Consent Requirements in Compulsory Fieldwide Unitization

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Introduction: The Context of the Consent Requirement

The Rule of Capture has played an important role in the development of American oil and gas law. The rule states that a landowner acquires title to all the oil and gas he can produce from operations on his land, even though part of that oil and gas may have migrated from adjoining lands. This allows a landowner to drain oil and gas from beneath his neighbor's land without liability. The rule therefore provides economic incentive for each landowner to drill and produce as rapidly as possible in order to maximize his portion of the available minerals.

Despite the role that the Rule of Capture has played in the historical development of oil and gas law, modern economic conditions have resulted in reevaluation of the rule. An early justification for the rule was that it provided a needed incentive for exploration and production of oil and gas. Today such incentive is provided by worldwide demand for oil and gas. Additionally, the rule is now seen as having several undesirable effects. It causes economic waste by encouraging the drilling of more wells than are necessary to efficiently and economically drain mineral reservoirs. It causes physical waste of oil and gas by encouraging rapid production. Rapid production may also cause dissipation of a reservoir's natural drive mechanisms which will limit ultimate recovery from the reservoir. Recognition of these undesirable effects of the Rule of Capture has led to the development of several restrictions on its application. These restrictions include well spacing rules, the use of allowables as limits on production and establishment of pooled units. One relatively recent restriction on the Rule of Capture has been the development of compulsory fieldwide unitization.

Fieldwide unitization is intended to temper the effects of the Rule of Capture by preventing the drilling of unnecessary wells, increasing

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1. Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558 (1948); 1 H. Williams & C. Meyers, Oil and Gas Law §§ 204.4 - 204.9 (1984) (also discussing exception for negligent or wasteful loss of recoverable hydrocarbons or negligent injury to the producing formation).
2. 1 H. Williams & C. Meyers, supra note 1, § 204.4.
3. See id. at §§ 204.4 - 204.7.
4. R. Meyers, Pooling and Unitization § 1.03 (2d ed. 1967).
ultimate recovery of oil and gas, and protecting correlative rights of the mineral estate owners. This conservation is effected by the combination or pooling of two or more separate tracts of land having different ownership in order to operate an entire reservoir as though all the tracts were of common ownership. This unitization creates a joint interest in developing the unit as efficiently and economically as possible for maximum recovery.

One use of fieldwide unitization is to facilitate enhanced recovery operations. Secondary recovery includes utilizing energy sources extrinsic to the reservoir to increase production, such as by water or gas injection. Tertiary recovery generally involves enhancing the characteristics of the reservoir by the injection of heat or chemicals which improve the migration of oil and gas. In order for such injection operations to operate successfully, it is necessary to force the oil and gas towards wells where it can be efficiently produced. This generally requires the crossing of lease lines, and unitization is needed to facilitate this joint cooperation between leaseholds.

There are many benefits to fieldwide unitization and secondary recovery operations. All parties benefit from enhanced total recovery. Extraction by primary production techniques generally recovers between ten and thirty percent of the total oil and gas in place. In contrast, secondary recovery methods will usually increase primary recovery by thirty to sixty percent and sometimes by over one-hundred percent. The royalty owner benefits by being able to agree in advance contrac-

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5. Id. at § 8.01; Technically, the terms “pooling” and “unitization” should be distinguished. “Pooling” is generally defined as the “bringing together of small tracts sufficient for the granting of a well permit under applicable spacing rules.” “Unitization” is “the joint operation of all or some part of a producing reservoir.” H. Williams & C. Meyers, supra note 1, §§ 901, 913.1.


7. Id.


9. Id.; R. Meyers, supra note 4, §§ 2.02 -2.03.


11. Barfield, supra note 6, at 41; Dutton, A Summary of Unitization In Various States, Landman, June, 1985, at 43.


tually as to what constitutes his fair share of production, and that share
generally cannot be altered by unit changes or the Rule of Capture. Additionally, the royalty owner's income is stabilized, prolonged, and protected by participation in all wells rather than reliance upon one well. This stabilization of production has had the further benefit to all parties of making a well a bankable asset and commodity. The unit operator and lessees benefit from lower operating costs resulting from the operation of the whole field by one party, the freedom to locate and produce wells selectively, and reduced surface acreage requirements. Federal and state governments benefit from increased tax revenues and increased royalty from government lands. Society is the ultimate beneficiary of this conservation and increased economic efficiency.

Although fieldwide unitization offers many apparent benefits, this method of production has been criticized on several grounds. One interesting criticism is aimed at one of fieldwide unitization's underlying goals of preventing physical waste. This criticism states that this goal, as achieved by the slower production resulting from fieldwide unitization, ignores the possibility that the increased recovery of oil and gas at some future date may not be worth, to producers or to society, the required sacrifice of current consumption. Another criticism is aimed at the apparent disregard for an individual owner's interests in favor of a societal policy of conservation. For example, an individual may have interests such as tax considerations for not desiring long-run benefits as opposed to immediate monetary gain from the oil and gas under his land, but such interests are overridden in favor of conservation. As such, fieldwide unitization has been criticized as socialistic. Criticisms are also aimed at problems involved in administration by major operators and apportionment under the control of government officials.

Despite these and other criticisms, several states have enacted compulsory fieldwide unitization statutes. The need for statutory authorization to compel fieldwide unitization was recognized after several cases held that neither courts nor administrative agencies had the authority to compel such conservation without legislative directive. One such case

15. Barfield, supra note 6, at 41.
16. R. Meyers, supra note 4, § 1.01(3).
17. McAnelly, supra note 14, at 7, 16; Barfield, supra note 6, at 41.
20. Comment, supra note 12, at 472.
21. Id.
is *Western Gulf Oil Co. v. Superior Oil Co.* In this case the plaintiffs had attempted to unitize the Paloma Oil Field in order to enhance ultimate recovery. The plaintiffs were operating gas cycling operations over part of the reservoir, but their efforts were being frustrated by the defendant’s reliance upon the Rule of Capture. The defendants were producing as rapidly as possible and refusing to reinject gas, which reduced reservoir pressure, caused retrograde condensation, and drained oil and gas from the plaintiff’s operations. The court held that a determination of whether public policy required compulsory fieldwide unitization was a question for the legislature and thus denied plaintiff’s request for relief.

The resulting statutes authorized the “compulsion” of fieldwide unitization. Voluntary fieldwide unitization occurs when all lessees agree to operate the reservoir jointly as a unit. In theory voluntary unitization would be easily obtained as all parties would understand the benefits to be derived from such operations. But in practice there are many barriers to voluntary fieldwide unitization. A minority of one or more persons can prevent the entire voluntary operation by refusing to consent thereto. This power to block a repressure program by refusing to participate can be parlayed into the power to insist upon unjust enrichment. Compulsion is needed to prevent such holdouts. While “compulsion” sounds like a bold exercise of sovereign authority, such compulsion is not ordered until a specified percentage of parties to be affected by the unitization have consented thereto. This consent requirement generally involves a majority interest, and thus compulsory fieldwide unitization is not as authoritarian as its name would imply.

Although most of these statutes have been in effect for several years, their use has resulted in very little litigation. This lack of litigation has been attributed to several factors. The statutes may all have benefitted from unusually complete draftsmanship. Alternatively, the benefits of the statutes may be so attractive that interested parties have little reason to object. Although these views and others may have merit, the credit for the lack of litigation may lie more correctly with the oil industry’s statesmanlike practices. For whatever reason, there is a lack of litigation

24. See infra text accompanying notes 141-66.
on the subject and the caselaw thus offers little guidance in interpreting the statutes.

All compulsory fieldwide unitization statutes include a set of prerequisites that the administrative agency or regulatory body must find before a compulsory unit can be ordered. The following requirements from various states are typical, although not all are required under all statutes.\(^{28}\)

1. The administrative agency must find that unit operations are reasonably necessary for one or more of the purposes for which unitization may be ordered.\(^ {29}\) In this regard, Mississippi’s statute requires a finding that:

   Unit operation of the field or of any pool or pools, or of any portion or portions or combinations thereof within the field, is reasonably necessary in order to effectively carry on secondary recovery, pressure maintenance, reppressuring operations, cycling operations, water flooding operations, or any combination thereof, or any other form of joint effort calculated to substantially increase the ultimate recovery of oil or gas or both. . . . \(^ {30}\)

2. There must be a feasible method of unit operation. The Mississippi statute requires that “[o]ne or more method of unitized operation as applied to such common source of supply or portion thereof is feasible. . . .” \(^ {31}\)

3. The cost of unitization must be exceeded by the value of the extra production to be obtained.\(^ {32}\) Wyoming’s statute clearly states this in a requirement that the “value of the estimated additional recovery of oil or gas will exceed the estimated additional costs incident to conducting unit operations.” \(^ {33}\)

4. There must be a unitization plan or contract. Louisiana’s statute requires “a written contract or contracts covering the terms and operation of the unitization signed and executed . . . and filed with the commissioner. . . .” \(^ {34}\)

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\(^ {28}\) Granville Dutton has summarized the main provisions of all states’ unitization statutes in a table format in his article; Dutton, supra note 11, at 44-45. See also Eckman, supra note 27, at 384-85.

\(^ {29}\) 6 H. Williams & C. Meyers, supra note 1, § 913.4.


\(^ {31}\) Miss. Code Ann. § 53-3-103(b) (Supp. 1985); 6 H. Williams & C. Meyers, supra note 1, § 913.4.

\(^ {32}\) 6 H. Williams & C. Meyers, supra note 1, § 913.4; McAnelly, supra note 14, at 10.


\(^ {34}\) La. R.S. 30:5(C) (1969).
5. There must be a finding that the proposed operation will be fair and equitable, as illustrated by Wyoming’s statute: “The oil and gas allocated to each separately owned tract within the unit area under the proposed plan of unitization represents, so far as can be practically determined, each such tract’s just and equitable share of the oil or gas in the unit area.”

6. The correlative rights of the affected interests must be protected. Protection of a party’s correlative rights means that the party must be given a fair opportunity to participate in the operation and that such participation will ensure that party a fair share of minerals from the reservoir.

7. There may be a “drilled out” requirement. Mississippi’s statute requires:

The operators of such unit shall have drilled a sufficient number of wells to a sufficient depth and at such locations as may be necessary for the board to approve the boundaries of the unit and determine that the field, pool or pools have been reasonably developed according to a spacing pattern approved by the board.

8. A certain percentage of the working interest ownership and the royalty interest ownership in a field must have voluntarily agreed to the unitization plan. This percentage is generally between sixty and eighty percent and if the administrative agency finds that the requisite percentage has voluntarily consented the agency may “force” unitize the remaining interests. The Wyoming statute offers a typical example of this requirement:

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

35. Winfield, New Legislation Relating to the Conservation Department, 8 Inst. on Min. L. 9, 14 (1961); 6 H. Williams & C. Meyers, supra note 1, § 913.4.
41. Id. at 1213.
any, have been signed, or in writing approved or ratified, by those persons who will be required to pay at least eighty percent (80%) of the cost of unit operations.\textsuperscript{42}

This consent requirement is the topic of this paper. The separate elements of the requirement will be analyzed with an eye towards identifying problem areas, both for purposes of preventing said problems and perhaps capitalizing on them.

\textit{Why Is Consent Needed?}

Although most compulsory fieldwide unitization statutes include a provision requiring the consent of a certain percentage of the affected parties, such a requirement does not seem necessary for the statute's validity. This issue was addressed in the Oklahoma case, \textit{Palmer Oil Corp. v. Phillips Petroleum Co.}\textsuperscript{43} Under the Oklahoma compulsory fieldwide unitization statute in effect at that time,\textsuperscript{44} consent of only fifty percent of the lessees was required. The royalty owners were not required or entitled to consent. Additionally, fifteen percent of the lessees could veto the operation. The royalty owners challenged this statute on two grounds. They first alleged that the consent requirement constituted an unauthorized delegation of legislative power because the effect of the legislation was made dependent upon the will of the parties affected by that legislation. The court rejected this challenge because only the Corporation Commission has the authority to create a unit. The consent requirement was not a legislatively sanctioned exercise of power to create a unit; it was merely a condition imposed by the legislature upon the Corporation Commission.\textsuperscript{45} This result ensured the validity of statutes with consent requirements.

The royalty owners also challenged the consent requirement on the grounds that they were not given the right to consent under the statute. The royalty owners claimed that this deprived them of the same powers of petition and protest that were granted to the lessees. The court dismissed this argument by stating that no consent was required to make the statute valid:

\begin{quote}
The question is not the wisdom of granting the right of protest to the lessees while withholding it from the royalty owners but whether it was within the power of the Legislature so to do. It
\end{quote}

\begin{footnotes}
43. 204 Okla. 543, 231 P.2d 997 (1951), dismissed \textit{sub nom.}, Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390, 72 S. Ct. 842 (1952) [hereinafter cited as \textit{Palmer}].
\end{footnotes}
was within the power of the Legislature to do so because being within its police power to enact the law without the consent of either lessees or royalty owners it was optional with it to require the consent of either. Where privilege is granted to some in such situation the Constitution is satisfied if all similarly situated are treated alike.46

Thus the legislature had acted within its powers in providing for the consent provision. The court held that granting consent rights to the lessees only was not an arbitrary discrimination because the lessees possessed the expertise to determine if unitization was desirable. Indeed, the lessors had leased their right to drill and produce to the lessees in reliance upon this expertise.47

This result was unchanged when this case was appealed to the United States Supreme Court under the name Palmer Oil Corp. v. Amerada Petroleum Corp.48 It was there dismissed for lack of a federal question. Although it had been judicially confirmed that consent was not needed for compulsory fieldwide unitization statutes to be valid,49 Oklahoma amended its law in 1951 to eliminate the fifteen percent veto provision and instituted a requirement that sixty-three percent of royalty owners and sixty-three percent of lessees must consent.50

Besides being a statutory requirement, consent may be required under the terms of individual oil and gas leases. Standard leases do not grant the lessee the authority to enter into operations of the magnitude of fieldwide unitization.51 Thus consent must be obtained from the royalty interest owner to satisfy the lease terms. This was recognized in Ramsey v. Carter Oil Co.52 The operator in that case planned to institute secondary recovery operations without the lessor’s consent. The court enjoined the lessee from converting a producing well into an input well

46. Id. at 549, 231 P.2d at 1004.
47. Id. at 550, 231 P.2d at 1005.
49. Accordingly, some statutes do not include a consent requirement. For example, La. R.S. 30:5(B) (1975).
51. Barfield, supra note 6, at 47; Clark, supra note 8, at 125. An exception is illustrated by Amoco Prod. Co. v. Jacobs, 746 F.2d 1394 (10th Cir. 1984). In this case, the lessors refused to consent to the inclusion of their lease in the Bravo Dome Carbon Dioxide Gas Unit. Amoco relied upon the lease pooling or unitization clause (reproduced in the appendix to the case, 746 F.2d at 1406) and included the lessor’s 2,160 acres in the unit. The unit contained 1,035,000 acres, making it the largest unitization ever attempted. The court held that the lease clause provided sufficient lessor consent to the unitization.
52. 172 F.2d 622 (7th Cir. 1949), cert. denied, 337 U.S. 958 (1949).
after a showing was made that such injection would cause oil and gas to migrate from the lessor's lands.\footnote{Id., but cf., Caster Oil Co. v. Dees, 340 Ill. App. 449, 92 N.E.2d 519 (Ill. App. Ct. 1950), in which an Illinois state court allowed an operator to convert a well into a gas input well as a means of secondary recovery without the consent of the lessor. No lessor consent was needed because the operator had a duty under the implied obligations of the standard form lease to produce as a prudent, competent and experienced operator for the best interest of both lessor and lessee.}

The consent requirements may be viewed as desirable features of these statutes. Landowners appreciate the consent requirement because it gives them an input and allows them to negotiate an agreement as to their share of future unit production which generally cannot be changed except with their consent. Lessees may consider the requirement desirable because it precludes minority interest lessees from blocking unitization or demanding major concessions as the price of consent.\footnote{Winfiele, supra note 35, at 17.}

Consent under the statutes can be expressed by the consenting parties signing Unitization Agreements or Unit Operating Agreements.\footnote{Doggett, Practical Legal Problems Encountered in the Formation, Operation and Dissolution of Fieldwide Oil and Gas Units, 16 Okla. L. Rev. 1, 23 (1963); McAnelly, supra note 14, at 12.} Alternatively, the signing of lease amendments will generally suffice.\footnote{McAnelly, supra note 14, at 12. But see Amoco Prod. Co. v. Jacobs, 746 F.2d 1394 (10th Cir. 1984), discussed supra note 51.}

**Determination of Consent by Area, Production, and Cost**

The compulsory fieldwide unitization statute will provide a general method for calculating consent, both as to who must consent and how much their consent will be weighted in computing the total percentage of consent needed. This calculation is usually done under an area, production, or cost parameter.\footnote{Eckman, supra note 27, at 359; Dutton, supra note 11, at 49.} For example, under a production parameter, those parties who are entitled to a share of production must be included in the group of persons from whom consent must be obtained. The weight that an individual party's vote carries depends upon how much of a production share he is entitled to receive. While the statute will generally provide the basic parameter to be used, the specifics of the application of that parameter are provided for in the unitization agreement. The parties who are interested in forming the unit will draw up the unitization agreement. This contract defines the rights of the parties and the terms of the unit operation.\footnote{Doggett, supra note 55, at 22.} Additionally, in applying the statute's consent parameter the unitization agreement can be used to affect who must consent and the weight of each party's
consent. This can be demonstrated by way of a simple hypothetical. Assume that certain parties wish to unitize a 200 acre reservoir in a state having a seventy-five percent consent requirement. The state's compulsory unitization statute provides that consent is to be calculated on the basis of surface acreage contributed to the unit. One landowner owns eighty acres in the proposed unit and refuses to consent, effectively blocking the 200 acre unit with a non-consenting forty percent interest. Assuming that the state administrative agency would approve a smaller unit and that a smaller unit would still be functional, the parties may desire to alter their unitization agreement. If the unit boundary can be adjusted to eliminate part of the nonconsenting owner's lands, sufficient consenting surface acreage owners may exist. For example, if the parties could redraw the unit boundary so as to eliminate forty acres of the non-consenting party's land while only reducing the unit to 160 total acres, the non-consenting landowner would only have a twenty-five percent voting interest and could no longer unilaterally obstruct the unit. Such a redrawing of the unit boundary could be used to eliminate a non-consenting party. The same manipulation is available under the production or cost methods, but those parameters are more complex so manipulation can be more subtle. There are many restraints upon abuse of these parameters, such as the requirement of approval of the unit by the administrative agency, and the good faith duty owed by the lessee to unitize for the mutual benefit of both lessor and lessee, so the opportunity for manipulation will generally be limited.

The area, production, and cost parameters each involve several issues worthy of discussion.

**Area Parameter**

The parties who need to consent, and the weight that their consent carries depends upon the amount of surface acreage that they contribute to the unit area. The Mississippi statute follows this scheme by computing consent percentages "on the basis of and in proportion to the surface acreage content of the unit area." When this method is utilized, the unitization agreement has little effect in determining who consents and how much their consent counts. The only variable that can be adjusted is the boundary of the entire unit. This is a difficult factor to adjust because unit boundaries are usually intended to conform to the geological extent of the underlying reservoir.

The area formula has the benefit of simplicity and allows for a relatively easy determination of whether the requisite consent has been

obtained. The main problem with an area formula is that the consent voting is not weighted on an economic interest basis. Since the voting is not dependent upon the parties' economic stake in the unit, it may be possible for a large landowner to have a strong bargaining position even though his surface acreage may lie over a less productive part of the reservoir. This potential inequity may be the reason that the area formula is used in only a minority of the statutes.61

Production Parameter

The parties from whom consent must be obtained and the weight of their votes is dependent upon the right of each party to receive production or proceeds from production. The Louisiana statute uses this parameter in computing both lessee and royalty owner consent.62

The benefit of this parameter is that it allows voting on the basis of economic shares and thus protects parties' interests.63 But there are several attendant costs. The parties' rights to future production must be ascertained in order to determine their voting interest. This is generally done by means of a formula containing both geological and engineering elements. These technical elements, together with the fact that this formula is negotiable, ensure that the final formula will be complex. This complexity is demonstrated by the following formula utilized in Wyoming's Harzog Draw Field:

<table>
<thead>
<tr>
<th>Parameter</th>
<th>Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>Usable wells</td>
<td>5.00 percent</td>
</tr>
<tr>
<td>First Six Months Production</td>
<td>24.25 percent</td>
</tr>
<tr>
<td>Peak Rate</td>
<td>2.50 percent</td>
</tr>
<tr>
<td>Wellbore Net Feet</td>
<td>7.50 percent</td>
</tr>
<tr>
<td>Last Three Months Production</td>
<td>1.50 percent</td>
</tr>
<tr>
<td>Last Six Months Production</td>
<td>1.75 percent</td>
</tr>
<tr>
<td>Remaining Primary</td>
<td>14.50 percent</td>
</tr>
<tr>
<td>Ultimate Primary</td>
<td>12.25 percent</td>
</tr>
<tr>
<td>GLO (General Land Office)</td>
<td></td>
</tr>
<tr>
<td>Developed Porosity Acre Feet</td>
<td>5.75 percent</td>
</tr>
<tr>
<td>GLO Porosity Acre Feet</td>
<td>12.25 percent64</td>
</tr>
</tbody>
</table>

Negotiation of these complex formulae may allow larger interests or parties with expertise in these areas to adjust factors in their favor. With or without such manipulations, the parties' economic interests under the formula cannot be expected to be exact due to the imperfect in-

62. Id. at 359; La. R.S. 30:5(C) (1964).
63. Dutton, supra note 11, at 47.
formation, such as geological data, used to calculate such interests. Despite these technical drawbacks, the use of production formulae is a better representative of economic interests than the area formulae.

**Cost Parameter**

Under the cost parameter method, consent rights and vote weight depends upon the share of unit expense that the party will be obligated to bear under the proposed unitization agreements.6 These formulae are only applicable to working interest owner consent provisions, and are generally combined with provisions providing for computation of royalty consent under a production parameter.6 Oklahoma and Wyoming both utilize this method.67

This parameter is roughly equivalent to the production parameter in regards to costs and benefits. Beneficially, the parameter protects economic interests by providing for economically based voting. But allocation of costs between the parties will generally be determined under a complex formula like the previously discussed production formula. This complexity problem is not as much of a concern in this instance because only lessees are involved and all can be expected to possess some measure of expertise.

**Treatment of Royalties**

The treatment of royalty interests causes several potential problems under the statutes. One such problem involves the weighing of royalty interest ownership to provide proportionate voting between royalty owners. For example, if two landowners each contribute their 100 acre tracts to a unit, but one landowner has a standard one-eighth royalty and the other has a one-fourth royalty, a potential problem exists in allocating voting rights between these parties. One author has criticized the Wyoming statute for failing to deal adequately with this issue.68 Williams and Meyers give four possible solutions to this problem.69

Under the first solution, royalty above the standard one-eighth royalty interest could be deprived of any vote.70 A strict reading of the Oklahoma statute which requires consent "by owners of record of not less than sixty three percent (63%) . . . of the normal one-eighth (1/8) royalty interest"71 could produce this result.

65. Eckman, supra note 27, at 359.
66. Id. at 384-85; Dutton, supra note 11, at 47.
69. 6 H. Williams & C. Meyers, supra note 1, § 913.5.
70. Id. at § 913.5.
A second possible solution is to provide for a one-man-one-vote rule, which would give owners of royalty above or below the standard one-eighth royalty the same voting rights as the owner of a one-eighth royalty interest. Williams and Meyers reject this solution because such a plan would allow the owner of a royalty to subdivide his interest into as many parts as he needed to defeat or approve the unit.\(^7\)

A third solution was a compromise between the first two. Royalty over one-eighth would not be entitled to vote except as a normal one-eighth interest, and royalty below one-eighth would only receive a partial vote. Williams and Meyers demonstrate this solution with a hypothetical:

A, B, and C each own 1,000 acres of land in fee, the total of which makes up the entire unit area. A leased for 1/4 royalty; B for the standard 1/8; and C for the standard 1/8, but C conveyed 1/2 of his royalty to D. A has one vote; B has one vote; and C and D each have 1/2 of the vote.\(^7\)

This solution raises an additional issue in regards to the fate of A’s unvoted excess one-eighth share. The unvoted interest may be absorbed into the working interest ownership which would thus be standardized as a net seven-eighths interest. Whether such a transfer of voting interest from royalty owner to working interest owner would give rise to a fiduciary duty upon the working interest owner to vote the transferred portion of the interest in accordance with the best interests of the royalty interest owner presents an interesting dilemma.\(^7\)

A similar solution is utilized by the Wyoming statute in its treatment of overriding royalty interests, but as shall be discussed below there are valid reasons for different treatment of such interests.\(^7\)

The fourth and favored solution provided that voting should be weighted in accordance with economic interest.\(^7\) Under this solution, the owner of a larger royalty has a greater economic stake in the unit and should be entitled to a larger vote share. Such a plan could be instituted by means of a “royalty-acre” formula. A royalty-acre is the normal one-eighth royalty on one acre. Under such a formula, a one fourth royalty interest owner of a 100 acre tract would have 200 royalty acres.\(^7\)

This voting based on economic interest seems to be what was intended by the Wyoming statute, and the previously mentioned criticism

\(^7\) Id. at § 913.5.
is unfounded. This intent is ascertained from the wording of the statute, which bases voting shares on rights to production without any limitation on the quantum of royalty interests. The statute limits overriding royalty vote for another purpose, but no such limitation burdens other royalty interests. This economic interest based voting is the fairest method of allocating voting shares, and it will theoretically prevent the formation of units which would not economically benefit the participants.

Another problem in the treatment of royalty interests concerns the voting rights of owners of royalty independent of any lease. Such royalty is sometimes called royalty per se. Most compulsory unitization statutes do not distinguish this type of royalty, and the problem is in ascertaining if such interest gets a vote, and if so, with what interests that vote is categorized.

It is not desirable to have parties who have an interest in the unit excluded from the consent voting, even though such discrimination may be allowed. In order to allow owners of royalty per se to have an input in the formation of the unit, their interests should be included with other royalty owners. The wording of the statutes generally refers to “royalty owners” or “royalty and overriding royalty interests which are free of costs,” and such descriptions are broad enough to include royalty per se owners. By creating a voting category for royalty owners, the statutes are generally drawing a distinction between cost-free and cost-bearing interests. Under such a distinction the royalty per se owner is properly included with other cost-free interests who will likely share similar concerns in regards to the unit plan.

The Oklahoma statute may not include language broad enough to allow royalty per se to vote with other royalty interests. The statute requires consent “by lessees of record of not less than sixty three percent (63%) of the unit area affected thereby and by owners of record of not less than sixty three percent (63%) (exclusive of royalty interests owned by lessees or by subsidiaries of any lessee) of the normal one-eighth (1/8) royalty interest. . . .” The “normal” leasehold royalty of one-eighth will be owned by the lessor. A strict construction of this statute would result in the royalty per se owner not being entitled to vote because such interest does not fit into either voting category. The

79. Id. at 446; Wyo. Stat. § 30-5-110(f) (1981).
81. See supra text accompanying notes 43-50; Palmer, 204 Okla. 543, 231 P.2d 997 (1951).
82. La. R.S. 30:5(C) (1964).
inclusion of the parenthetical language excluding interests connected with the lessee indicates that a broader reading may have been intended, but strong arguments can be made against voting rights for a royalty per se owner under the statute's language.

Mississippi's statute imposes a similar restriction on royalty interests. The statute requires consent of eighty-five percent of the royalty owners "exclusive of royalty interests owned by lessees or by subsidiaries or successors in title of any lessee." This provision is designed to prevent royalty owners whose interests are sympathetic to the lessees and working interest owners from voting in the class of cost-free interest. This provision deals with a valid concern, but as will be discussed below, there may be fairer ways to treat such interests rather than depriving them of any consent voting rights.

The most troublesome royalty problem concerns treatment of overriding royalty interests. Overriding royalties cause problems because they are difficult to classify into a consent category representing owners of interests with similar concerns for the unit. Overriding royalties are generally created by a working interest owner, often as the result of a sublease in which an original lessee subleases to the working interest owner while reserving an overriding royalty. This transaction is often the result of a mutually profitable business arrangement, and the sublessor is likely to be sympathetic to the desires of the working interest owner. But the interests of the original lessee and the sublessee may also be considered as divergent. The sublessor now has a cost-free interest limited to one tract. The sublessee is a cost-bearing party whose interests may extend to several tracts within the unit. These differences can cause conflicts between the interests of the parties. For example, the sublessee may be willing to accept a unitization plan which is unfavorable to the sublessor's tract but which will benefit the sublessee elsewhere in the unit. Recognition (or non-recognition) of this difficulty in ascertaining where the overriding royalty interest owner's concerns actually lie has resulted in different treatment of overriding royalties under different statutes.

One possible method of treating this royalty is to withhold voting rights from overriding royalty owners. This could be rationalized on the ground that the vote should be exercised by the lessee or sublessee who created the interest. But creating such a representational duty ignores the divergence of interest between cost-free and cost-bearing parties.

86. See infra text accompanying note 95.
88. Gray & Swan, supra note 78, at 445.
A second solution is to put the cost-free overriding royalty interest into the cost-free royalty interest classification for consent purposes. The problem with this is that it may allow a lessee to dilute the lessor’s vote. A law review article has stated:

There was a reasonable basis for the concern on this point. For financing purposes, very large cost-free interests may be carved out of the working interest on a tract, such as production payment or overriding royalty. The net result is to produce a cost-free interest, the owner of which probably will be sympathetic with the lessee or working interest owner. The interest might well be of sufficient size to outweigh the vote of the lessor holding the basic 1/8th royalty interest in the tract. Conceivably, such large cost-free interests could be carved out by designing lessees for the purpose of achieving approval by the owners of the specified percentage of cost free interests.9

Classifying the override with the working interest owners for consent purposes may not adequately protect the interests of the overriding royalty interest owner. When the interests of the cost-free override are divergent from the interests of the working interest owners, the relatively minor interest of the overriding royalty will likely be railroaded by the much larger working interest ownership. A recent amendment to Louisiana’s statute has classified overriding royalty interest owners together with working interest owners.90 This amendment was made in response to an Order issued by the Louisiana Commissioner of Conservation which focused on the distinction between cost-free and cost-bearing interests and classified the overriding royalty interest owners in a consent category with other “royalty owners.”91 The Order of the Commissioner conformed to the wording of the statute before its amendment, but it is submitted that neither the old nor the new versions of the statute sufficiently and fairly deal with this issue.92

More desirable methods of handling overriding royalty interests involve placing limitations on the voting rights of the interest so that the interest cannot be manipulated to unfairly affect consent. The Mississippi statute places the overriding royalty vote in with the “royalty owners,” but the vote is “exclusive of royalty interests owned by lessees or by subsidiaries or successors in title of any lessee.”93 Whether a sublessor is a “successor” in title may turn on whether the sublease “reserved”

89. Id. at 445.
92. See infra text accompanying notes 93-95.
or "granted" an override to the sublessor. If the override is reserved, the sublessor can vote with the cost-free royalty interest owners. This allows the overriding royalty interest owner to vote with presumably conforming interests, and also prevents dilution of royalty owner consent by a sublessee. The only remaining concern is whether the sublessor is so sympathetic with the sublessee that he will blindly vote in accordance with that interest.

A similar limitation is implemented by the Wyoming statute. The statute provides that "to the extent that overriding royalty interests are in excess of a total of twelve and one-half percent (12 1/2%) of the production from any tract, such excess interests shall not be considered in determining the percentage of approval or ratification by such cost-free interests." This provision provides that overriding royalty interests vote with cost-free royalty owners and it prevents dilution of the cost-free voting by the sublessee by putting a twelve and one-half percent limit on the quantum of overriding royalty vote. The problem with this provision is that it ignores the possibility of multiple successive subleases which create several overriding royalties in several parties. These overriding royalty interest owners would apparently vote by dividing the maximum twelve and one-half percent voting interest among themselves. Thus they are deprived of a voting interest in proportion to their economic interest on the basis of the assumption that they would vote sympathetically with the sublessee in all cases. Although this assumption may not always be accurate, especially when one sublessor in a chain of subleases is not in privity with the ultimate sublessee, the statute is a fair compromise. The overriding royalty interest owners get some voting rights, and dilution of cost-free voting by the sublessee is prevented.

The limitations imposed by the Mississippi and Wyoming statutes seem to be fair compromise treatment of overriding royalty interests. An even fairer approach may be the creation of a third category of consent interests comprised solely of owners of overriding royalty interests. This category may be justified due to the considerable difficulties faced in fitting such an interest into preexisting royalty or working interest categories. But generally, overriding royalties represent a relatively minor economic interest in a given unit, and thus may not warrant separate treatment of this sort. If a third category is created, it may be desirable to have a lower consent percentage requirement in order to prevent these relatively minor interests from unfairly blocking an entire unit program.

95. Gray & Swan, supra note 78, at 445.
Title Disputes, Unleased Lands, Encumbrances, and Large Landowners

When there is dispute over title to a tract included in a unit, an issue arises in regards to consent voting for that tract. The administrative agency does not have authority to adjudicate title disputes, so it cannot proclaim one party the "owner" and accept his vote. Three alternative treatments are worthy of discussion.

First, the disputed acreage could be excluded from consent consideration. While a consent provision is not required to make a statute constitutional, the granting of voting rights to some landowners while depriving other landowners of similar voting rights because their title is in dispute may violate Equal Protection rights. Although such a classification may not be arbitrary or capricious and thus possibly constitutional, this solution seems inherently weak.

A second solution may be for the administrative agency to determine who is likely to prevail in the title dispute and then accept that party's vote. The obvious problem with this solution is that the agency determination may be wrong. There may be serious problems if the unit is approved and instituted on the basis of this incorrect voting and the true owners later object to the unit. Unless such a determination can be made with a high degree of certainty, it is doubtful that an administrative agency would approve a unit with such a risk factor.

The only reasonable solution seems to be to require that the effects of the dispute be neutralized. The parties proposing the unit should set this as their goal regardless of how they expect the administrative agency to deal with the problem. Neutralizing the interest can be accomplished in two ways. First, the requisite consent can hopefully be obtained without any need for the disputed tract's vote. If the consent of the disputed tract is necessary in order to obtain the requisite consent percentage, the parties proposing the unit may wish to obtain consent from all parties contesting the title. In this way, the consent will exist regardless of the judicial outcome of the dispute. These cautious approaches are warranted from the standpoint of both the administrative agency and the parties petitioning for the unit formation in order to avoid needless expenditure on a unit proposal which may ultimately fail due to title disputes.

The voting rights of unleased lands included within the proposed unit area are generally covered by the statutes. Theoretically, these

97. Id.
98. See Palmer, 204 Okla. at 549-50, 231 P.2d at 1004-05 (discussing the equal protection issue in the context of the consent requirement), as discussed in text accompanying supra notes 45-47.
landowners, by not having leased their lands, have retained both a working interest and a royalty interest and thus should be entitled to vote in both categories of consent. But the compulsory unitization statutes generally create voting categories on the basis of a distinction between cost-free and cost-bearing interests. A consenting unleased landowner would bear his share of costs, and to allow him to vote in the cost-free interests with the royalty owners will dilute the voting rights of the cost-free interests.99 Most statutes recognize this problem and expressly provide for unleased land voting. For example, Louisiana’s statute provides for voting in a category of “owners.”100 “Owners” are elsewhere defined to include “the person who has the right to drill into and to produce from a pool and to appropriate the production either for himself or for others,”101 and an unleased landowner clearly retains that right. Similarly, Oklahoma’s statutory voting category of “lessees”102 is defined to include “owners of unleased lands or mineral rights having the right to develop the same for oil and gas.”103 This limitation on the voting rights of unleased landowners can be easily defeated by means of a lease to an affiliate.104

Another concern regards voting of encumbered lands. Generally the record owner is entitled to vote for or against the unit plan.105 Wyoming has a fair treatment of such interests because the owners of encumbrances are given notice of the proceeding and an opportunity to appear and assert any rights that they may claim.106 The decision as to which party should be given the right to vote “should be determined on the basis of who, under general property and contract law, holds the incidents of ownership of the interest involved.”107

A different problem may exist where one person may own a large enough percentage of working interest or royalty interest to satisfy the statutory consent requirement by himself.108 “Some statutes deal directly with the problem and require that at least one other working or royalty interest owner agree to unitization; it is conceivable that such a provision

100. La. R.S. 30:5(C) (1964).
105. 6 H. Williams & C. Meyers, supra note 1, § 913.5.
106. Gray & Swan, supra note 78, at 446.
107. Id.
108. Custy & Knowlton, Compulsory Field-Wide Unitization Comes to Mississippi, 36 Miss. L.J. 123, 127 (1965); 6 Williams & C. Meyers, supra note 1, § 913.5.
might be written into a statute which lacked it if a court was presented with a difficult problem."109

Timeliness of Consent

There are two possible deadlines for obtaining the percentage of consent required by the statutes; contractual and statutory. The contractual deadline is imposed by the parties themselves in the unitization agreement. This deadline is the date on which the unitization agreement will expire if the requisite consent has not been obtained.110 There is no requirement that the parties proposing the operation continue their offer of participation for an indefinite period of time111 and thus these deadlines may be earlier than statutory deadlines.

Statutory deadlines are divided into two basic groups.112 Some statutes require that the requisite consent be obtained before the administrative agency hearing. Louisiana follows this scheme,113 which allows the administrative agency to approve or disapprove the unit plan solely on the basis of information presented at the original hearing.

The second basic statutory deadline scheme requires that consent be obtained within a specified time after the administrative agency hearing, generally within six or twelve months.114 Under this scheme, the agency may then schedule "supplemental" hearings for the purpose of ascertaining if the requisite consent has been obtained. Both Oklahoma and Wyoming utilize this method, and both provide that the unit order shall be revoked by the administrative agency if the requisite consent is not obtained within six months of the date of the order approving the unit.115 The Wyoming statute allows further extensions upon a showing of "good cause,"116 but the Oklahoma deadline is absolute.117 Although the administrative agency has approved the unit plan prior to obtaining the requisite consent, the order to unitize is not effective until the plan is ratified by the necessary consent.118 This system may make it easier for the parties proposing the unit to obtain the needed consent. The administrative agency generally must find that the unit order is "fair"

110. Barfield, supra note 6, at 51.
112. Eckman, supra note 27, at 384-85 nn.2 & 10; Dutton, supra note 11, at 44.
113. La. R.S. 30:5(C) (1964); McAnelly, supra note 14, at 12.
114. Eckman, supra note 27, at 384-85 nn.2, 18 & 27; Dutton, supra note 11, at 44.
in order to grant approval, and this finding may be a considerable selling point in obtaining consent. Also, the approved unit may act as an effective block to alternative proposals. Conversely, a deadline for consent after obtaining administrative approval may not be an efficient use of government resources. If the requisite consent is not obtained, costly hearings and supplemental hearings have been held for no reason. Although the costs of such hearings may be substantially borne by the parties proposing the unit, there are other costs such as the inefficient use of administrative time. This concern is apparently not very persuasive to legislatures as a majority of the statutes have adopted a supplemental deadline system similar to that used under the Oklahoma and Wyoming statutes.

Administrative Approval

Besides requiring the consent of a certain percentage of unit participants, compulsory unitization statutes require approval of the unit by the state administrative agency. All these statutes require this approval, as only the exercise of state police power can order compulsory unitization. As previously discussed, the approval is contingent upon a finding by the administrative agency of several prerequisites.

The authority of an administrative agency under these statutes has been criticized as "unduly restricted." The Louisiana statute has particularly been criticized because the Commissioner of Conservation's authority is limited to either approval of the project as previously approved by the majority of the interested owners or outright rejection of the application. The Commissioner is not empowered to force any compromise. Discretion under most statutes appears to be similarly restricted.

The State Oil and Gas Board of Alabama recently construed its powers in a broader fashion, despite a lack of specific statutory authorization. Getty Oil Company petitioned to unitize the Smackover-Norphlet Gas Pool in the Hatter's Pond Field in Mobile County, Alabama. One of the main features of the unitization was a participation formula based 100 percent on pore volume. This formula and other elements of the unit plan were challenged at the hearing, and the resultant order issued by the State Oil and Gas Board did not approve the unit.

119. See supra text accompanying notes 35-36.
120. Eckman, supra note 27, at 384-85; see Dutton, supra note 11, at 44 & 47.
121. See supra text accompanying notes 29-42.
122. Winfiele, supra note 35, at 17.
123. McAnelly, supra note 14, at 9.
124. Pore volume is the storage space in rock expressed in porosity feet, as calculated by multiplying the net pay feet by the average porosity for each foot of pay.
The Board also went one step further and "remanded" the petition to Getty. The Board "ordered" that Getty "immediately prepare a unitization proposal, including a Unit Agreement, a Unit Operating Agreement, and Special Field Rules" consistent with the Board's findings, which in effect instituted a compromise between Getty and the opponent parties.125

The administrative agency's consent and the satisfaction of all statutory prerequisites results in the compelled unitization of the nonconsenting interests. "The order issued . . . adopting the unit agreement and requiring its operation as to nonsigners has the effect of approving, insofar as nonsigners are concerned, the essential elements of the unit agreement, such as method of physical operation, areal extent of the unit, and tract participations in unit production."126 It is uncertain whether other terms and conditions of the unitization agreement, such as force majeure and surface usage rights, are also imposed on nonconsenting parties.127 The main constraint in this area is the Contract Clause of the United States Constitution which provides that no state shall pass a law impairing the obligations of contracts.128 Enforcing all of the terms of the unitization agreement against the non-consenting parties may violate this constitutional provision if such terms vary substantially from individual lease terms.

Amendment

Consent requirements are also an issue when an amendment of an existing unit is sought. Most compulsory unitization statutes contain provisions allowing amendments on basically the same terms as are required for unit formation.129 For example, the basic amendment provision of the Wyoming statute states, "[a]n order entered by the commission under this act (section) may be amended in the same manner and subject to the same conditions as an original order. . . ."130 Onerous amendatory provisions are desirable from the landowner's point of view because they allow the landowner to rely upon the original unit contract as a firm definition of his economic rights.131

The Louisiana statute has no provision for amendment of the unit, and thus amendment may involve the creation of a completely new unit.
incorporating the desired changes. 132 The same consent requirements would be applicable to both the original unit and the amendment. While the Louisiana law is currently unclear regarding amendment, one possible way to avoid a requirement that amendments be made by creating a completely new unit would be to include amendatory process in the Unitization Agreement. The Commissioner’s approval of the unit would thus approve the amendatory procedure. Such a method has administrative merit, but may constitute an unlawful delegation of the Commissioner’s power. 133

Amendments are generally allowed for the purposes of changing the unit operating agreement or enlarging the unit area. When the amendment is limited to working interest matters, such as an allocation of equipment investments, the majority of the statutes only require the consent of the working interest owners. 134 For example, the Oklahoma statute provides that “where an amendment to plan of unitization relates only to the rights and obligations as between lessees the requirement that the same be signed, ratified or approved by royalty owners of record of not less than sixty three per cent [sic] (63%) of the unit area shall have no application.” 133 This is a desirable provision which makes it relatively easy for cost-bearing interests to adjust their burdens, while at the same time protecting minority interests and royalty owners.

Enlargement of the unit area generally requires the consent of both current unit participants and those parties to be added to the unit, under the same percentage requirements as were applicable to approval of the original unit. 136 Most statutes also provide that such an amendment cannot alter allocations of production between tracts within the prior

133. The Kansas Supreme Court held that such a procedure was invalid in Parkin v. State Corp. Comm’n, 234 Kan. 994, 677 P.2d 991, 80 Oil & Gas Rep. 39 (Kans. 1984). In this case, the original plan of unitization, as approved by order of the Kansas Corporation Commission, included a provision whereby 65 percent of the working interest owners could terminate the unit when they determined that unitized substances could no longer be produced in paying quantities and that the unit was infeasible. The Corporation Commission had denied the plaintiff/royalty owner’s petition for unit termination on the grounds that the sole working interest owner (Misco Industries) still believed that unit operations were feasible. The court held that only the Corporation Commission had the authority to decide when unitization should terminate, and that such authority could not be delegated to the working interest owners. Similarly, The State Oil and Gas Board of Alabama recently refused to endorse a Unit Agreement provision which would have allowed enlargement of the unit area and unitized formation upon written consent by 60 percent of the royalty owners in the unit area prior to enlargement. State Oil and Gas Board of Alabama Order No. 83-170, dated July 29, 1983. This amendment procedure would have been in contravention of a specific statutory procedure: Ala. Code § 9-17-85 (1975).
134. Eckman, supra note 27, at 361.
unit, except perhaps with the consent of the owner of every affected tract. For example, the Wyoming statute states that "no amendatory order shall change the percentage for the allocation of oil and gas as established by the original order for any separately owned tract, except with the written consent of all persons owning oil and gas rights in such tracts." Under unitization statutes such as Louisiana's where a completely new unit plan may be needed to amend the unit, tract allocation can apparently be changed by the same percentage of consent as required to form the original unit. Under either amendatory procedure, unit participants are assured that their economic rights under the original unit plan are being protected.

Problems in Obtaining Consent

As previously discussed, an administrative agency can order a compulsory fieldwide unit only after a requisite percentage of the parties to the unit have consented to the unit plan. One reason justifying the state's ability to compel the unitization is the difficulty in forming a voluntary fieldwide unit by obtaining consent of 100 percent of the parties involved. The result is that most statutes require only between sixty and eighty percent of the parties under the unit plan to consent before the state can compel formation of the unit. While the statutes thus reduce the quantum of consent required, they have not eliminated the problems involved in obtaining consent. While it certainly is easier to obtain consent of between sixty and eighty percent of the parties involved than it is to obtain 100 percent consent, there are still many difficulties involved in obtaining consent.

Many state statutes exacerbate these difficulties by requiring a high percent of the parties under the unit plan to consent to its formation. Mississippi's eighty-five percent requirement is the highest in the country, and it has been criticized as "unrealistic" as compared to the lower requirements in other states. The Mississippi compulsory fieldwide unitization statute has been singularly unsuccessful, as evidenced by the fact that it was utilized only once between 1964 and 1972. Recent

137. Eckman, supra note 27, at 361, 384-85; 6 H. Williams & C. Meyers, supra note 1, § 913.10.
140. McAnelly, supra note 14, at 16.
141. See supra text accompanying notes 40-42.
142. See supra text accompanying notes 24-26.
143. Anderson, supra note 40, at 1213.
145. Rogers & Gault, supra note 12, at 196; see Dutton, supra note 11, at 47.
146. Id. at 187.
amendments have eliminated many of the other weak points of the statute, but the eighty-five percent consent requirement has remained.\textsuperscript{147} Another state with a relatively high consent requirement is Wyoming which requires consent of eighty percent of both cost-free and cost-bearing interests.\textsuperscript{148} However, the Wyoming statute has an unusual provision allowing a reduction of the consent requirement to seventy-five percent. This reduction can be ordered upon a finding that negotiations have been conducted diligently and in good faith for at least nine months before the filing of the application, and that the eighty percent approval will not be obtained.\textsuperscript{149} It is submitted that such a provision effectively lowers the Wyoming requirement to seventy-five percent and that the statute should simply state this rather than requiring the further unitization expense involved in applying for a reduction of the eighty percent requirement. Higher consent requirements may hinder unitization projects, thus effectively defeating the conservation purposes of the statutes.

One of the difficulties faced in obtaining consent involves the logistic problems of identifying the parties who need to consent and then physically obtaining that consent.\textsuperscript{150} An example of the magnitude of this difficulty is presented by the Hawkins Field Unit in East Texas. The field was comprised of 327 tracts, covering 10,665 acres. Through sales, inheritances, conveyances and severances the title included over 3,000 royalty owners.\textsuperscript{151} An effort to obtain consent to unitize a comparable field may literally take years to complete.\textsuperscript{152} Difficulties in both identifying the necessary parties and obtaining their consent are beyond the scope of this paper, but the Hawkins Field provides a vivid example of the possible logistic problems involved.\textsuperscript{153}

The element of risk can make it difficult to obtain consent in two ways. First, parties may decline to consent to what they perceive to be a risky operation.\textsuperscript{154} These parties may be receiving a steady production income and may not want to risk losing such monies in the event that the unitization project backfires. The second aspect of risk involves what

\textsuperscript{147} Id. at 196-197.
\textsuperscript{149} Id.; Gilmore v. Oil & Gas Conservation Comm'n, 642 P.2d 773, 75 Oil & Gas Rep. 172 (Wyo. 1982).
\textsuperscript{150} See generally Prutzman, Cage, Fletcher, Keith, Miller & Winn, supra note 12; Meyers, supra note 5, at 107.
\textsuperscript{151} Barfield, supra note 6, at 47; Putzman, Cage, Fletcher, Keith, Miller & Winn, supra note 12 (the McComb Field Unit in Pike County, Mississippi contained over 2100 royalty owners).
\textsuperscript{152} McAnelly, supra note 14, at 18.
\textsuperscript{153} See Barfield, supra note 6, at 41 (discusses practicalities involved in obtaining consent).
\textsuperscript{154} 6 H. Williams & C. Meyers, supra note 1, § 913.5.
Williams and Meyers refer to as the "Gambler's instincts." Some lessees may believe that their interests lie in the most favorable part of the producing structure and they are willing to risk that the production solely from their land will be more valuable than an undivided interest in the fieldwide unit.

The most frequently disputed issue in unitization and the most serious obstacle to obtaining the requisite consent is determining the method of production allocation. Early statutes and cases often allocated production on the basis of and in proportion to surface acreage contribution to the unit. These allocation formulae had the benefit of simplicity and certainty, but were only fair in the rare instances where formations were uniform in quality and thickness throughout the unit so that each tract had equal reserves per acre. Although such formulae have been judicially upheld, production in a fieldwide unit is rarely, if ever, solely allocated on a surface acreage basis under the modern statutes.

Modern statutes generally require in broad terms that the allocation of production be equitable, leaving the specifics of allocating production to the parties proposing the unit. An example of this type statutory requirement, and an excellent example of excessive legalese, is presented by the Mississippi statute:

A formula for the allocation among the separately owned tracts in the unit area of all the oil or gas, or both, produced and saved from the unit area, and not required in the conduct of such operation, which formula must expressly be found reasonably to permit persons otherwise entitled to share in or benefit by the production from such separately owned tracts to receive, in lieu thereof, their fair, equitable and reasonable share of the unit production or other benefits thereof. A separately owned tract's fair, equitable and reasonable share of the unit production shall be that proportionate part of unit production that the contributing value of such tract for oil and gas purposes in the unit area and its contributing value to the unit bears to the total of all like values of all tracts in the unit, taking into account all pertinent engineering, geological and operating factors that are reasonably susceptible of determination.

155. Id. at § 910.
156. Eckman, supra note 27, at 359; Barfield, supra note 6, at 45; 6 H. Williams & C. Meyers, supra note 1, § 910.
158. Id.
159. Id.; Humble Oil & Ref. Co. v. Welborn, 216 Miss. 180, 62 So. 2d 211 (1953).
The parties proposing the unit will create an algebraic formula combining a variety of parameters to allocate production. An example of the struggle to create an equitable formula is illustrated by Gilmore v. Oil and Gas Conservation Commission. In this case, eighty-one working interest owners negotiated and considered seventy-one separate formulae for production allocation. The formulae became increasingly complex as individual parties urged the inclusion of specific geological or engineering parameters favorable to their tracts. After unsuccessfully voting on almost sixty formulae including various parameters, the parties reexamined their voting records and used a computer to create a compromise formula. This formula only received 75.89 percent approval, which met Wyoming's statutory consent requirement after the Commissioners reduced the requirement. Problems like these are common, as the allocation of production is subject to legitimate expert controversy.

Other difficulties in obtaining consent have been identified as including the pride of ownership, structural advantage of particular properties, profitable obstructionism, lack of reservoir data, lease prohibitions, and federal controls on the price of oil and gas. Although compulsory fieldwide unitization statutes make it easier to obtain consent by not requiring 100 percent approval, the realities of obtaining consent still represent a formidable obstacle to fieldwide unitization.

Conclusion

The consent requirements in fieldwide unitization statutes contain many issues ripe for dispute. Undoubtedly many unit plans could be defeated by challenges to the application of these statutory consent requirements. It seems that only the cooperative nature of the oil industry and the recognition of the benefits to be gained by fieldwide unitization have prevented significant litigation under these statutes. Should such litigation ever arise, the statutory consent requirements may prove inadequate to withstand the challenges, and revised legislation may be necessary.

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