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CAN A LOUISIANA UNIT ORDER BE EFFECTIVE RETROACTIVELY?

INTRODUCTION

In order to prevent waste and avoid the drilling of unnecessary oil and gas wells, the Louisiana Commissioner of Conservation is given the power to force the pooling of mineral interests into drilling units.\(^1\) The area within the drilling unit and the allocation of production from the unit well is set forth in an order issued by the Commissioner.\(^2\) Of principal concern to those whose land lies within the unit is the point at which they begin to share in production. Until the unit order becomes effective, only the producing tract receives production and other tracts do not share.\(^3\) Therefore, the issue arises whether a Louisiana unit order, which requires the sharing of production, may have retroactive effect. A related question involves the point at which the sharing of production should occur.\(^4\)

The following hypothetical situation illustrates the problem. Assume A owns a tract of land adjacent to a tract owned by B. On January 1st, A completes a producing well on his tract. On February 1st, B files an application with the Commissioner of Conservation requesting the creation of a unit comprising the tracts owned by A and B.\(^5\) The Commissioner issues a unit order on March 15th and makes the order effective as of that day.\(^6\) During this two-and-one-half month period, A continues to produce oil and gas, some of which migrates from beneath B's tract. Once B files the application for unitization, the Commissioner will not issue new drilling permits pending the outcome

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\(^1\) La. R.S. 30:9(B) (1989). “For the prevention of waste and to avoid the drilling of unnecessary wells, the commissioner shall establish a drilling unit or units for each pool . . . .” Id.

\(^2\) Id. art. 9-10.

\(^3\) “Until such time as a unit is created, no other tract is entitled to production from a well.” Desormeaux v. Inexco Oil, 298 So. 2d 897, 899 (La. App. 3d Cir.), writ denied, 302 So. 2d 37 (1974).

\(^4\) Professor Owen Anderson, in an article addressing this issue, asserts that “a compulsory pooling order normally should be retroactive to the date of first production.” Anderson, Compulsory Pooling in North Dakota: Should Production Income and Expenses be Divided From Date of Pooling, Spacing, or “First Runs”? 58 N.D.L. Rev. 337, 573 (1982).


\(^6\) Id.
of the unitization proceeding. Hence, for the one-and-a-half month period from the filing of B's application until the Commissioner enters the unit order, B's property is drained although B is prohibited from drilling an offset well to protect against drainage.

If a dispute develops over who is entitled to share in the minerals produced during this period, both A and B may argue that property has been taken without compensation. B will contend that the Commissioner's denying him the right to drill an offset well pending unitization constitutes an unconstitutional taking of his property. In order to compensate him for the deprival of his right to drill, B will argue, the unit order must take effect retroactively to the date of the application for unitization. A, on the other hand, will argue that the unit order cannot be made retroactive, for to do so would constitute a taking of his property. A will assert that under the Louisiana Mineral Code, oil and gas reduced to possession become his property. Making a unit order effective retroactively and forcing A to share minerals that he has reduced to his possession would take property from him for the sole purpose of compensating and benefitting B, A will contend.

The contentions of A and B squarely present the issue that is the subject of this article: May a unit order be given retroactive effect without constituting a taking? This article investigates the issue in four sections. The first section gives a brief overview of Louisiana's theory of mineral ownership and the rights of a landowner under the Louisiana Mineral Code. This section also includes a discussion of those few Louisiana decisions that touch upon this issue. Section two considers the judicial responses to this issue by other states with more well-developed jurisprudence. Section three examines the compatibility of other jurisdictions' positions with the Louisiana law of mineral ownership. This section also shows the problems associated with retroactivity and presents an alternative by which Louisiana may protect the rights of affected landowners. In section four, this author concludes that a unit order may not have retroactive effect in Louisiana and that an

7. It is standard practice for the Commissioner of Conservation to deny drilling permits to adjacent landowners once an application for unitization is filed. Such a denial fulfills the Commissioner's mandate to prevent waste and the drilling of unnecessary wells. Interview with Patrick H. Martin, Professor of Law, Louisiana State University; former Louisiana Commissioner of Conservation, in Baton Rouge, Louisiana (February 17, 1989).
8. The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
   Article I, section 2 of the Louisiana Constitution provides, "No person shall be deprived of life, liberty, or property except by due process of law."
9. Id.
alternative is available by which the rights and interests of all parties may be protected.

A BRIEF OVERVIEW OF MINERAL OWNERSHIP IN LOUISIANA

The Louisiana Mineral Code sets out the principles governing mineral ownership in Louisiana. The Mineral Code adopts the “nonownership” theory of minerals. Under that view, ownership of land does not include ownership of oil and gas lying beneath the surface. The landowner does, however, have the “exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.” Ownership of oil and gas vests when the minerals are reduced to possession. The Mineral Code further provides that a landowner “may reduce to possession and ownership all of the minerals . . . that can be obtained by operations on or beneath his land even though his operations may cause this migration from beneath the land of another.” Thus, a producing landowner ordinarily need not reimburse his neighbor for oil and gas taken from beneath his neighbor’s property.

The rights created under the Mineral Code are not absolute. Louisiana law, recognizing that a neighboring landowner whose property overlies the common reservoir should have some rights in that reservoir, creates a reciprocal relationship between a producing landowner and his neighbor. The landowner has no ownership interest in the common reservoir, but the theory of correlative rights recognizes that he, like his producing neighbor, has the right to develop his property, protect it from drainage, and “utilize the natural reservoir energy.”

Prior to the development of conservation law, to protect one’s property from drainage by a producing neighbor, “the remedy of the injured landowner . . . [was] to be that of self-help—‘go and do like-

11. Id. arts. 1-215.
12. Id. art. 6 provides: “Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form . . . .”
13. Id.
16. Id. art. 14. Note that such production must be legitimate and cannot be in violation of Revised Statutes 31:10 (1989). See also id. art. 10 comments.
17. Id. art. 9 provides: “Landowners and others with rights in a common reservoir or deposit of minerals have correlative rights and duties with respect to one another in the development and production of the common source of minerals.”
18. Id. comment.
Each landowner, to protect his property, was forced to drill his own well. This resulted in the drilling of unnecessary wells that were harmful to the efficient production of the reservoir. The waste resulting from such drilling led to the creation of conservation law. The conservation statutes of Louisiana, to remedy the waste created by the drilling of unnecessary wells, mandate the forced pooling of mineral interests into drilling units when interest owners fail to pool voluntarily. Once a unit is established, those landowners whose land lies within the unit are prohibited from exercising their right to explore and develop their property for oil and gas. However, unitization will eventually give them some compensation by letting them share in production and insuring that they receive their "just and equitable share of the reservoir content."

Louisiana has not yet determined whether a unit order may or must be effective retroactively. Three Louisiana cases have approached the issue of retroactivity, but none has resolved it. The earliest Louisiana case that touched upon the issue was Desormeaux v. Inexco Oil Co. The facts of that case presented a retroactivity question, but the court

19. 1 H. Williams & C. Meyers, Oil & Gas Law § 204.4, at 57 (1988).
22. Drilling units are defined in Louisiana Revised Statute 30:9 as "the maximum area which may be efficiently and economically drained by one well." Id. art. 9(B).
23. La. R.S. 31:10(A)(1) in part provides:
   A. When two or more separately owned tracts of land are embraced within a drilling unit which has been established by the commissioner as provided in R.S. 30:9B, the owners may validly agree to pool their interests and to develop their lands as a drilling unit.
   (1) Where the owners have not agreed to pool their interests, the commissioner shall require them to do so and to develop their lands as a drilling unit, if he finds it to be necessary to prevent waste or to avoid drilling unnecessary wells.
24. Id. arts. 9, 10.
25. In a letter dated April 11, 1983, Commissioner Patrick H. Martin expressed concern over those parties whose property was being drained pending the issuance of a unit order. Commissioner Martin believed that some protection should be afforded those parties. To protect those parties affected, Commissioner Martin determined that pending the issuance of a unit order, allowables would only be issued upon a unit basis. The effect of this determination was to allow those parties whose property was being drained while unitization was pending, to share in production prior to the issuance of the unit order.
   In a memo dated August 20, 1985, Commissioner Herbert W. Thompson stated that "[o]rders issued by the Commissioner under Title 30 shall be effective only after testimony is received and entered of record. Hence, no Order will be given an effective date earlier than the date that all evidence has been received and the hearing concluded."
did not directly address it. The plaintiff in Desormeaux, as owner of land within a unit, sought to share in all production of the unit well since the date of first production. The third circuit rejected the landowner's claims, holding that "until such time as a unit is created, no other tract is entitled to production from a well." 27 Although a landowner does have the exclusive right to explore and develop his land, reasoned the court, he does not own the oil and gas beneath the property. 28 Under the rule of capture, whoever first possesses the minerals owns them. Hence, the court concluded, except insofar as the conservation statutes had modified the rule of capture, the landowner could not claim any of the production.

The Desormeaux court next defined how far the conservation statutes had modified the rule of capture. The court declared that unitization "modifies the rule of capture only to the extent that each . . . tract will receive its just and equitable share of [the] reservoir content." 29 This modification allowed the Commissioner to force sharing once the unit is created, said the court, but it did not grant any right to production before the unit existed. In the Desormeaux court's view, the conservation statutes do not disturb the rule of capture as it applies to pre-unit production.

The facts of the Desormeaux case very clearly raised an issue of retroactivity. The Commissioner issued the unit order on August 7, 1971, but the order was made effective from June 30, 1971. 30 Each party, then, had an argument that property had been taken improperly. The producer could have protested the retroactive effect by citing the very rule of capture the court relied upon. The producer could have claimed that it owned the minerals produced between June 30th and August 7th, and that making the unit order effective retroactively took those minerals from it without compensation. The landowner also had a taking claim. From the time of the application for the unit order, the landowner was forbidden to drill. By taking away the right to drill, which the plaintiff would argue is a property right, a taking might have occurred. Neither party, however, raised these arguments, and the Desormeaux court did not take up the issue on its own.

The third circuit reaffirmed the Desormeaux holding in Pierce v. Goldking. 31 In Pierce, a lessor sued his lessee for failing to protect his

27. Id. at 899.
28. Id. "Under the law of capture, the landowner is not the owner of minerals beneath the surface of his lands. He has the right to search for and draw the minerals through the soil and thereby become the owner." Id.
29. Id. "The creation of a drilling unit modifies the rule of capture only to the extent that the Commissioner's finding indicates unitization should reasonably insure each tract will receive its just and equitable share of reservoir content." Id.
30. Id. at 898.
property from drainage by a well on adjacent property. The lessor sought to share in the “pre-unit production.” The court found that since the lessor was “not entitled to receive royalties until such time as the effective date of the unit,” the lessor’s argument had no merit.

Since that case, only one court, again the third circuit, has addressed the question. In Burley v. Sunbelt Royalty, Inc., the lessor argued “that the Department’s order of May 1, 1984, should be applied retroactively to November 1, 1982.” The court concluded that the lessor “offered no authority for this proposition” and refused to address the issue. This abrupt dismissal of the claim implies that, in the third circuit at least, the issue is settled: unit orders may not take effect retroactively.

In sum, the Louisiana courts have had three opportunities to address this issue. The courts have made it clear that until a unit is created, adjacent tracts are not entitled to share in production. Therefore, a unit order may not be made effective prior to the establishment of a unit.

**THE RETROACTIVITY ISSUE IN VARIOUS JURISDICTIONS**

Other oil and gas producing states have adopted compulsory unitization. Although laws governing unitization vary from state to state, certain issues created by compulsory unitization are common to all states that employ such a scheme. One common issue is whether a unit order requiring the sharing of production may be effective retroactively.

This section will examine the extent to which Texas, Oklahoma, and Nebraska have addressed this issue. The theories of mineral ownership adopted by these states are not identical, nor are their compulsory unitization laws. For this reason, no two states have come to identical conclusions on the question whether a unit order may have retroactive effect. Nonetheless, jurisprudence from these states illustrates the varying policies and interests that must be considered in determining whether a unit order may take effect retroactively.

32. Id. at 529.
33. Id. at 534.
34. 534 So. 2d 101 (La. App. 3d Cir. 1988).
35. Id. at 102.
36. Id.
37. It is important to note that the effect that the creation of a unit has varies from state to state. In some states, the spacing of wells and the allocation of production are not determined simultaneously. In many states, for example, a spacing order initially establishes the area within the unit, and a later pooling order allocates production. By contrast, a Louisiana unit order directs both the spacing of wells and the allocation of production.

For purposes of this comment, unitization will refer to the spacing and pooling of mineral interests into drilling units and will not refer to fieldwide unitization.
Texas

Texas adopts the "ownership in place theory." Under this theory, the landowner may create a separate mineral estate, apart from ownership of the land. Ownership of oil and gas is vested even while the oil and gas is beneath the surface of the land, whether or not the oil and gas is reduced to possession. Despite the ownership in place theory, ownership of oil and gas beneath one's property may be lost under the rule of capture by legitimate drainage.

The state of Texas developed conservation laws to prevent waste and the drilling of unnecessary wells caused in part by the operation of the rule of capture. The Mineral Interest Pooling Act authorizes the Railroad Commission to force the pooling of mineral interests under certain circumstances. The Commission cannot force the pooling of mineral interests, however, absent a petition from an owner of affected mineral interests. The law requires that an owner seeking pooling must first make a "fair and reasonable" offer of voluntary pooling to the producing party. If the producing party refuses, the interest owner may then petition the Railroad Commission for a pooling order.

Once a pooling order is issued, the question arises whether the order may be effective retroactively. A Texas court addressed this issue in Buttes Resources Co. v. Railroad Commission of Texas. The conflict arose between the operator of existing units, Buttes, and the owner of the mineral interests underneath land adjacent to these units, Schneider. After an unsuccessful attempt at voluntary pooling, Schneider applied to the Railroad Commission to force the pooling of his interests with the units operated by Buttes. Hearings were held, and, sixty days later, the Railroad Commission issued an order pooling a portion of

38. "The theory that a landowner owns the oil and gas which was originally in place beneath his surface acreage." 8 H. Williams & C. Meyers, Oil & Gas Law 683 (1987). See Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290 (1923).
39. "Under this theory, the landowner may create by grant or reservation a corporeal or possessor interest in the minerals separate from the estate in the surface." 8 H. Williams & C. Meyers, supra note 38 at 683.
40. See Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948). "In Texas, and in other jurisdictions, a different rule exists as to ownership. In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture. . . ." Id. at 561 (citations omitted).
42. Id. §§ 102.011-.012 (Vernon 1978).
43. Id. § 102.013 (Vernon 1978).
44. See generally Douglass & Whitworth, Selected Topics on Oil and Gas Law—Practice Before the Oil and Gas Division of the Railroad Commission of Texas, 13 St. Mary's L.J. 719, 740-51 (1982).
Schneider's interests with part of a unit operated by Buttes. The Commission made the order effective retroactively to the date of the hearing. Buttes then brought suit to attack the validity of this order.

A Texas appellate court upheld the pooling order but refused to allow the order to take effect retroactively. The court, however, gave little explanation for its conclusion. Citing the Texas Constitution, the court stated that a retroactive pooling order would interfere with a producing owner's vested property rights. As further support for its position, the court quoted language from an earlier case, Superior Oil Co. v. Railroad Commission, which had indicated that one has a vested property right to do with one's property as one desires. In other words, the Buttes court concluded that retroactive application of a pooling order would interfere with the property owner's vested right to do what he pleases with his property. Reliance on this vague right to have absolute control of property makes the Superior case somewhat dubious, but it remains the law of Texas.

In sum, the Texas courts have concluded that a pooling order may not be retroactive. The Texas position may not be as persuasive as it could be because the reasoning of the Texas courts seems imprecise.

Oklahoma

Oklahoma, like Louisiana, adopts both the "nonownership theory"

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46. Id. at 677.
47. Id. at 682. "[T]he earlier effective date resulted in an unconstitutional retroactive interference with vested property rights. Tex. Const. art. 1, § 16. The MIPA is clearly 'in derogation of the right of one to do with his own property as he so desires,' Superior Oil Co. v. Railroad Commission." Id. (citation omitted).

In American Operating Co. v. Railroad Comm. of Texas, the same court reaffirmed its holding by stating: "In Buttes Resources . . . we held that the Railroad Commission is without authority to make such an order effective prior to the time it is signed. We adhere to that holding." 744 S.W.2d 149, 156 (Tex. Ct. App. 1987).
48. Art. 1, § 16 reads as follows: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

The official comment says:

A retroactive law is one meant to act on things that are past. As such, a statute is retroactive which takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes new duties, or adopts a new disability in respect to transactions or considerations already past, and which affects acts or rights accruing before it came into force. . . .

It is to be noted that unless vested rights are destroyed or impaired, the law is not invalid even though retroactive in operation. Paschal v. Perex, 7 T[ex]. 348 (1851); City of Ft. Worth v. Morrow, Civ. App., 284 S.W. 274, error refused (1926). However, to be a vested right, it need not be strictly speaking a property right.
50. Id. at 482.
51. This theory has been defined by Williams and Meyers as "[t]he theory that no
and the rule of capture. Oklahoma’s unitization laws are also similar to those of Louisiana. The Oklahoma courts, however, have already resolved the issue of whether a pooling order may take effect retroactively. To understand the Oklahoma approach, a close review of that state’s case law will be useful.

The earliest Oklahoma case addressing whether a pooling order could take effect retroactively is *Wood Oil Co. v. Corporation Commission*. This case involved a pooling order directing a producer to share production from the date of first production with an adjacent tract. On December 21, 1946, Wood Oil completed a well and began producing. Toklan Producing Company had a mineral interest on property adjacent to the Wood Oil tract. On April 1, 1947, the Corporation Commission, Oklahoma’s conservation authority, established the boundaries of the drilling unit. The acreage in which Toklan had a mineral interest was within this unit. Attempts at voluntary pooling failed, and, in July, 1947, Toklan applied for compulsory pooling. The Corporation Commission issued a pooling order that instructed Wood Oil to share production with Toklan from the date of first production.

Wood Oil appealed the retroactive effect of the order. The Oklahoma Supreme Court, accepting Wood Oil’s contentions, reversed the order. The court reasoned “that Wood Oil had title absolute to the oil and gas” produced prior to the creation of a drilling unit. Hence, until such time as a drilling unit was created, Toklan was not entitled to share in production.

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person owns oil and gas until it is produced, but that the right to produce is limited to those persons who own land upon which a well may be drilled.” 8 H. Williams & C. Meyers, supra note 38 at 619. Some however classify Oklahoma as adopting a “qualified ownership theory.” “The theory that landowners whose tracts overlay a producing formation have correlative rights in the formation.” Id. at 796.

52. “[U]nder the ‘law of capture’ which obtains in Oklahoma, a landowner does not own migratory substances underlying his land, but has an exclusive right to drill for, produce, or otherwise gain possession of such substances, subject only to restrictions and regulations pursuant to police power.” Frost v. Ponca City, 541 P.2d 1321, 1323 (Okla. 1975).


55. Id. at 537, 239 P.2d at 1025.

56. Id. at 538, 239 P.2d at 1025.

57. Id. at 539, 239 P.2d at 1026.

We think it follows from this statement of the law that Wood Oil had title absolute to the oil by it produced prior to the pooling. We find nothing in the conservation law that purports to disturb the title of the producer thereto. The effect of the order of the commission is to treat the unitization effective as of the time of the drilling of the well and the interest of Toklan in the production coincident with that of Wood Oil. To the extent the order holds Wood Oil
The Oklahoma Supreme Court again addressed this issue in *L. O. Ward v. Corporation Commission*. In January, 1969, Ward completed a well on a section of land, owned in part by Tenneco. In February, 1969, Tenneco filed an application seeking the creation of a 640-acre drilling unit. In March, 1969, Ward filed an application seeking the creation of a 160-acre drilling unit. In June, 1969, the Corporation Commission combined the two applications and issued a spacing order establishing drilling units on a 640-acre basis. Ward appealed this order but was unsuccessful. In February, 1971, the Corporation Commission issued a pooling order, which was amended in May, 1971. The effect of the May amendment was that "Tenneco was entitled to participate in the production from the well from and after June 26, 1969, which is the date of the spacing order." Ward appealed this order.

The Oklahoma Supreme Court concluded that Tenneco's right to share in production arose when Tenneco's right to drill was denied. The court determined that the governing statute prevented Tenneco from exercising its right to drill after the spacing order was issued, and that the denial of this property right without compensation would be a "taking by the State of [Tenneco's] property without due process in violation of the Fourteenth Amendment to the Constitution of the United States." The court determined that the denial did not occur until the

accountable to Toklan directly or indirectly for a share in the production before the spacing unit was created, same is not authorized by law and it was error to so hold.

Id.

59. Id. at 504.
61. 501 P.2d at 504.
62. Id. at 507.
63. Id.
64. "We have recognized mineral owner's right to reduce minerals to possession is a valuable property right." Frost v. Ponca City, 541 P.2d 1321, 1323 (Okla. 1975) (citing Wright v. Carter Oil Co., 37 Okla. 46, 223 P. 835 (1923)).
65. 501 P.2d at 507.

At the time the unit is established a unit well is or probably soon will be producing oil or gas. At the moment production commences, resulting pressure differentials in the common source of supply portend, in greater or less degree, drainage from all parts of the unit toward the producing unit well. This drainage is occurring from areas where oil and gas lessees are prohibited from doing anything to protect their leased premises from drainage. With the purpose of § 87.1 to prevent the drilling of unnecessary wells before it, the Commission will not, except in extreme cases, make an exception to the rule that permits one producing well only on each spacing (drilling) unit. To impose this denial without granting the right to participate in production of unit well, as of the time the non-drilling owners were prohibited from drilling, is the taking by the
unit was created and therefore Tenneco's right to share in production did not arise until that time. The decision was consistent with Wood in that no sharing of production occurs prior to the creation of a unit.

In C. H. Kuykendall v. Helmerich & Payne, Inc., the Oklahoma Supreme Court modified this position, concluding that a pooling order must be effective retroactively to the date that the application is filed. In this case, Helmerich & Payne, the mineral lessee, commenced drilling a well on a tract adjacent to the leased property. On December 9, 1976, Helmerich & Payne applied for the creation of a unit that included the leased property. The unit hearing occurred during the lease term, but the order was not signed until December 21, 1976, one day after the lease was set to expire. If the unit order was given retroactive effect either to the date of the hearing or before, the lease would not have expired. Both the trial court and appellate court held that the lease had not expired, and the lessors appealed to the Oklahoma Supreme Court. The Oklahoma Supreme Court concluded that the effective date of the order was to be the date an application for spacing is filed.

In addressing the effective date of the order, the court relied upon its reasoning in Ward: In Ward, "this Court noted that withdrawing an owner's right to drill without granting the right to participate in the proceeds of the unit well amounted to the taking by the state of owner's property without due process . . . ." The court in Ward based this determination on its interpretation of a United States Supreme Court case, Thompson v. Consolidated Gas Utilities Corp. The Oklahoma Supreme Court interpreted Thompson as saying that the withdrawal of an adjacent landowner's right to drill is the taking of a property right such that compensation is required.

In determining when the right to drill was denied, the court looked to the Oklahoma statute that prohibits the drilling of a well once an application for spacing is filed. The court, based upon the language


Id. 66. 741 P.2d 869 (Okla. 1987).

67. Id. at 870.

68. Id. at 869.

69. Id. at 873; see supra note 65.


71. 52 O.S. 1981 § 87.1(e). Kuykendall, 741 P.2d at 871:

The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited. The drilling of any well or wells into a common source of supply, covered by a pending spacing
of this statute, determined that a landowner’s right to drill is withdrawn at the time an application for spacing is filed and therefore the right to share in production from the unit well arises at that time.\textsuperscript{72} The court reasoned that in order to avoid an unconstitutional taking of property, the sharing of production must occur when the right to drill is denied, and therefore a pooling order must be effective retroactively.\textsuperscript{73}

In sum, Oklahoma prohibits the drilling of a well once an application for spacing is filed. The Oklahoma Supreme Court has concluded that such a denial constitutes a taking of property such that compensation is required. The Oklahoma Supreme Court has therefore concluded that a pooling order must be effective retroactively from the time an application for spacing is filed to avoid the unconstitutional taking of property.

\textit{Nebraska}

The Nebraska Supreme Court addressed whether a pooling order may be effective retroactively in \textit{Farmers Irrigation District v. Schumacher}.\textsuperscript{74} On October 15, 1964, White Feather completed a producing well on a Government Lot, part of which was owned by Farmers Irrigation District. Over two years later, Farmers Irrigation District applied with the Nebraska Oil and Gas Conservation Commission for a pooling order and asked that the order be made effective retroactively to the date of first production.\textsuperscript{75} The commission issued the order as requested.\textsuperscript{76} White Feather brought suit to reverse the Commission’s order, and the case eventually reached the Nebraska Supreme Court.

The Nebraska Supreme Court allowed the pooling order to take effect retroactively to the date of first production.\textsuperscript{77} In so deciding, the court noted that the Nebraska Conservation Act modified the rule of capture in order to protect the correlative rights of those with interests in the common pool.\textsuperscript{78} For Farmers Irrigation District to receive its just

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\begin{itemize}
  \item application, at a location other than that approved by a special order of the Commission authorizing the drilling of such a well is hereby prohibited . . . .
  \item 72. 741 P.2d at 873.
  \item 73. In Roberts v. Funk Exploration, Inc., 764 P.2d 147 (Okla. 1988), the Oklahoma Supreme Court affirmed an order “making the unit effective from [the] date of application.”
  \item 74. 187 Neb. 825, 194 N.W.2d 788 (1972).
  \item 75. 187 Neb. at 826, 194 N.W.2d at 789.
  \item 76. Id.
  \item 77. Id. at 833, 194 N.W.2d at 792. However, retroactive application must not be inequitable.
  \item 78. Id. at 831-32, 194 N.W.2d at 791.
\end{itemize}

Under the common law rule of capture, appellees would have been entitled to all oil produced and appellants only remedy would have been to drill its own
and equitable share, concluded the court, the pooling order must take effect retroactively to the date of first production. The court announced a rule of qualified retroactivity stating that there may be instances in which equity could not justify a retroactive order. In the case at issue, the court found the order to be “fair and equitable.”

The Nebraska Supreme Court again addressed this issue in Ohmart v. Dennis. The Commission had issued an order pooling the interests in a tract of land, and the producing landowner sued to void the order. The trial court made the pooling order effective retroactively to the date of first production.

well. With the adoption of the Oil and Gas Conservation Act, a landowner could no longer so protect his interest. It became necessary to get a drilling permit and the act contemplates that there shall be only one well if that one can adequately pump out the oil in the pool. Here the appellants are entirely dependent for protection on the pooling order allocating to them a share in the production. Several sections of the act consistently stress the protection of correlative rights. They are clearly designed to protect adjoining landowners under whose lands a pool may extend.

Id.
79. Id. at 832, 194 N.W.2d at 791-92. “To permit an adjoining owner to obtain, recover, and receive his just and equitable share, the pooling order may be made retroactive to the time production started . . . .” Id.
80. Id., 194 N.W.2d at 792. “We do not mean to say that this should be done in every instance.” Id.
81. Id.
82. Id. at 832-33, 194 N.W.2d at 792.
In this case, due to the early notice of a claim to pooling rights given appellees by appellants, and to the obvious delaying tactics pursued by appellees, although proceedings before the commission were not commenced as early as they might have been, we are inclined to believe that limiting the pooling order to the date of commencement of such proceedings is not justified and that the order should be made retroactive at least to the date notice of appellants’ claim was given. . . . [W]e find the order to be fair and equitable.

The dissent recognized the right to share in production from the date an application for spacing is filed. While the dissenting judge acknowledged that a pooling order may in fact be retroactive to some point in time, he asserted that it could not be made effective from the date of first production. Instead, the dissenter believed “that the date of application or motion for the establishment of the spacing unit is the time beyond which the pooling may not be retroactive,” and implied that prior to that date, the rule of capture prevails. The dissenter would have allowed Farmers Irrigation District to share in production only from the date an application for spacing was filed, not as far back as the date of first production.

83. 188 Neb. 260, 196 N.W.2d 181 (1972).
84. Id. at 261-62, 196 N.W.2d at 183.
of first production.\textsuperscript{85} The supreme court upheld the trial court "[n]ot
withstanding strong doubts on the equity of retroactivity."\textsuperscript{86} It is im-
portant to note that the court did not question the rule laid down in
\textit{Farmers Irrigation District} but merely expressed doubt about the lower
court's application of the rule to the facts.

In sum, the Supreme Court of Nebraska has held that pooling orders
may, when equitable, be effective retroactively to the date of first
production. Therefore, it is clear that this question is settled in Nebraska.

\textbf{ANALYSIS}

The jurisprudence from the above mentioned states illustrates the
varying policies and interests that must be considered in determining
whether a unit order is effective retroactively. The states addressing the
question have come to different conclusions. The Texas Court of Appeal
has determined that pooling orders may not be retroactive at all.\textsuperscript{87}
Oklahoma has concluded that the United States Constitution requires
that pooling orders be retroactive.\textsuperscript{88} Nebraska has concluded that pooling
orders may be retroactive to the date of first production, but only when
that is equitable.\textsuperscript{89} The question remaining for discussion is whether
Louisiana may or must make unit orders effective retroactively.

As further analysis will show, the adjacent landowner may claim
that retroactivity is compelled to avoid the unconstitutional taking of
his property. On the other hand, the producing landowner could just
as easily argue that the taking of production which he has already
reduced to possession is a taking in itself. Before analyzing these claims
of both landowners, it is important to recall basic Louisiana mineral
concepts.

Prior to the creation of a unit, a producing landowner is free to
produce oil and gas that migrates from beneath the property of his
neighbor without sharing the production with his neighbor.\textsuperscript{90} Upon an
application for unitization, the Commissioner routinely denies adjacent
landowners the right to drill offset wells for the purpose of preventing
waste and to avoid the drilling of unnecessary wells.\textsuperscript{91} During the period
of time between the filing of the application and the issuance of the

\textsuperscript{85} Id. at 265, 196 N.W.2d at 185.
\textsuperscript{86} Id. at 266, 196 N.W.2d at 185. A prior order was vacated because the Secretary
of the Interior "had not determined that such pooling would be in the public interest."
Id. at 264, 196 N.W.2d at 185.
\textsuperscript{87} See supra text accompanying notes 38-50.
\textsuperscript{88} See supra text accompanying notes 51-73.
\textsuperscript{89} See supra text accompanying notes 74-86.
\textsuperscript{90} Desormeaux v. Inexco Oil Co., 298 So. 2d 897 (La. App. 3d Cir.), writ denied,
302 So. 2d 37 (1974).
\textsuperscript{91} See supra note 7.
order, however, the producing landowner is free to drain oil and gas from beneath his neighbor without his neighbor being able to prevent drainage. It is the production during this interim period that adjacent landowners feel entitled to share, but that producers believe cannot be taken from them.

**The Taking Claim of the Adjacent Landowner**

The Louisiana Mineral Code gives a landowner the "exclusive right to explore and develop his property for the production" of oil and gas. An adjacent landowner could argue that denying him the right to drill pending the issuance of a unit order deprives him of a property right. Thus, the landowner could argue that such a deprivation constitutes a taking such that compensation is required.

In order to determine whether such a denial constitutes a taking, one must first determine whether the right to drill constitutes a property right. If the adjacent landowner's right to drill is not a property right, then the denial of that right would not be a taking. If, however, we conclude that the right to drill is a property right, constitutional issues relative to state action in denying the right arise. Louisiana Revised Statute 31:15 provides that "[a] landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and reduce them to possession." Such a provision clearly indicates that...

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94. "'Property' is a word of very broad meaning and when used without qualification, may reasonably be construed to include obligations, rights and other intangibles, as well as physical things." Citizens State Bank of Barstow, Texas v. Vidal, 114 F.2d 380, 382 (10th Cir. 1940). Nowak, Rotunda and Young note:

Intangibles, ... and other nontraditional types of property may be protected by the taking clause of the fifth amendment. The existence of the property right will be determined with reference to state law. Once it has been determined that a property interest exists in an intangible, the Court will inquire whether the holder of the interest had a reasonable investment-backed expectation that the property right would be protected.

95. Both the fifth and fourteenth amendments prohibit the taking of property without due process. The fifth amendment provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Likewise, the fourteenth amendment provides that "No State shall ... deprive any person of life, liberty, or property, without due process of law ...."

State action must not violate these provisions. For this reason, State action which infringes upon the rights of a person must be examined.
the right to explore and develop may be conveyed and transferred and that this right has value and worth. Louisiana Revised Statute 31:697 provides that this right is one exclusive to the landowner. Based upon these articles, a landowner would clearly expect that this right constitutes a property right.

The conclusion that the right to drill is a property right does not compel the further conclusion that the denial of that right pending the unit order is a taking. As the United States Supreme Court has pointed out on numerous occasions, not every restriction of a property right rises to the level of a taking.98 The court, for example, has held that regulatory action restricting the right to use one's property is a taking requiring compensation only if the regulation denies all or substantially all use of the property, results in a substantial reduction of the property's value, or if no valid public purpose exists for that restriction.99 The court in balancing these factors views the aggregate of rights associated with property ownership as a "bundle of rights."100 The destruction of one "strand" in the bundle may not constitute a taking when viewing the property in its entirety.101

The right to explore and develop may constitute a substantial portion of a tract's value. For example, the right to explore and develop on property in a south Louisiana marsh may constitute nearly all of that property's value. In this case, the denial of the right to drill could, under the Supreme Court's test, constitute a taking, for the restriction deprives the owner of a substantial portion of the tract's value. Likewise, the owner of a mineral servitude purchases from the landowner the right to explore and develop. The denial in this case deprives the lessee of all use of his right and therefore might also constitute a taking.

On the other hand, the right to explore and develop may not in some instances constitute a substantial portion of the property's value. The right to explore and develop on property upon which a multi-story building rests may not constitute a substantial portion of the property's value. Nor would the denial of this right prohibit substantial use of the property. In this case, there would probably be no taking.

Whether a land use regulation constitutes a taking depends upon a balance of the above mentioned factors. Because no one factor is ever

97. Id. art. 6.
101. Id.
the same, one may not categorically say whether the denial of the right to explore and develop constitutes a taking. For purposes of this paper, it is enough to conclude that the denial of this right under some circumstances would constitute a taking.

Since adjacent landowners will have a taking claim in at least some cases, it is important to provide a means of avoiding those claims. The Oklahoma Supreme Court, for example, avoids violating the fifth amendment by making pooling orders effective retroactively so that an adjacent landowner who is denied the right to drill is compensated by sharing in production from the time his right to drill is denied.102 Louisiana, like Oklahoma, denies an adjacent landowner the right to drill when an application for unitization is filed. To prevent waste and the drilling of unnecessary wells, the Commissioner of Conservation will not issue a drilling permit while unitization is pending.103 One solution then, is to make all unit orders retroactive to the application for unitization. This solution is not foolproof, however, as further analysis will show.

The Taking Claim of the Producer

Compensating the adjacent landowner for his right to drill by giving unit orders retroactive effect could constitute the taking of oil and gas owned by the producing landowner. Under the Louisiana Mineral Code once a producing landowner reduces oil and gas to his possession, even in the period of time pending the issuance of a unit order, he is vested with ownership of that oil and gas. A producing landowner could argue that he owns the oil and gas reduced to his possession pending the issuance of a unit order and therefore a unit order effective retroactively would constitute a taking of his property.

If Louisiana were to make unit orders effective retroactively, the state would be compensating the landowner who was denied the right to drill by taking from the producing landowner property in which he has vested ownership. In other words, the state would be taking property from one private person and giving it to another private person. The United States Supreme Court, in Thompson v. Consolidated Gas Utilities Corp.,104 reiterated that “the taking of one man's property and giving it to another” is unconstitutional.105 In sum, making the order retroactive to compensate the adjacent landowner is a constitutionally dubious course.

Recommendation

It is clear that under Louisiana’s theory of mineral ownership, Louisiana may not make unit orders effective retroactively. At the same time, one may not categorically say whether the denial of the right to explore and develop constitutes a taking. For purposes of this paper, it is enough to conclude that the denial of this right under some circumstances would constitute a taking.

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Recommendation

It is clear that under Louisiana’s theory of mineral ownership, Louisiana may not make unit orders effective retroactively. At the same
time it appears that Louisiana must make unit orders effective retroactively. This conflict is seemingly unresolvable.

One solution would be to further modify the rule of capture. Louisiana Revised Statute 30:4 provides that "[t]he Commissioner has jurisdiction and authority over all persons and property necessary to enforce effectively the provisions of this Chapter and all other laws relating to the conservation of oil or gas." Having been granted such broad authority, it would be within the Commissioner's power to require all monies from oil or gas produced after an application for unitization is filed to be escrowed pending the issuance of the unit order. Prior to the filing of an application, the rule of capture would prevail and the producing landowner would be free to produce oil and gas that migrates from beneath his neighbor without sharing production with his neighbor. Once an application for unitization was filed, ownership of oil and gas produced after the filing would not be vested in the producing landowner. Proceeds from this production could then be used to compensate adjacent landowners whose right to drill was denied. After the issuance of the unit order, all escrowed proceeds would be distributed such that each tract received its just and equitable share. This approach would avoid the complex problems of retroactivity while compensating those landowners who were prohibited from protecting their property from drainage.

CONCLUSION

One can conclude that denying an adjacent landowner the right to drill constitutes an unconstitutional taking under the fifth amendment. Therefore, the interests of the adjacent landowners must be protected. One state facing a similar problem, Oklahoma, protects such rights by making pooling orders effective retroactively to the date an application for unitization is filed, which is the date on which the adjacent landowner's right to drill was denied. Louisiana, like Oklahoma, denies adjacent landowners the right to drill once an application for unitization is filed. However, retroactivity is not an option in Louisiana. Retroactivity, based on Louisiana's theory of mineral ownership, takes the property of one individual and gives to another. Such action has been interpreted as being unconstitutional.

Louisiana must fashion some alternative procedure for protecting the rights and interests of both the producing landowner and the adjacent


107. Such a solution was used by Commissioner Patrick H. Martin and is currently an issue in pending litigation.

108. See supra text accompanying notes 51-73.

109. See supra note 7.

110. See supra text accompanying notes 104-05.
landowner who is prohibited from protecting his property from drainage. This author concludes that such an alternative is available.

This author suggests that once an application for unitization is filed, the Commissioner of Conservation should condition further production on an agreement by the producing landowner to escrow monies obtained from oil and gas produced after the filing. Prior to the filing, the rule of capture should prevail and the producing landowner would be free to produce oil and gas without sharing production with adjacent landowners.

This solution appears to be an equitable alternative to making unit orders effective retroactively. This solution protects the rights and interests of both the producing landowner and the adjacent landowner who is prohibited from protecting his property from drainage while avoiding the complex issues associated with retroactivity.

Stephen Schilde Williams