a) (Supp. 1957).

163. Id. § 57-1115, par. (c).

164. Id. § 57-1115, par. (b).

165. Id. § 57-1115, par. (e).

The court shall consider all the evidence, shall not be bound by any finding of fact or conclusion of law made by the Commission, shall hold a trial de novo, shall pass on the credibility of witnesses and the weights to be given to their testimony, and shall determine independently all issues of fact and of law with respect to the validity and reasonableness of the provision, rule, regulation, or order complained of.¹⁶⁶

An agency can develop a certain skill at dealing with such complex facts, but the amount of time that could be consumed by a trial before a judge who is not an expert in petroleum engineering might well compare with the time spent in a large anti-trust suit. If the judge did not consider all the evidence and arguments his findings would have to be arbitrary. If the person contesting the rule or order were trying to defeat its application, without regard to the fact that it might be exactly the type of rule or order authorized by the statute and necessary to prevent waste, judicial arbitrariness could work only in his favor.

It must also be pointed out that there would often be more than one hearing and trial before a person finally would become subject to an order. "Any person adversely affected by or dissatisfied with any rule, regulation or order" may bring an original action seeking to enjoin the Commission and to obtain other relief;¹⁶⁷ "any person who may feel himself aggrieved by any rule, regulation, order or decision" may take an appeal.¹⁶⁸ To take a hypothetical case: there could be a hearing to determine what size and shape spacing units in a field should be and the final order or regulation could be appealed; if the appellant lost he could then apply for an exception to the spacing order, claiming that, as applied to his land, it was inequitable; after a hearing and an appeal on his application for an exception, he would refuse to join in voluntary pooling plan and could appeal from any order establishing compulsory communitization on the ground the amount of production allotted to his land was not fair and reasonable. It is suggested that long before this litigation was finished the provisions of the statute relating to review would be amended. As the statute stands it is hard not to feel that its provisions were not intended to be binding on a person who really objected to them.

There is little case law pertinent to this problem¹⁶⁹ (except for the large number of reports from other jurisdictions that show that extensive litigation about a conservation commission's orders is not unusual). The most helpful case is an unreported decision by a Colorado district court.¹⁷⁰ There the court solved the problem raised by statutory provisions similar to those in Wyoming¹⁷¹ by saying that the questions before the court on

166. Id. § 57-1117, par. (c).

167. Id. § 57-1117, par. (a).

168. Id. § 57-1117, par. (b).

169. See "De Novo Review of State Administrative Findings," 65 Harvard L. Rev. 1217.

170. Sharples Oil Corp. v. Oil and Gas Commission, discussed in Juhan, "The Administration of the Texas and Colorado Oil and Gas Conservation Statutes," 31 Dicta 98, 108 (1955).

171. Colo. Rev. Stat. § 100-6-3 (1953).

trial *de novo* are not the same as those before the Commission; "While it is true that the proceedings in review must be conducted as a trial *de novo*, the issue at the trial *de novo* is whether or not the orders of the Commission complained of are valid. . . . The test to be used by this court is whether or not the evidence before the court will sustain the orders of the Commission." Apparently this means that evidence is to be taken in court only to see if the orders are supportable, *i.e.*, reasonable. This approach would allow a court to find that there was enough evidence to support the Commission without forcing the court to go on and make sure that it would reach the same result as the Commission. Even so a great deal of time could be consumed in taking evidence. It is suggested that the approach of this court would have to be followed in a case where the trial concerned the validity of a rule or regulation of broad application; the courts could hardly be expected to perform, *de novo*, the Commission's policy making "quasi-legislative" functions.

If the courts were willing to support the Commission, to accept its decision once substantial evidence was presented to support them, then the problem of dilatory litigation might not loom so large. But it is not possible to be sure that the Wyoming Court will take this approach. In the past the Court has not been sympathetic with the agency that administered the laws relating to oil and gas. In *McDougal v. Board of Land Commissioners*¹⁷² the Court held that the Board could not hire additional help to search out negligent operations, that the Board could not hire auditors to check the accounts of lessees who leased lands from the state. The decision was based on two holdings: that there was an improper delegation of discretionary power by the agency and that there were no appropriations for employees. The effect of the decision was to make a dead letter of what laws there then were regulating oil and gas operations. Of course, the case is not in point,¹⁷³ but, if the general approach used by the Court in *McDougal* were to be applied to the review provisions of the present act, the Commission could easily be stripped of any effective power.

The alternate provisions of the model act seem much more workable.¹⁷⁴ The power of the courts to issue restraining orders is very limited. There is trial *de novo*, but in the case of a general rule the order is to be upheld if there is "substantial evidence" presented to support it. Only if there is involved the right to drill a well or an order fixing allowables are the courts free to upset findings supported by evidence.

Another solution would be to have review only of the record made before the Commission and to require that the Commission's order need be

172. 48 Wyo. 493, 49 P.2d 663 (1935).

173. The Commission has its own funds, Wyo. Comp. Stat. § 57-1121 (Supp. 1957) and the authority to hire employees as needed, *id.* § 57-1122, par. (b). The holding denying the power to delegate might keep the Commission from using trial examiners.

174. Interstate Oil Compact Commission, Legal Committee, A Form for an Oil and Gas Conservation Statute alternate § 14 (1950).

supported only by substantial evidence. This would seem to be the best approach. An interesting example of its application can be seen in *Corzelius v. Harrel*.¹⁷⁵ There Harrel sought to have Corzelius' allowable reduced on the ground that Corzelius' production interfered with his recycling operation. The Court refused to pass on the facts involved, saying that the allowables set by the Commission were reasonable and that it could not upset the Commission's orders. Even so, the litigation was very involved; there were at least five proceedings in the courts and at least two orders by the Commission. The litigation might still have gone on, but for an act of God.¹⁷⁶ If there had been a trial *de novo* on each appeal the litigation would have been even more complex and there might never have been a valid proration order. It would seem that some effective order, even if not the best order possible, is better than interminable litigation.

On the other hand, if the power to preserve correlative rights exist in the courts, but not in the Commission, then trial *de novo* is almost a necessity. The courts would either have to take evidence in order to be able to modify the Commission's orders to protect these rights or would have to hold a trial separate from the appeal and grant the relief needed in the form of an equity decree. It would be much more workable if the Commission had the power to issue proration orders since it is better equipped than the courts to determine the basic facts of the physical structure of a reservoir that are necessary to support such an order.

There are other questions that are better tried *de novo*, questions not of conservation, but of title. If, for example, there is a dispute, not about how production is to be allocated among the lands in a drilling unit, but about who is entitled to the production allocated to particular lands, the Commission's order granting production to one of the disputants should not be binding on the courts. It is not expert in determining questions of title. As long as all matters are tried *de novo* there is no problem. But this is not really an argument against allowing the Commission's findings to be supported by substantial evidence on the record; a section providing for this type of review can easily specify that the findings shall be sustained only if the Commission is acting within its authority. This authority need not include determining questions of title.¹⁷⁷

One other problem may confuse the application of the Act. Fifty per cent of the land in Wyoming is owned by the Federal Government and there are complex Federal laws governing the production of oil and gas from these lands.¹⁷⁸ Since the regulations for lessees of the public domain

175. 143 Tex. 509, 186 S.W.2d 961 (1945).

176. *Corzelius v. R.R. Comm'n.*, 182 S.W.2d 412 (Tex. Civ. App. 1944) (Corzelius' well caught fire, Harrel drilled a directional well to put it out at Corzelius' expense, and ended up with all the land in the field).

177. Interstate Oil Compact Commission, Legal Committee, A Form for an Oil and Gas Conservation Statute § 14, par. D.

178. See Hoffman, Oil and Gas Leasing on the Public Domain (1951).

are, in general, much more stringent than those created by the Wyoming statute, the rights of parties subject to both "laws" would generally be controlled by the Federal rule. The Wyoming Act does apply to these lands to the extent that it is not inconsistent with Federal law.¹⁷⁹ On the other hand, if private lands are pooled in a unit with lands in the public domain, the Commission may suspend the provisions of the Wyoming statute. Suffice it to say that problems concerning lands in the public domain are not likely to be affected by the Wyoming statute.

CONCLUSION

This paper has discussed the effect of the Wyoming Oil and Gas Conservation statute on the rights of the private persons who own interests in oil and gas in place. It should at least have made apparent the fact that limitations on the means that may be used to produce petroleum alter not only the amounts ultimately produced, but also control who will be able to turn their inchoate interests in the petroleum underground into oil and gas in their pipelines and money in their pockets. The major conclusion that can be drawn is that, though the statute may have provisions effectively outlawing wasteful practices, it does not supply a clear answer as to how the relationships among parties subject to these provisions are to be adjusted. This problem of who is to receive the incidental benefits or detriments resulting from waste preventive measures is raised by all the major provisions of the statute.

The specific conclusions may be briefly summarized:

1.) The communitization provisions do allow for a satisfactory adjustment of the interests of persons whose lands are included in a drilling unit; but the courts should be careful to treat the effect of production from such a unit exactly as if there were a well on each tract of the unit producing its allotted share of the production.

2.) There apparently is no general power by which the Commission could compel the adoption of secondary recovery methods and no power to compel unitization.

3.) In the situation where a person voluntarily adopts secondary recovery techniques the Commission should be found to have the power to prevent the production by his neighbors of petroleum available only through his efforts.

4.) The statute will not be equitable in its application unless the Commission has the power to protect correlative rights; the statute should be amended so as to guarantee the protection of these rights.

5.) If it is to be effectively enforced, the statute should be amended to provide for more limited review.

179. Wyo. Comp. Stat. § 57-1125 (Supp. 1957) (apparently this is constitutional; see "Opinion of the Attorney General, June 19, 1947," Opinions of Attorneys General of the State of Wyoming 1941-1947 981 (1947).