The Impact of Conservation Law and Decisions Upon the Mutual Obligations of the Mineral Lease

James A. George
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INTRODUCTION

The evolution of the so-called "implied covenants" in mineral leases has been termed a "progression from cocksure ignorance to thoughtful uncertainty" in an article appropriately entitled "Implied Covenants—The New Look Under Conservation Laws." The "new look" alluded to in that title has been a result of the many radical changes wrought by the transition from the theory of production which was manifested in the formative years of the mineral production industry to the antithetic philosophy of conservation which now reflects the public interest in the preservation of exhaustible mineral reserves. This sometimes painful evolution has carried in its wake much confusion and doubt as to the role which the implied covenants are allowed to play within the confines of the various regulatory schemes presently in force throughout all the mineral-producing states. Due to the birth of the implied covenant doctrine at a time when there existed an almost complete ignorance of the very nature of oil and gas deposits, and of the geological conditions affecting them, growing technical knowledge has been accompanied by increasing restriction on the operation of the covenants. Or, as stated by one of the leading authorities in the law of implied covenants, "we should expect a change in the factual basis upon which a rule of law rests to bring about a correspondent change in the rule." Such "correspondent changes" have been extensive in some segments of this body of law, and it will be the purpose of this article to provide a general discussion of those changes and the reasons for them, as well as the resultant effects on the “traditional” lessor-lessee relationship. The emphasis will be on the Louisiana cases and rules.4

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3. Id. at 469.
4. This paper will attempt to center attention on the covenants which have
HISTORICAL SURVEY; ORIGIN OF COVENANTS

In an early Pennsylvania decision involving a suit for cancellation of a quarry lease, it was said to be clear that the "parties contemplated that the quarry should be worked by the defendants to some extent, and not lie idle and unproductive to the landlord." In so holding, the court was recognizing a basic principle of law that whenever a relationship exists in which compensation to one party depends wholly upon the diligent conduct of the other, the law will imply a duty upon the other to be diligent, even in the absence of express contractual provisions. Several other Pennsylvania decisions gave similar treatment to express provisions in leases, but it was not until 1889 that the Supreme Court of that state had occasion to express itself specifically on the possibility that there could be implied from a mining or mineral lease (or, inferred from the lessor-lessee relationship) covenants to develop. In that year, the case of Stoddard v. Emery was decided, in which case the following dictum appeared:

"Had there been nothing said in the contract on the subject, there would of course have arisen an implication that the property should be developed reasonably, and evidence of a custom of reasonable development by boring a given number of wells in a certain space of time, would have been competent and perhaps controlling."

Only a year later, in 1890, this dictum was translated into a rule of law, in a holding that certain obligations would be deemed to be implied from the lease provisions in proper cases. Shortly thereafter, the doctrine spread to Ohio and West Virginia, and by 1902 had also been fully recognized in California, Indiana, and Texas. By this time it may be said to have become a generally recognized rule of law, utilized to promote the immediate development of leased premises.

been "inferred" from the lessor-lessee relationship, commonly referred to as the "implied" covenants of the mineral lease. For a complete discussion of recent developments in the field of express covenants, see Comment, The Effect of Unitization on the Duration and Extent of Mineral Interests in Louisiana, 37 Tul. L. Rev. 769, 784-88 (1962).
6. Id. at 368 (dictum).
8. Ibid.
10. Merrill, Covenants Implied in Oil and Gas Leases 42-47 (2d ed. 1940) [hereinafter cited as Merrill].
It has been said that "the original structure of oil and gas jural law was founded on a factual void."11 This statement, of course, referred to the fact that the law of implied covenants stemmed basically from the mistaken assumption that the minerals were inexhaustible and migrant. Proceeding from this assumption, the courts worked their way to the conclusion that the law governing the production of minerals from the land should be the same as that which governed the capture of animals *ferae naturae* and subterranean waters, i.e., he who captures them first is their owner. From this analogy was born the "Law of Capture," from which in turn sprang the rule requiring "offset drilling."12 Under these theories, the landowner was said to have the right to drill for and "capture" all the oil and gas he could before the minerals escaped and migrated from his land. No one suspected at that time that these were erroneous assumptions of fact, and the courts' advice to one who complained that a competing neighbor was reducing "his" minerals to possession was "Go, thou, and do likewise."13 As a result of these beliefs, the fountainhead of the doctrine of implied covenants was developed—the elemental public policy of development. In this context, the reasons for the doctrine were said to be the following, *inter alia*: (1) the primary object and consideration of an oil and gas lease is the payment of royalties; (2) since minerals are inexhaustible, they are of no value until they are captured and marketed, and it is to the best interests of the lessor and the general public that they be captured as quickly as possible; (3) since the lessor has invested the lessee with the exclusive right to drill on the land and is powerless to exercise that right himself, the lessor's reasonable expectation of development should be afforded protection by the law.14 The shift in emphasis from the interests of the private owner of the land underlain by the minerals, exemplified in the development philosophy, to those of the public, or the conservation attitude, has

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caused the courts to stress the interests of both the lessor and the lessee more often than the special interest of the lessor only.\textsuperscript{15}

\textbf{AN OUTLINE OF THE IMPLIED COVENANTS}

Although the lessor’s transfer to his lessee of the exclusive right to operate on the land contemplates some duty of the lessee with respect to conduct of operations, most leases do not attempt to set out in great detail the precise manner in which these operating rights are to be exercised because of the impossibility of foreseeing the many ways in which this might be effected.\textsuperscript{16} Therefore, the courts have evolved broad implied obligations of a lease, the standard classification of which is the following:\textsuperscript{17}

1. The implied covenant to drill an exploratory well.
2. The implied covenant to drill additional wells — the diligent development obligation.
3. The implied obligation to market the product if discovered in paying quantities.
4. The implied covenant to protect the leased land against drainage by wells on adjoining land.

The standard of performance underpinning all of the implied covenants is that the lessee shall perform to the extent expected of “operators of ordinary prudence, having regard to the interests of both lessor and lessee”\textsuperscript{18} — the prudent operator standard.\textsuperscript{19}

The obligation to drill an exploratory well is implied because of the lessor’s interest in prompt exploration of his land in order

\textsuperscript{15} MERRILL, at 472.
\textsuperscript{17} This is the usual classification, and is that of Professor Merrill, set forth in his treatise, \textit{COVENANTS IMPLIED IN OIL AND GAS LEASES} 23 (2d ed. 1940). The academic disputes which center about this classification are not sufficiently important, for the purposes of this study, to be explored in great detail.
\textsuperscript{18} Brewster v. Lanyon Zinc Co., 140 Fed. 801 (2d Cir. 1905).
\textsuperscript{19} See Malone, \textit{Sufficiency of Development of Leased Premises}, Proceedings, Deep South Regional Meeting, New Orleans, La., Nov. 29, 1955, A.B.A. Section of Mineral Law 3 (1955). Recent cases in which the prudent operator standard is discussed and applied include: Meeker v. Ambassador Oil Co., 305 F.2d 875 (10th Cir. 1963); Sun Oil Co. v. Frantz, 291 F.2d 52 (10th Cir. 1961); Olsen v. Sinclair Oil & Gas Co., 212 F. Supp. 332 (1963); Simmons v. Pure Oil Co., 124 So.2d 161 (La. App. 2d Cir. 1960), aff'd, 241 La. 592, 129 So.2d 786 (1961); Monsanto Chemical Co. v. Sykes, 147 So.2d 290 (Miss. 1963); Monsanto Chemical Co. v. Andreae, 147 So.2d 116 (Miss. 1963); Wells v. Continental Oil Co., 142 So.2d 215 (Miss. 1962); Bales v. Delhi-Taylor Oil Corp., 362 S.W.2d 388 (Tex. 1963).
to secure revenue. The lease is said to have been given not "for speculative purposes, but for present benefits or for benefits to be obtained within a reasonable time."\textsuperscript{20}

In the absence of known geological facts to the contrary (and, it should be noted, in the absence of payment and acceptance of delay rentals), the remaining portions of the leased premises should also be developed if the exploratory well is completed as a producer.\textsuperscript{21} This covenant is for the protection of the lessor against two kinds of harms which conceivably could transpire: (a) failure to drill enough wells might result in the permanent loss of oil, and (b) a slower rate of production might result in a deprivation of the use of the capital represented by the unproduced royalty oil.\textsuperscript{22}

The covenant to market the product is simply a further extension of the notion that the major consideration for the granting of the lease by the lessor is the receipt by him of royalty payments for the use of his land.

Where it can be shown that the hypothetical "reasonably prudent operator" would drill a well upon the leased premises in order to protect the land from drainage of the underlying mineral deposit by a well on a neighboring tract, the lessee is held to an obligation to drill such a well. It must be shown that the adjacent well is a commercial producer and is actually draining the deposit.\textsuperscript{23}

The theory has been advanced by some writers that the lessee should be under a duty, separate and apart from the other implied covenants of the lease, to attempt to develop production from lower strata where available data shows that there is a likelihood of such production in profitable quantities.\textsuperscript{24} One eminent author in the field has suggested that the usual standard of performance, the prudent-operator test, should not limit this duty. This suggestion is illustrated by the case of a rancher upon whose land there have been drilled three producers, after which there is discovered a producing sand on

\textsuperscript{20} Mansfield Gas Co. v. Alexander, 97 Ark. 167, 133 S.W. 887 (1911).
\textsuperscript{21} Moses, The Effect of Louisiana's Conservation Statute on the Doctrine of Implied Covenants in Oil and Gas Leases, 27 Tul. L. Rev. 313 (1953).
\textsuperscript{23} Ibid.
\textsuperscript{24} Meyers, The Implied Covenant of Further Exploration, 34 Texas L. Rev. 553 (1956).
premises two miles away from the lessor's land. In this situation, it is his contention that there is a duty upon the lessee to explore the deeper formation without regard to the prudent-operator rule, and without consideration of the expectation of profit from the exploration of the deeper formation. Dissent has been registered from this stand by several writers who contend that the situation is properly governed by the implied covenant to develop, measured by the prudent-operator standard, 25 and a recent case arising in Oklahoma has adopted this position. 26 It is also said that it is only fair to take into consideration the usual requirement that the lessee be able to make some reasonable profit out of the drilling operation. Some cases, however, demonstrate a trend toward extension of the rule of "reasonable diligence" to require further development, both vertically and horizontally, than would have been required under older statements of the "prudent-operator" standard. 27

The author of the authoritative treatise in this field, 28 Professor Maurice Merrill, has advocated the position that the advent of the conservation laws has brought about the birth of a new implied duty, the duty to "take such steps as are necessary to qualify him under the regulations, to secure the largest possible allowable," 29 and that the lessee who has stopped short of the complete exhaustion of all remedies toward this end and who has not performed all necessary administrative acts to secure prudent development has not discharged his duties to the


26. In Chenoweth v. Pan American Petroleum Corp., 314 F.2d 63, 66 (10th Cir. 1963), the following discussion is found: "The prudent operator rule as applied in Oklahoma has been considered by this court in a number of cases.... Under these authorities, the rule does not require an oil and gas lessee to further develop the lease in a proven field unless there is a reasonable expectation that there will be returned from production the cost of the development plus a reasonable profit."

27. For instance, in Middleton v. California Co., 237 La. 1039, 112 So.2d 704 (1959), the Louisiana Supreme Court stated that where exploratory tests have proven parts of leased lands non-productive, "it is settled that the lessee is bound to release all acreage which he does not intend to develop." And in Romero v. Humble Oil & Refining Co., 93 F. Supp. 117 (1950), modified and aff'd, 194 F.2d 383 (5th Cir. 1952), it was said that "under decisions of the Supreme Court of the United States as well as the Louisiana Supreme Court a mineral lessee must either develop his leasehold or give up his lease." See also Coyle v. North American Oil Consolidated, 201 La. 99, 9 So.2d 473 (1942); Wier v. Grubb, 228 La. 254, 82 So.2d 21 (1955).

28. MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES (2d ed. 1940).

29. Merrill, Fulfilling Implied Covenants Administratively, 9 Okla. L. Rev.
lessor. Arguments supporting this fifth implied covenant are that the exclusiveness of the lessee's operating rights, and its access to most of the pertinent data relating to the leased minerals, render him the only person qualified to represent the interests of the owner in matters pertaining to production of minerals from the land. 30 Although considerable controversy surrounds this new obligation of the lessee, 31 it has been judicially accepted in a few states. One of the most direct statements in support of the duty to perform all necessary administrative acts to secure prudent development is found in a recent California decision: 32

"...it has become accepted law in this state that there is an implied covenant of diligent exploration and diligent operation of any producing wells. Imminent in this implied obligation is that of doing such incidental or subsidiary acts as may be reasonably necessary to accomplish the major purpose — in this instance the procuring of the drilling permit through an easily obtained zoning exception. ... Appellant (lessee) was subject to an implied obligation to obtain the necessary drilling permit through a zone variance." 33

The idea adopted by the California court is beginning to gather support, both from the authors and experts in the field, and from some courts to date. Several considerations militate in favor of its application where the interests of the lessor and lessee are not directly opposed, including the lessee's superior position to that of the lessor in dealing with regulatory bodies due to its usually continuous contact with such agencies. However, in instances in which the interests of lessor and lessee are in direct opposition, imposition of a duty upon the lessee to press the lessor's case to the detriment of its own interests would seem unreasonable, and application of a lesser obligation

125 (1956); Merrill, Current Problems in the Law of Implied Covenants in Oil and Gas Leases, 23 Texas L. Rev. 137 (1944).
33. Ibid.
would appear warranted. Such a duty could be fitted into the framework of the relatively new "duty of fair dealing."

A duty of "fair dealing" has recently been suggested, and finds support in a few judicial statements, mostly in obiter dicta as to the general standard of conduct which must be maintained between lessor and lessee. As its primary advocate points out, "the cases in which a breach of the duty of fair dealing has been found are few in number and hence the character and extent of the duty are difficult to discern."34 One of the clearest discussions of this new covenant is found in the recent Louisiana court of appeal decision of McDonald v. Grande Corp.35 In that case, the court said:

"Thus, in exercising the broad powers granted to a mineral lessee by a lease, the mineral lessee is under the duty to exercise them in accordance with the fundamental purpose for which they were granted to him by the lessor-landowner, which is to secure the greatest possible ultimate return to the landowner from the mineral development of his land.

The mineral lessee must therefore act in connection with the voluntary pooling power with the good faith intention of serving the lessor-landowner's interest or, at the very least, the mineral lessee must not act in connection with such pooling power to the detriment of the lessor-landowner's interest, since in pooling the lessor-landowner's land, the lessee is acting virtually as the former's agent as well as for itself."36

This obligation may be illustrated by an Oklahoma case,37 in which a community lease had been executed by the owners of twenty-one lots. The lease authorized the inclusion of other lots "at any time" and the lessee, after some producers had been drilled on the land owned by the plaintiffs, sought to permit the owners of other lots to join the unit and share in the royalties from the producers. It was shown that the lessee owned the royalty interests in these lots, and the court denied the lessee the right to include them, observing, as did the court in the Mc-

35. 148 So.2d 441 (La. App. 3d Cir. 1963), cert. denied, 150 So.2d 588 (La. 1963).
Donald case, that "the lessee was virtually the agent of the lessors, and for this reason he was bound to use good faith."^38

It would appear that all of the obligations which have been inferred from the lessor-lessee relationship are mere particularizations of a much broader doctrine: the rule that the lessee must conduct operations on the leased premises as would a reasonably prudent operator under similar circumstances. The foundation case in this area is Brewster v. Lanyon Zinc Co.,^39 in which the court stated the "reasonably prudent operator test" in the following terms:

"No obligation rests on [the lessee] to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them. It is only to the end that oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required. Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required."^40

This rule, enunciated in 1905, has also undergone many changes under the conservation statutes. The notion of "diligence" has taken on an entirely different meaning in some situations. However, this is not to say that there has been a complete reversal in this idea. Speaking of the fictional "prudent operator," and his present esteem in the law, a well-known practitioner has said: "like another fictional character — 'the reasonable and prudent man' of tort fame — the vacuum which would result from his demise would be hard to fill."^41 The discussion to follow will point up the role which the "prudent operator" theory plays under present law.

A review of the law of fourteen oil and gas-producing states reveals great variance in the modes of remedy available to the lessor upon proof of a breach of an implied covenant by the lessee.^42 The two major remedies are damages and total or par-

^38. Id. at 81, 84 P.2d at 1109.
^39. 140 Fed. 801 (8th Cir. 1905).
^40. Id. at 814.
tial cancellation of the lease. In three states, Kansas, Texas, and Nebraska, damages is the preferred remedy, although the courts of those states will order cancellation of a lease where there could be no other adequate relief. The remedy of forfeiture has been recognized and applied in Arkansas, Indiana, Kentucky, Louisiana, New Mexico, and Oklahoma, but not in California, Illinois, Ohio, and West Virginia, which limit the lessor to an action for damages. Forfeiture is allowed in all these states, of course, for a breach of an express covenant in the lease. The Pennsylvania rule is that the lessor may have an action for forfeiture only where it is shown that the lessee has abandoned the lease.

As previously indicated, the remedy in Louisiana is cancellation of the lease. However, article 1933 of the Louisiana Civil Code, which makes a putting in default prerequisite to recovery of damages for passive breach of an obligation, has been interpreted to apply to cancellation of a mineral lease for breach of an implied covenant. A lessee who is not placed in default

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47. Mayhew v. Collard, 312 F.2d 395 (7th Cir. 1963); Lowdermilk v. Ohio Oil Co., 203 F.2d 399 (7th Cir. 1953); cf. Carr v. Huntington Light & Fuel Co., 33 Ind. App. 1, 70 N.E. 552 (1904).
49. See, e.g., McDonald v. Grande Corp., 148 So. 2d 441, 449 (La. App. 3d Cir. 1963), cert. denied, and cases cited therein.
54. Harris v. Ohio Oil Co., 57 Ohio St. 118, 48 N.E. 502 (1897).
prior to the commencement of a suit for cancellation of the lease can maintain an exception of no cause of action:

"... plaintiff, before suing to have the contract declared forfeited, should have made demand on defendants to further develop the property, and should have given them a reasonable time within which to have done so. In other words, plaintiff should have put defendants in default ... .

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"As plaintiff’s petition does not allege that defendants were put in default, we are of the opinion that it discloses no cause of action." 58

A SKETCH OF THE VARIOUS REGULATORY SCHEMES

Before focusing attention upon the impact of conservation laws upon the mutual obligations of the lessor and the lessee, it would be well to outline briefly the nature of the several legislative programs which are presently in force.

The three major species of regulations are: (a) well-location regulation, (b) well-production regulation, and (c) unitization or pooling.

A graphic illustration of the circumstances which gave rise to the need for spacing regulations is found in the following excerpt:

"Prior to the adoption of this rule many lease lines were crowded so closely that the derrick legs actually rested on the lease boundary line. The owners of the offset leases, to comply with the implied and express covenants of their leases then had to offset the lease line at a point equidistant. In many places in Oklahoma one may still see these twin derricks with their feet together." 59

To prevent this kind of waste, well-location regulation was evolved. This device is closely related to that of unitization and pooling, as it is necessary for their effective functioning. When a given area is unitized, the conservation order usually contains a provision that there shall be but one well drilled on the unitized area, at or near the center of the unit. Other wells in

the area are prohibited by this order. One of the main purposes of this regulation is prevention of the waste which would otherwise result from strict adherence to the implied obligation that the lessee protect the land against drainage from other wells.

The device of prorationing limits the amounts of minerals which a given operator may produce from his well, with the level of restricted production usually determined by either actual market demand or the so-called "maximum efficient rate of production."

As indicated above, the conservation devices of well-location regulation and well-production regulation are usually necessary concomitants to the broader device of unitization, which is the most complete form of regulation of the production of oil and gas. This system attempts, through application of good engineering methods, to accomplish in a scientific manner for the entire reservoir what the other two types of regulation attempt to accomplish within the limits of the lease boundary. It may either be compulsory, under the conservation statute, or voluntary, effected by the agreement of the parties, sometimes with express authorization of the state's regulatory body.

**THE EFFECT OF CONSERVATION LEGISLATION AND INTERPRETIVE JUDICIAL DECISIONS UPON IMPLIED COVENANTS**

The foregoing discussion has outlined the traditional classification of the implied covenants, along with some new ones now being proposed, and has also shown the nature of the several kinds of regulatory regimes in use throughout the petroleum-producing states. There can be no doubt that these legislative regulations of the oil and gas industry have greatly altered the implied covenants in oil and gas leases, and have actually superseded them in some instances. There are several shadings in

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60. The maximum efficient rate of production is defined as that rate at which production may be effected without causing undue dissipation of reservoir energy or ultimate recoverable hydrocarbons from the deposit.


62. See Alston v. Southern Prod. Co., 207 La. 370, 21 So. 2d 383 (1945), in which the Louisiana Supreme Court said "an order of the Conservation Department . . . can have the effect of superseding pooling agreements made between owners of adjacent lands." In the recently decided case of Kimbrough v. Atlantic Refining Co., 152 So. 2d 412 (La. App. 1st Cir. 1963), the court stated: "[T]he orders of the Commissioner of Conservation relating to drilling and production of oil are paramount, become the law of the case, and govern, despite conventional contractual obligations between landowners and lessees. Delatte v. Woods, 232 La. 341, 94 So. 2d 281; Hunter Company v. Shell Oil Company, 211 La. 583,
the controversy as to the extent to which the conservation acts have altered, or done away with, the implied covenants. One extreme is represented by this statement:

"It would seem, when all the factors are considered together, that implied covenants no longer embody a correct approach to the problem of oil and gas leases. It is illogical and unreasonable to believe that oil and gas leases must be so construed as to prevent delay and promote development, regardless of the resultant injury. The courts surely realize that the policy of development has been superseded by a program of conservation to prevent economic and physical waste." 63

Another writer has stated that "even if these implied covenants have not been abolished, the heart has been cut out of them as we know them." 64

A more conservative and qualified stand is taken by another writer:

"It does not follow, however, that a lessee, confronted with the assertion that he has failed to perform duties imposed upon him by the law of implied covenants, may set up an impregnable defense merely by pointing to an administrative regulation which, on its face forbids compliance with the obligation put forward. The legal problems involved are far too complex to be resolved so easily." 65

The impact of the conservation laws upon the mutual obligations of the lessee and lessor has raised major questions, some of which are: What duties are affected by the conservation statutes? How extensive have these changes been? What efficacy, if any, are the covenants allowed to have within the framework of conservation legislation? Have the factual suppositions undergone such change as to leave the covenants without a foundation in fact, or a reason for existence?

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EFFECT OF PRORATION UPON THE MUTUAL OBLIGATIONS OF THE LEASE

This mode of regulation was the first major type to be enacted, and is still with us; its principle is an integral part of many of the more modern conservation statutes. Since this kind of scheme means greatly restricted production, whereas the doctrine of implied covenants was originally dedicated to obtaining the maximum minerals out of the lease in the shortest possible time, it is obvious that proration must have changed some of these implied covenants.

The treatment of this regulation, as well as that of the well-location regulation, will be relatively brief, since these earlier types of regulation have given way, in many producing states, to the more extensive regulation of the unitization regime.

It will be recalled that the general test for determining whether or not there has been a compliance with the implied covenants in the lease is that of the reasonably prudent operator: whatever in the circumstances would be expected of operators of ordinary prudence, having regard to the interests of both the lessor and the lessee, is what is required. A part of this test for compliance is that no obligation rests upon the lessee to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor would result from these operations. This rule has played a key role in the limiting of the original implied covenants of the lease under the proration statutes.

For instance, in State v. Phillips Petroleum Co., the lessor of gas-producing lands sued for breach of the offset covenant of the lease, at a time when the demand for gas was very slight. Because of this low demand, the allowable from this field was also very low, and the court denied relief to the lessor on the basis that the offset well was not likely to be profitable to the lessee under existing market conditions. A similar result was reached by the Kansas court, in a situation in which the allowable had been set at only 1.45% of the potential daily production.

An interesting situation is posed by a 1941 Louisiana case, *Louisiana Gas Lands, Inc. v. Burrow*,\(^7\) in which the lessee had produced an amount of gas smaller than the allowable set by the regulatory agency. In passing on the sufficiency of the petition, the Supreme Court said that the petition did not state a cause of action, since it is not enough for the petition to state that the lessee did not produce all that was allowed. However, the court emphasized that it was not dealing with a "true proration order" but merely a general, permissive conservation law which restricted production of gas wells to a certain percentage of their free flow. It has been suggested that the implication of this careful statement was that a proration order *could* have the effect of setting a standard of conduct for measuring the lessee's duty to produce.\(^7\)

Proration statutes have not killed the implied covenants of oil and gas leases, but have severely limited their operation. The duty of the lessee is no longer the duty to produce as much as possible and as quickly as possible, but has been translated into the duty to produce the maximum amount possible within the restrictions on production set by proration. This change has taken place largely within the boundaries of the prudent-operator standard of conduct imposed on the lessee. The operator is, of course, under no duty to produce *over* the allowable under the statute, or order. But he is usually under a duty to produce the amount set by the allowable unless he is able to show convincing reasons why a reasonably prudent operator would not. It is submitted that, in view of the fact that many economic and physical facts relating to the reservoir in question are considered in setting field allowables, a reasonably prudent operator would normally produce the amount which is set by the allowable, and that variations from this allowable should be the exception to the rule.

The covenant of diligent development of the premises under lease has also been greatly modified by this regulation. If the lessee can show that the drilling of additional wells, pursuant to this covenant, will be unprofitable to him because of the low allowable set for the leased land, the courts will not force him...

\(^7\) 197 La. 275, 1 So. 2d 518 (1941).

\(^7\) Gibbens, *The Effect of Conservation Legislation on Implied Covenants in Oil and Gas Leases*, 4 Okla. L. Rev. 337, 363 (1951). Other cases involving economic considerations influencing the lessee's duty include Riserger v. Arkansas-Louisiana Gas Co., 198 La. 101, 3 So. 2d 289 (1941); LeLong v. Richardson, 126 So. 2d 819 (La. App. 2d Cir. 1961).
to conduct drilling operations on this land at the suit of the lessor for the breach of the development covenant.

**Effect of Spacing Regulation Upon Mutual Obligations of the Lease**

Over-concentration of wells caused much waste and forced the states to adopt well-spacing regulations in order to prevent this kind of activity. It is at once obvious that there is a direct conflict between this sort of regulation and the implied covenant to diligently develop since the amount of production is necessarily curtailed by an order of a state regulatory body that there shall only be, for instance, one well per forty acres of land within a given area. Insofar as spacing regulation of particular reservoirs is concerned, such regulations are usually set only after consideration of many economic and physical factors associated with production from the area, and raise several questions as to the impact upon the mutual obligations of the oil and gas lessee and lessor. What is the extent of the duty owed the lessor by the lessee under this kind of regulation? Since there is a careful study made of the production from the field in which the lease lies before a determination of the well spacing, does the spacing order set an inflexible standard of conduct for the lessee, or may he, within the limitations of the prudent operator test, drill a lesser number of wells on the leased land? And, does this regulation set up any new duties for the lessee? It must be said at the outset of this discussion that the cases do not offer any definitive answer to these questions, but some of the more important cases will be analyzed in an attempt to discern an indication of the direction in which the law might be formulated in the future.

The typical spacing regulation applies only to a specific producing stratum. Therefore, this type of regulation does not seem to affect the implied covenant of further exploration as to sands not affected by the spacing order. If a given area has two or more producing sands, the well density at the surface may be much greater than that ordered for the wells going to only one particular stratum. Accordingly, it would appear that the lessor could prevail in a case in which he contended that the lessee had breached his covenant of further exploration,

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and that the lessee would have no defense in the spacing order where his failure was to explore sands not affected by the order.

Clearly, well spacing affects and limits the covenant for reasonable development of the premises. There is some question, not answered directly in the cases, as to the extent to which the spacing order establishes a standard of conduct for the lessee to follow. The following factual situation will illustrate the problem. The state regulatory body, after hearing all pertinent data relating to the production from the land, decrees a well spacing of one well per forty acres. The lease encompasses 160 acres, and the lessee has drilled two producers from the north half of the land. Does the spacing order set a minimum for drilling operations, as well as a maximum? Is the lessee free to drill less than the amount of wells set by the regulatory body after due hearing, or must he drill one well per forty acres to qualify as the mythical prudent operator? The more reasonable view holds that the spacing order is merely another matter of proof in the inquiry of whether or not the operator is a reasonably prudent operator. If the lessor is able to show that commercial quantities could be produced from the south half, he will have proved a substantial part of his case.

Another matter of importance is the burden-of-proof question. Is the lessor bound to show that an exception to the spacing order could have been obtained by the lessee in order to show that he did not diligently develop the premises? Or, may the lessee merely point to the conservation regulation as an absolute defense? Under the theory of the proponents of the proposed new implied covenant of the lessee to exhaust administrative remedies in the interest of the lessor, it would seem that the lessee could not point to the conservation order as an absolute defense. This view has been taken by a Texas court, which took judicial notice that under the Texas statute there were provisions for the procurement of an exception to the spacing order. The court said that, in the absence of proof by the lessee that he had attempted to obtain such an exception, the

73. Id. at 477. An interesting view on this problem is found in a note to a case in 7 OIL & GAS REP. 1472 (1958) by Professor Kuntz: "In practice, the drilling unit set by the Commission sets the pattern [for] minimum as well as maximum drilling operations because of demands by lessors upon lessees to develop all authorized drilling sites. The Commission is not designed to be a forum to determine the respective rights of lessors and lessees under implied covenants. Yet, if it gives weight to the economics of drilling operations, it is being used indirectly to adjudicate rights."

lesser would prevail in a suit for cancellation of the lease for
the breach of the exploration covenant.

Since the spacing regulation allows only one well within the
specified acreage limitation, it clearly renders almost ineffec-
tive the obligation of the lessee to prevent drainage from the
leased land, leaving this duty intact only where the offset well
may be drilled within the limitations of the spacing order.

THE EFFECT OF UNITIZATION AND POOLING UPON MUTUAL
OBLIGATIONS OF THE LEASE

When proration statutes proved somewhat ineffective
against wasteful practices in the oil and gas industry, the next
plateau in the advance of regulatory schemes was that of spac-
ing orders, or well-location regulation. As the shortcomings of
both of these became apparent, some states turned to a much
more comprehensive form of regulation—unitization. This
program usually integrates both proration and spacing restric-
tions, so the above discussion of these two points will have some
application to this section.

The statement of a well-known practitioner in the field of
oil and gas law shows the extent of the impact which some be-
lieve the compulsory unitization statutes have had upon the im-
plied covenants:75

"The law of capture is effectively repealed in a field where
compulsory unitization has been put into effect, and the doc-
trine of implied covenants, which is based on the law of cap-
ture, must go with it. It remains to be seen whether a
changed doctrine of implied covenants will be retained by
the courts to protect the lessor's interest under unitization."

Other commentators have said that this view is too extreme,
and subscribe to the conclusion that there is some place for the
implied covenants to operate in the pooled-unitized field—"the
theater for their performance will be the unitized area instead
of the individual lease."76 To buttress this position, the following
points are made. There is no impairment of the original obliga-
tion to operate the producing wells in a prudent manner, even
though the field is pooled or unitized. Similarly, there is no

75. Gibbens, The Effect of Conservation Legislation on Implied Covenants in
Oil and Gas Leases, 4 OKLA. L. REV. 337, 363 (1951).
76. Merrill, Implied Covenants, Conservation and Unitization, 2 OKLA. L.
REV. 469, 477 (1949).
alteration in the duty to market the product once production is achieved. And, the unit operator is under an obligation to drill a test well as he would be if there were no unitization or pooling.\textsuperscript{77}

Because of the variation in the ways in which the questions have arisen with regard to this kind of conservation regulation, and to facilitate discussion, each covenant will be discussed separately.\textsuperscript{78} As the cases which raise questions of validity of the lease under conservation statutory unitization or pooling arrangements involve four factual situations, these cases will be classified as follows:\textsuperscript{79}

\textbf{Case 1.} All of leased land is included within the unit. Production is obtained from, or drilling commenced upon, leased land.

\textbf{Case 2.} All of the leased land is included within the unit. Production is obtained from, or drilling commenced upon, land other than leased land, but within the unit.

\textbf{Case 3.} Part of the leased land is within the unit. Production is obtained from, or drilling commenced upon, that part of the lease within the unit.

\textbf{Case 4.} Part of the leased land is within the unit. Production is obtained from, or drilling commenced upon, land within the unit, but not on the leased land within the unit.

\textit{(1) The Initial Test Well, or Exploratory, Covenant}

As above indicated, this duty is not affected in any way when the lessee is designated the unit operator. However, where this is not the case, the obligation to drill an initial exploratory well is abrogated. In the Louisiana case of \textit{Crichton v. Lee},\textsuperscript{80} a \textit{Case 1} situation, the court held that the effect of the order of the regulatory agency's pooling all the leases in a field for


\textsuperscript{78} The covenant to market the product, a duty not directly affected by conservation schemes, is not important for the purposes of this study and will not be discussed. Recent decisions involving this obligation include Gazin v. Pan American Petroleum Corp., 307 P.2d 1010 (Okl. 1962); Cotiga Development Co. v. United Fuel Gas Co., 128 S.E.2d 626 (W. Va. App. 1962).

\textsuperscript{79} This classification is that used by Professor Meyers, \textit{The Effect on Implied Covenants of Conservation Laws and Practices}, 4 \textit{Rocky Mt. Mineral L. Inst.} 463, 496 (1958).

\textsuperscript{80} 200 La. 561, 25 So. 2d 229 (1946).
unitized operation superseded the lessee's obligation to the lessor to drill a test well, where the lessee, as unit operator, had drilled elsewhere in the unitized field. It may be noted that the court in *Crichton* was dealing with an express duty in the lease, but that it used language in the opinion which is broad enough to cover a case in which the covenant would have been implied. Other Louisiana cases have followed this ruling in similar situations, and in *Hunter v. Vaughn*,\(^8_1\) the court stated that the inability of the lessee to drill because the leased premises had been placed within a unit might be viewed as due to a *force majeure*, and thus excused. This view effectively evaded discussion of the issue whether or not the order of the conservation department abrogated private contracts between parties. Because the rule has become so well settled that drilling anywhere on the unitized land is drilling for the entire unit in *Case 1* and *Case 2* situations, there is very little jurisprudence disputing this point.

More controversy centers around the situations presented in *Case 3* and *Case 4*, in which part of the leased land is not within the unit. In this circumstance, does the drilling of an initial test well upon the unit, either on or off the leased premises, amount to drilling of a well on the leased premises in order to extend the lease beyond its primary term? The question has been answered in the affirmative, by such cases as the Louisiana decision in the *Hardy* case,\(^8_2\) a *Case 2* situation, in which the lessor claimed that the lessee had not drilled on the lease within the primary term, thereby losing the lease, although there had been production from the unit into which the lessor's land had been placed. The court dismissed the lessor's suit, using the following language:

"... the clause in the lease requiring defendants to drill a well on the leased premises within the primary term of five years is not applicable where a well producing gas in paying quantities has been drilled on land within the drilling unit of which the leased land forms a part and where the lessee is prohibited by orders of the Department of Conservation from drilling a well on the leased premises.

..."

\(^8_1\) 217 La. 459, 46 So. 2d 735 (1950).
\(^8_2\) Hardy v. Union Producing Co., 207 La. 137, 20 So. 2d 734 (1944).
"... the right of defendants to drill a well on the 47 acre tract covered by the lease was in effect taken away from them by the orders of the Commissioner of Conservation ... ."\textsuperscript{83}

Thus, by compelling analogy, the obligation of the lessee to drill an initial test well is abrogated where the lessee is not designated the unit operator. Where the lessee is the unit operator, his duty remains unchanged by the unitization order.

(2) The Diligent Development Obligation

In Case 1 and Case 2, it is settled that development of the unitized land is tantamount to development of the leased premises, and the lessor has no cause of action against the lessee who is not producing from his own leased land within the unit as long as production is being achieved from the unit. Several Louisiana decisions may be considered in connection with this point. In \textit{Hardy}, dealing primarily with the obligation to drill the first well, the court made it clear that their holding in relation to that point applied equally to the duty to develop the premises through the drilling of additional wells. The court said:

"Defendants' hands were literally tied as the result of the orders issued by the Commissioner of Conservation and they could do nothing whatsoever to prevent the primary term of the lease from expiring without drilling a well thereon."\textsuperscript{84}

Thus, the original covenant for adequate development of the leased premises has undergone revision where Cases 1 and 2 are involved, since the present rule is that production from the unit is production for all of the leased premises lying therein. The requirement that each and every lease be fully developed which existed prior to the advent of the unitization scheme is no longer extant.\textsuperscript{85}

The law is not so well settled as to the impact of the unitization order upon the covenants under Cases 3 and 4.

One of the major areas of dispute in this area is contained in the following query: Is there a \textit{greater} development obliga-

\textsuperscript{83} \textit{Id.} at 141, 20 So. 2d at 737.
\textsuperscript{84} \textit{Ibid.}
\textsuperscript{85} A caveat must be added here to the effect that this statement applies only to the sand or sands unitized.
tion owed to excluded acreage in Cases 3 and 4 under unitiza-
tion than there is owed to a lease unaffected by pooling or uni-
tization? Such a greater duty has been suggested in the Tenth
Circuit case of Gregg v. Harper-Turner Oil Co., an Oklahoma
decision in which the lease covered 160 acres. Two wells had
been drilled thereon, a producer in 1943 and a dry hole in 1947:
In 1948, forty acres around the producer were included in a
unit, excluding the other 120 acres. The lessor made several de-
mands upon the lessee for further development of the lease out-
side the unit in 1948 and 1949, all to no avail. He then sued for
partial cancellation of the lease as to the 120 acres outside the
unit, which the court ordered. The court said:

"[Lessees] caused the unitization agreement excluding this
120 acre tract therefrom to be effected. This resulted in a
division of the acreage of the [leased] tract. . . . As the
owner of the lease, [lessees] now stand in a different rela-
tionship to the excluded acreage than they do to the 40 acres
included in the producing unit. Equity will consider the
rights of both the lessor and the lessee under these circum-
stances. Their responsibilities as lessees became correspond-
ingly greater toward the excluded acreage than it was be-
fore severing by unitization." (Emphasis added.)

It may be noted that only two years had elapsed between the
completion of the last well on the leased premises and the de-
mand for further development thereon. Considering the fact
that most Oklahoma cases refuse cancellation where only a short
time has elapsed between the completion of the last well and the
demand for further development, this case may be viewed as in-
creasing the duty which the lessee owes the lessor as to the land
which lies outside the unitized area, by considerably shortening
this time.

On the other hand, in a Louisiana decision in which partial
cancellation was ordered in a case similar to that of the Gregg
litigation, the court used no language indicating a special duty
on the lessee as regards the land lying outside the unit.

The two important Louisiana decisions of Hunter Co. v. Shell

86. 199 F.2d 1 (10th Cir. 1952), discussed in Meyers, The Effect on Implied
463, 505-06 (1958).
87. Id. at 5.
Oil Co. and LeBlanc v. Danciger Oil & Ref. Co., involving Case 4 problems, should be discussed in this context. In the Hunter Co. case, the issue was whether or not the land subject to the lease lying outside the unit was extended beyond the primary term by production within the unit but not on the leased premises. The Supreme Court held that such production did hold the leased land outside the unit, but noted that the lessor had a remedy, if it was found that "the producing well in the unit is not sufficient to meet the obligation of adequate development of property covered by the lease." This dictum has been puzzled over by several writers, with contradictory conclusions. It seems that the court meant that the lessor had a right to have the lease cancelled partially, only as to that part of the lease which was excluded from the unit, although this result has been termed "undesirable and unworkable." One writer interprets the passage to mean that each lessor whose land is within the unit has a right of action to cancel the lease for failure to adequately develop the unit itself, and not the leased land lying outside the unit. This writer is unable to subscribe to that view, and believes that the court merely was striving to mitigate the stringency of holding the leased land outside the unit by production within the unit, regardless of how small might be the area within the unit. The LeBlanc case involved a factual situation closely similar to that presented in the Hunter Co. case, and the court followed the rules announced in the latter.

A point raised by the Hunter Co. and LeBlanc cases, which

89. 211 La. 893, 31 So. 2d 10 (1947).
90. 218 La. 463, 49 So. 2d 555 (1950).
91. This is the general rule, as stated in 2 Summers, Oil and Gas § 302.1, at 283 (perm. ed. 1945): "Where only a part of a leased tract is included within a pooled or unitized area, a majority of the courts hold that drilling or production within the unitized area during the primary term of the lease, which prevents the termination of the lease at the end of the primary term, prevents its termination as to the portion of the lease excluded from the unitized area as well as to that portion included." This rule was reaffirmed in Delatte v. Woods, 232 La. 341, 94 So. 2d 281 (1957).
92. 211 La. 893, 31 So. 2d 10 (1947). A recent decision of the Mississippi Supreme Court includes a statement very similar to the one quoted. In Wells v. Continental Oil Co., 142 So. 2d 215, 221 (Miss. 1962), the court said: "The covenant to develop requires the lessee to develop all of the lease as would any ordinary prudent operator. These plaintiffs have a remedy for a breach of this covenant if it occurs, which remedy could consist of either a cancellation of that part of the lease, for damages, or for both. See 35 Texas Law Review, 839, June 1957; Nunley v. Shell Oil Co., La. App. 1954, 76 So. 2d 111."
94. Ibid.
was also raised by the *Gregg* case, is the question whether there may be effected a "division" of the lease, if the court is to decree a partial cancellation of the lease for noncompliance with the development covenant as to the land outside the unit. The Louisiana court has steadfastly maintained that the obligation of the lease is indivisible, a position illustrated by this passage from the *Hunter Co.* case:

"It is true that the orders of the Commissioner divided the lease in the sense that a part of the property described in the lease was placed within the unit (Section 5) and the remainder of the property formed no part of this unit. But the question here presented is whether under the orders the Commissioner divided the obligation of the lease. In our opinion these orders by their provisions clearly did not divide the obligation of the lease.

"...

"The law is well settled that the lessee's obligation to drill a well is indivisible in its nature, and that the grantor's corresponding obligation to deliver the land is likewise indivisible, and that, if the obligation of one of the parties is to be fulfilled entirely, the obligation of the other...must likewise be fulfilled in whole."95

However, the court in *Gregg* took what may be the more realistic position, when it decreed cancellation as to the land outside the unit, stating that a "division of the acreage" of the lease *had* resulted in the subsequent formation of the unitized area. The dissenting Justice in the *Hunter Co.* case stated that the order of the conservation commissioner could indeed "legally cause to be excluded from a lease a portion of the acreage provided for therein," in the valid exercise of his police powers.96

A contrary line of reasoning to that employed in *Hunter Co.* and *LeBlanc* was once adhered to by the Mississippi Supreme Court. In *Gulf Prod. Co. v. Griffith*,97 that court held that to decree that the leased land outside the unit was held by production from within the unit, but not on the lease itself, would

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95. 211 La. 893, 901-02, 31 So. 2d 10, 13 (La. 1947).
96. Id. at 911, 31 So. 2d at 16 (Hamiter, J., dissenting).
be tantamount to depriving landowners of property without due process of law, since the landowner would not be paid for the land outside the unit. However, Mississippi has now adopted the majority rule in the recent case of Wells v. Continental Oil Co.,\textsuperscript{98} in which the court distinguished the Griffith decision both on the facts and on the ground that it was decided under a different conservation statute.

The Louisiana decision of Wilcox v. Shell Oil Co.\textsuperscript{99} is important in this area, not so much for its actual holding, which only dealt with an interpretation of the lease there in question, but for the possible implications for the future which the language of the opinion might carry, and problems presented by the facts of the case in the field of implied covenants. An abstract of the factual situation there will assist understanding of the case. This was a Case 4 instance, in which the unitized area contained 160 acres. Eighty acres of this land was subject to the lease of the plaintiff. The unitization order only covered the "FX" and the "FV" sands. The lease provided that commencement of a well, or production from a completed well, on any portion of a unit in which all or part of the lease had been placed would have the same effect, for the purpose of extending the lease beyond the primary term, as would commencement of a well on, or production from, the leased land itself. Pursuant to the establishment of the unit, operations were begun, within the unit, but not on the lessor's lease, and the well was drilled to both of the sands specified in the unitization order, but without success. The lessee then encountered another sand, the "FT" sand, which showed some prospect of being productive. Then, only one day before the delay rental was due the lessor, the lessee filed a declaration of unit, and claimed that he was not bound to pay the delay rental because the production which had been obtained from the "FT" sand was production from the leased land, under the terms of the lease agreement. The court, observing that only the first two sands were included within the terms of the original unitization order, held that the lessee did not achieve production from the "FT" sand when it was part of the unit,

\textsuperscript{98} 142 So. 2d 215 (Miss. 1962).
and thus granted the cancellation which the lessor sought. If this is viewed as only a case which puts a very restrictive interpretation on the subject lease provisions, it is important only in the drafting of pooling clauses. But a question arises as to what the result would have been had there been production only from one of the two sands which were specified in the original unitization order—the "FX" or the "FV" sands. If production were achieved from only one of these, would that production maintain the lease as to that sand only, or would this have been reasonable diligence in developing the entire lease, i.e. (under the unitization order), the two sands? It could be argued that the lessor in such a case would have a right to have the lease cancelled as to the sand which was not developed, if he could prove that a prudent operator would have effected such development.100

In Rogers v. Westhoma Oil Co.,101 a case arising in Kansas, the court had before it the question whether the "Pugh Clause" allowed a horizontal division of the leased premises. The lease provided for extension of the lease term as to "the premises" covered and included by any consolidation of estates, but not as to nonproducing areas not included within a production unit. Consolidation was effected as to eleven producing horizons above sea level, and the court decided that the Pugh Clause operated to allow a horizontal severance of the leasehold estate. In a supplemental opinion, the court denied that its decision was a departure from the prudent operator standard, and emphasized that it involved merely a "question of lease termination at the expiration of the primary term."102 In a dissenting opinion, one judge agreed with the trial court's conclusion that the Pugh Clause did not "specifically or clearly designate underground horizons." The result reached by the court has been termed "startling"103 and in direct contravention of the rule of indivisibility announced in the Hunter Co. case.104

101. 291 F.2d 726 (10th Cir. 1961).
102. Id. at 733.
As a result of the Wilcox decision, a new lease form was published which is aimed at an amelioration of the effect of that decision. This form provides, in pertinent part:

"Any unit formed by Lessee hereunder may be created either prior to or during or after the drilling of the well which is then or thereafter becomes the unit well."\(^{105}\)

In Odom v. Union Producing Co.,\(^{106}\) the Louisiana Supreme Court, construing a lease provision very similar to that set out above, held that this pooling provision allowed lessee to extend the lease by pooling part of the leased land with land on which production had been effected. Answering the contention that the Wilcox decision required cancellation of the lease because production had not been obtained before the pooling had taken place, the court said:\(^{107}\)

"Unlike the lease in that case, the present lease authorizes pooling after production and does not require the production to be from a well completed to production on the unit. Because of the variant lease provisions, we find the case inapplicable."

In conclusion, it seems that future decisions might hold the lessee to a greater duty of development as to the land lying outside the unit than would exist without unitization. Furthermore, recent Louisiana decisions show that future developments in this field will depend greatly, if not wholly, upon particular lease provisions governing the effect of pooling and unitization, with ambiguities in construction being resolved against the lessee who prepares the lease contract.\(^{108}\)

\(3\) The Offset, or Protection, Covenant

Under Cases 1 and 2, it would appear that the protection obligation of the lessee is not present, where drainage is from one part of the unit to another, since he is receiving revenue from the minerals within the unit anyway. But if it can be shown that there is drainage from the leased premises to non-unit premises, or from unit to non-unit premises, the offset

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\(^{105}\) Bath Form 42 CPM — New South Louisiana Revised Six (6) — Pooling, Paragraph 2.

\(^{106}\) Odom v. Union Producing Co., 243 La. 48, 141 So.2d 649 (1962).

\(^{107}\) 243 La. 48, 92, 141 So.2d 649, 664 (1962).

\(^{108}\) 243 La. 48, 85, 141 So.2d 649, 662 (1962).
obligation is effective as to the unit operator. A more troublesome situation is the one posed where in Cases 3 or 4, there is proven drainage from the portion of the leased land outside of the unit to that portion of the leased premises within the unit. While it is true that the owner of the leased land will continue to receive some royalties on his oil, it will only be a royalty on the proportionate part of the production from the whole unit. Had he achieved production from the leased land outside the unit, he would have been entitled to the entire royalty. No convincing support for the lessor's right to damages in these cases was found.

Therefore, it may be said that the offset, or protection, covenant retains some life, but that it also has been greatly modified by the unitization programs.

CONCLUSION

The foregoing discussion has shown that the original implied covenants have undergone great modification with the advent of modern conservation statutes now in force in the oil and gas producing states. As a result of the various holdings interpreting the conservation statutes and their effect upon the mutual obligations of the lessor and the lessee, the industry has been constantly responding with changes in lease forms, changes in leasing practices, etc. It has been indicated that some writers are of the conviction that the implied covenants have been rendered wholly obsolete by the philosophy and practices of conservation which now express the public interest in the preservation of these irreplaceable minerals. The sounder view is that the covenants have lost their vitality in many areas, but are still very much alive, and very useful, in others. Despite the great restrictions which have been judicially placed upon the traditional covenants pursuant to conservation schemes, some of the implied obligations will remain, although in new configurations, as long as the lessee is held not to have the basic right to use the leased property solely for his own interests.

109. Where such a situation as that suggested in this section exists, i.e., drainage from unit to non-unit premises, an obligation may be imposed upon the lessee to represent the lessor's interest before a regulatory agency in order to secure appropriate orders. See generally Renner v. Monsanto Chemical Co., 187 Kan. 158, 354 P.2d 326 (1960), containing a good discussion of the duty of the lessee to protect the leased premises against drainage from another tract.