# **1 The Law of Pooling and Unitization, 3rd Edition § 3.02**

***The Law of Pooling and Unitization, 3rd Edition* > *CHAPTER 3 Overcoming the Rule of Capture***

**§ 3.02 Historical Perspective of State Efforts to Promote Conservation**

Pooling and unitization are effective tools of conservation.[[1]](#footnote-2)12 In order to better understand the place that pooling and unitization have taken in the conservation movement it is necessary to review very briefly the history of the conservation movement in both federal and state arenas.[[2]](#footnote-3)13

Unlike the ownership of natural resources in most other countries, the ownership of natural resources in the United States is held by the individual and not the state. While ***oil*** and gas have been justifiably regarded as private property in every state where discovered, their production, storage, and transportation have always been treated as being affected by public interest. This public interest is based on the fact that these minerals are non-renewable; that they are immensely beneficial, even necessary, to private and public welfare; and that they constitute in many jurisdictions an important source of revenue received through direct and indirect taxation and through public ownership of ***oil*** and gas interests. Thus, whenever ***oil*** and gas have been found, state and local regulation of the industry has shortly followed.

The states have enacted such legislation under police powers designed to protect public health, safety, morals, and general welfare. The landmark decision upholding the basic constitutionality of conservation statutes is *Ohio* ***Oil*** *Co. v. Indiana.*[[3]](#footnote-4)14 This case involved a straightforward regulation of natural gas wells, prohibiting the venting of ***oil*** and gas in such a way as to cause injury to others with interests in the reservoir.[[4]](#footnote-5)15 The statute prohibited the practice of allowing ***oil*** or gas to escape into the open air, without being confined within a well or proper pipes or other safe receptacle, for a period longer than two days after discovery.[[5]](#footnote-6)16 The basic argument of the ***oil*** and gas lessees was that the regulation of their private property was a violation of the due process clause of the Fourteenth Amendment. The court rejected that argument on two grounds. Initially, the court determined that the statute’s primary purpose was to prevent the waste of the common property in the pool. Such a purpose was a valid police power objective.[[6]](#footnote-7)17 Secondly, the court ruled that it was under state law that the property rights in common reservoirs arose and hence state law could further define the nature and extent of those rights in relation to the common reservoir.[[7]](#footnote-8)18 While the court acknowledged that the ***oil*** and gas that was being produced belonged to Ohio ***Oil***, it was within the state’s police power to determine that it was being wasted and to enact such regulations as were necessary to avoid that waste. Thus, it was established that the private property rights of a mineral owner could be constitutionally limited for the purpose of conserving the resource for the public benefit.

1. **History of Compulsory Pooling Regulation**

As noted earlier, the concepts of pooling and unitization are related but distinct. Pooling deals with the consolidation of mineral interests necessary to meet the minimum well-spacing or drilling unit restrictions or to otherwise provide for a sharing of the risks and benefits of ***oil*** and gas development. As such, the advent of compulsory pooling regulations had to follow the enactment of conservation legislation restricting the number of wells that could be drilled. On the other hand, unitization deals with the unified development of all or a portion of a common source of supply. Thus, compulsory unitization measures could and did develop independently of other forms of conservation legislation.

In several states compulsory pooling was adopted at the same time that spacing regulations went into effect, because the well-spacing statute contained within it a compulsory pooling feature. Pooling was a necessary complement to spacing to avoid confiscation of the right to produce ***oil*** and gas. In those situations the creation of the drilling unit effectively pooled all or some of the interests contained therein. Louisiana and Oklahoma by statute, and Mississippi by judicial decision, are prime examples of this type of compulsory pooling statute.[[8]](#footnote-9)19 The first attempt at a compulsory pooling regulation that engendered litigation was enacted not by a state but by the city of Oxford in Kansas.[[9]](#footnote-10)20 This was followed by municipal enactments in other states including Oklahoma and Texas.[[10]](#footnote-11)21

The first state compulsory pooling statute was enacted in New Mexico[[11]](#footnote-12)22 and Oklahoma.[[12]](#footnote-13)23 The New Mexico provision used the proration unit system of conservation as the primary inducement to voluntary pooling, but did specifically authorize the state to force-pool separate interests within the proration unit. The Oklahoma statute, on the other hand, used the drilling unit system to space wells and declared that if two or more owners were located within a designated drilling unit, their interests would be pooled on a surface acreage basis.

The municipal compulsory pooling ordinance of Oxford, Kansas was the first compulsory pooling provision that was challenged as being unconstitutional. In *Marrs v. City of Oxford,*[[13]](#footnote-14)24 the validity of the ordinance was upheld. The ordinance provided that only one well could be drilled on any city block and that the royalty owners within that block were entitled to share in the royalty in proportion to their holdings within the block. In addition, the other mineral lessees who were denied an opportunity to drill because of the well-spacing limits were given the right to receive a proportionate share of the ***oil*** if they tendered to the permit holder their proportionate share of the drilling and operating expenses.[[14]](#footnote-15)25 Both the district court, in an extensive opinion, and the Eighth Circuit, in a much shorter opinion, concluded that the conservation of ***oil*** and gas was a valid objective under the city’s inherent police powers, and that the restrictions on the individual’s property interest were not so severe as to amount to a taking of private property without just compensation.[[15]](#footnote-16)26

In addition to the taking issue claim, the operators and royalty owners also alleged that the ordinance violated their substantive due process rights. The court responded by analogizing the pooling ordinance to a land use control ordinance. In essence, a well-spacing ordinance is a form of land-use control that restricts the right of the property owner to use his or her property as he or she sees fit. Unlike the surface land use case, however, the landowner is not concerned about the physical loss of his or her property because it will not be “captured” by his or her neighbors. A per se attack on the police power enactment dealing with a surface land use case was denied in *Village of Euclid v. Ambler Realty Co.*[[16]](#footnote-17)27 because of the important governmental interest in stabilizing property values in the various neighborhoods of the village. The Oxford ordinance not only stabilized property values but was directly connected to the protection of the public safety by preventing the drilling of more wells than was otherwise necessary. Overdrilling in an urban setting would substantially increase fire and explosion danger to the adjacent properties.[[17]](#footnote-18)28 The Eighth Circuit opinion also put forth the correlative rights theory of *Ohio* ***Oil*** as a reason why there was no deprivation of a property right without due process of law.[[18]](#footnote-19)29

The first state statute to withstand a constitutional attack was the Oklahoma compulsory pooling provision enacted in 1935. In *Patterson v. Stanolind* ***Oil*** *& Gas Co.,*[[19]](#footnote-20)30 a royalty owner whose interest was force-pooled in a ten-acre drilling unit attacked the constitutionality of his compelled sharing of the royalties with other royalty owners within the unit. The well, quite obviously, had been drilled on the plaintiff’s acreage and he claimed that his property interest had been taken without due process or just compensation.[[20]](#footnote-21)31 The court recognized the state’s power to prevent waste and protect correlative rights under its police power umbrella. It then concluded that the royalty owner’s interest had not been taken, but had merely been “restricted or qualified.” As such there was no violation of the due process or taking provisions of either the United States or the Oklahoma constitution.[[21]](#footnote-22)32

The Ohio Supreme Court found that a compulsory pooling and drilling unit statute was unconstitutional as applied to a pre-existing lease which called for non-apportioned royalties in *Burtner-Morgan-Stephens Co. v. Wilson.*[[22]](#footnote-23)32.1 The court relied on the impairment of obligation of contract provision of the Ohio Constitution.[[23]](#footnote-24)32.2 The court said: “… R.C. 1509.27 may not be retroactively applied to determine distribution of royalties that are provided for in an ***oil*** and gas lease that was entered into and recorded prior to the enactment of the statutory provisions.”[[24]](#footnote-25)32.3 This position is clearly contrary to the holdings of the cases cited earlier in this section. Similar arguments to those accepted by the Ohio Supreme Court were rejected in *Marrs,* *Hunter Co.,* and *Patterson.* The police power clearly can affect property and contract rights as long as it does totally nullify their effect. Adjustments to private rights is the essence of the exercise of the powers of conservation agencies. It would allow private contractual rights to frustrate the valid public objectives of preventing waste and protecting correlative rights. The *Burtner* rationale that allowing an operator to take advantage of the statutory rights granted it under pooling and unitization statutes would violate the impairment of obligation of contract rights protections was followed in *American Energy-Utica, LLC v. Fuller.*[[25]](#footnote-26)32.3a A mineral lessee was denied the right to seek a compulsory pooling of the lessor’s interest because the lease placed restrictions on the exercise of the power to pool. The court noted the compulsory pooling statute but found that its terms cannot change or vary the contractual language limiting the exercise of the pooling power. The authors believe that both *Burtner* and *Fuller* are wrongly decided and defeat the Legislature’s clear power to enact conservation legislation designed to prevent waste, protect correlative rights, and conserve natural resources. In *Paczewski v. Antero Resources Corp.*,[[26]](#footnote-27)32.3b the court distinguished *Fuller* where the parties had affirmatively included language requiring approval for any unitization to the situation where the parties merely deleted a pooling or unitization clause in the lease. The court treated the deletion as only making the lease silent on the issue of unitization and thus the lessee’s use of the compulsory unitization process did not breach the contract’s express terms. Furthermore, the court relies on *Burtner* to extol the important police power objectives obtained through the compulsory pooling process.

There have been several challenges to the constitutionality of imposing risk penalties on working interest and/or unleased mineral owners who choose not to participate in the costs of drilling a well.[[27]](#footnote-28)32.4 Applying traditional constitutional principles including a presumption of constitutionality the courts have upheld the validity of the compulsory pooling statutes in Utah[[28]](#footnote-29)32.5 and Mississippi.[[29]](#footnote-30)32.6 The working interest or unleased mineral owner who is afforded an option to participate in the costs of drilling or not participate has not its property interest taken without just compensation. It is the opportunity to participate that protects the owners with the nonconsent penalty merely being incorporated to prevent the nonparticipating owners from benefitting from their choice not to participate.[[30]](#footnote-31)32.7 A recent decision upheld an ***oil*** and gas conservation agency’s decision to go with the pooling applicant’s choice of using a model form joint operating agreement without the requested, but rejected amendments proffered by the nonoperating working interest owner.[[31]](#footnote-32)32.8

Compulsory pooling statutes exist today in all major producing states except Kansas and West Virginia.[[32]](#footnote-33)33 While most of these provisions were enacted prior to 1950, several states have recently adopted compulsory pooling statutes in partial response to the expanded exploration for ***oil*** and gas that followed the meteoric rise in its price following the Arab ***oil*** embargo of the early 1970’s.

1. **History of Unitization**

While the concept of unitized production from a common source of supply was well known within the engineering profession prior to 1924, it was through the efforts of Henry L. Doherty that the nation was made aware of the many benefits that would flow from the unitized operation of ***oil*** reservoirs.[[33]](#footnote-34)34 Initially through a letter to President Coolidge,[[34]](#footnote-35)35 and then through a continued effort aimed at the leaders of the ***oil*** industry and state governments, Doherty forcefully presented his arguments for governmental intervention in the ***oil*** industry for the purpose of mandating the conservation of our nation’s ***oil*** and gas resources. One of his suggestions was compulsory unitization of ***oil*** reservoirs to be imposed by federal legislation.[[35]](#footnote-36)36 The imposition of compulsory unitization was strongly opposed by many members of the ***oil*** and gas industry. Nevertheless, the concept of unitized development continued to be studied and became an accepted alternative to conditions that encouraged a tremendous amount of waste of our ***oil*** and gas resources.[[36]](#footnote-37)37 As early as 1926, the Federal ***Oil*** Conservation Board declared:

The unit idea in producing ***oil*** is bound to win out because the natural unit is the ***oil*** pool … [and it] means both efficiency in development and operation and the determination of equities among the owners.[[37]](#footnote-38)38

This led in 1929 to adoption by the Section of Mineral Law of the American Bar Association (ABA) of a policy statement endorsing the concepts of both voluntary and compulsory unitization legislation.[[38]](#footnote-39)39 In addition, the Section developed a model compulsory unitization statute because it had determined that voluntary unitization by the ***oil*** industry would not occur in the “near future.”[[39]](#footnote-40)40

This model would allow a majority of the operators of a common source of supply to petition the government for an order compelling the minority owners to join in a cooperative plan of development agreed to by the majority. The petition would have to show that it would both conserve the hydrocarbons within the common pool and protect the correlative rights of the working and royalty interest owners.[[40]](#footnote-41)41 After notice and a public hearing, the state agency would be authorized to compel the non-signers to join in the cooperative agreement and come under the control of an operators committee that would be formed at the time of the agency order. The committee would be responsible for implementing and enforcing the agreement. Finally, the state agency would be authorized to suspend individual leasehold drilling or other obligations pending the final approval of the compulsory unitization order.[[41]](#footnote-42)42

The 1929 ABA report was followed in 1930 by a publication of the Mid-Continent ***Oil*** & Gas Association that reviewed the deplorable state of the ***oil*** industry and suggested that unitization was the panacea needed to right the listing ship. Although this publication argued that unitization should be accomplished by the cross-assignment of working interest ownership rights and by the assignment of each lease to a common trustee, who in turn would assign to each owner his or her proportionate undivided interest in the whole interest, its strong arguments in favor of the general unitization concept were widely accepted. In addition, many forms and procedures contained in the publication were widely adopted in the ***oil*** industry and aided in the industry’s understanding of the unitization process.[[42]](#footnote-43)43 The handbook served as an educational device as to how to create reservoir-wide units, and provided important information on the success of the few existing voluntary units that had been formed in Kansas and Oklahoma prior to its publication. While many of these pioneer efforts were small and created for the drilling of an initial test well, they nonetheless constituted a tremendous advance over the previous methods of operation. The publication also reviewed wasteful operations in several existing fields and attempted to quantify, in hypothetical terms, the savings that would have occurred had voluntary unitization agreements been in force.

In 1930 a survey by the American Institute of Mining and Metallurgical Engineers discovered that there was little industry acceptance of unitization.[[43]](#footnote-44)44 Several units had been developed in Texas, and two were reported in Arkansas, but Louisiana and New Mexico failed to report any voluntary unit agreements. Unitization had been tried in some rare instances in the Rocky Mountain region as well as in California’s North Dome Kettleman Hills Field, but, in general, the ***oil*** and gas industry was reluctant to embrace the unitization concept.

During the 1920’s the federal government’s role in studying the unitization concept was an active one. The Federal ***Oil*** Conservation Board issued a series of reports on the national ***oil*** industry during this time and was a catalyst for the vociferous debate between Doherty and other members of the ***oil*** industry regarding both the current state of the ***oil*** industry and the need for federal intervention through a compulsory unitization statute.[[44]](#footnote-45)45

The 1930’s saw an increase in state government regulation of the ***oil*** and gas industry.[[45]](#footnote-46)46 The predominant form of regulation, however, was the prorationing system, not compulsory unitization of ***oil*** and gas reservoirs.[[46]](#footnote-47)47 At the federal level there was much discussion about the role of federal versus state government in dealing with the ***oil*** glut, but after the invalidation of the key provisions of the National Industrial Recovery Act, the federal government’s involvement was somewhat limited.[[47]](#footnote-48)48 Perhaps the most important development in the 1930’s was the creation of the Interstate ***Oil*** Compact Commission (IOCC). The idea behind the IOCC developed from a series of meetings between the Federal ***Oil*** Conservation Board and a conference of governors of the ***oil***-producing states held in the 1929–1931 period.[[48]](#footnote-49)49 It was not until 1935, however, that the Interstate ***Oil*** Compact was signed by six states. It was approved by Congress on August 27, 1935, after a series of compromise proposals was accepted by the adopting states.[[49]](#footnote-50)50

The 1940’s ushered in a new era for the advocates of compulsory unitization. The Legal Committee of the IOCC recommended as early as 1940 the compulsory unitization of ***oil*** and gas reservoirs in order to encourage the use of secondary recovery and pressure maintenance techniques.[[50]](#footnote-51)51 A 1942 report of the Legal Committee included within it a model of statutory enactment that authorized both voluntary unitization agreements and compulsory unitization orders if certain prerequisites were met.[[51]](#footnote-52)52

The call did not go unheeded for long. In 1945, Oklahoma became the first state to enact a compulsory unitization statute.[[52]](#footnote-53)53 The act authorized the Corporation Commission to unitize all or a portion of a common source of supply upon the petition of lessees representing at least 50 percent of the area to be included within the unitized area. Veto power over the petition could be exercised by owners of more than 15 percent of the ***oil*** and gas if they filed a petition against compulsory unitization. The act required the petitioners to prove that additional amounts of ***oil*** and gas were recoverable if the reservoir or portion thereof was unitized and that the additional cost of recovering such ***oil*** and gas would be exceeded by the value of additional hydrocarbons recovered.[[53]](#footnote-54)54 There was substantial opposition both to the concept of compulsory unitization and to some of the specific provisions of the 1945 act. Thus, in 1951 the act was amended to eliminate the veto provision held by 15 percent of the mineral owners. In addition, the procedural requirements were more clearly defined, particularly those dealing with notices and hearings. The amendment also specified in much greater detail the findings that the commission had to make before it could create a compulsory unit.[[54]](#footnote-55)55

The 1945 act was immediately challenged after the commission compulsorily unitized the West Cement Medrano Unit over the objections of several mineral lessees.[[55]](#footnote-56)56 In a 5–4 decision, the Oklahoma Supreme Court found that the compulsory unitization statute was both constitutional as written and constitutional as applied. In addition, the court concluded that the particular order was within the statutory authorization of the commission. The opposing lessee contended that the act was unreasonable because it did not require that the commission find, as a condition precedent to the creation of the unit, that the purposes of the conservation legislation would be better served with the unitized operation than with other available regulatory tools. The court dismissed that argument since the commission was required to make certain policy findings under the act regarding the beneficial aspects of the proposed unitized operation.

The plaintiffs also contended that the act amounted to an unconstitutional delegation of legislative power to the management committee for the majority owners. The court rejected the delegation argument because it was the commission and not the majority owners who had the power to create the unitized area.[[56]](#footnote-57)57 On behalf of several royalty owners, an argument was made that the exclusion of royalty owners from the entire decision-making process rendered the process unconstitutional. The court rejected that argument since the state’s police power could be exercised to protect public health, safety, morals, and general welfare without the consent of either the mineral or the royalty owners. As long as parties who were similarly situated were treated similarly, there was no constitutional violation.

The plaintiffs also attacked the validity of the order creating the unit. In general, the court concluded that it could not substitute its judgment for that of the commission and that persons attacking commission orders had to sustain a heavy burden of proof to show that the order was unreasonable or discriminatory.[[57]](#footnote-58)58

In ***Kerns*** *v. Chesapeake Exploration, LLC*,[[58]](#footnote-59)58.1 the plaintiffs challenged Ohio’s compulsory unitization statute as a regulatory taking of their mineral interests.[[59]](#footnote-60)58.2 The court summarily dismissed the takings claim on a combined analysis of regulatory takings and substantive due process by saying that the plaintiffs’ mineral estates “ha[ve] not been taken or confiscated: its use has merely been restricted and qualified.”[[60]](#footnote-61)58.3 But the court had to also deal with the takings claim based on the physical invasion of the subsurface by the horizontal lateral to be drilled by the operator. While the surface owner is the owner of the subsurface strata which would normally constitute an interest in real property that would be protected by the Fifth and Fourteenth Amendments, the court concluded that under Ohio law, the surface owner’s interest in the subsurface does not amount to “absolute ownership” and thus in order to constitute a trespass or a taking such physical occupation must “actually interfere with their reasonable and foreseeable use of the subsurface.”[[61]](#footnote-62)58.4 Because the plaintiffs’ petition did not allege such an interference, no property interest had been alleged so the petition could be dismissed for failing to state a cause of action.[[62]](#footnote-63)58.5

Compulsory unitization statutes were enacted in many of the major ***oil***-producing states during the 1950’s, so that today only Pennsylvania and Texas remain without a compulsory unitization process.[[63]](#footnote-64)59 Statutory authorization was required because, unlike the doctrine of equitable pooling, the power to compel unitization was never implied by a court to apply to either an administrative or judicial proceeding.[[64]](#footnote-65)60

1. **History of the Federal Pooling and Unitization Programs**

In addition to its role as a potential regulator for conservation purposes, the federal government as owner of the public domain has from an early date embraced the concepts of pooling and unitization as they applied to its own mineral rights. While the Federal ***Oil*** Conservation Board refused to endorse federal pooling and unitization regulatory statutes, other federal governmental agencies were applying the concepts to federally owned and leased minerals.[[65]](#footnote-66)61

The Mineral Leasing Act of 1920[[66]](#footnote-67)62 ushered in a new era of federal governmental stewardship of its mineral resources. Nevertheless, the 1920 act did not permit or authorize the Secretary of the Interior to pool (“communitize” in federal parlance) or unitize federal mineral holdings. Notwithstanding this lack of authority, the secretary in 1929 began negotiations with several lessees and other mineral owners regarding the need to unitize the North Dome Kettleman Hills Field in California. A tentative unitization agreement was reached that included a provision to shut in the field while the secretary sought congressional approval to unitize federal lands.[[67]](#footnote-68)63 The secretary was successful in lobbying Congress for the changes in the Mineral Leasing Act of 1920 necessary to approve the unitization plan.[[68]](#footnote-69)64 The amendment, however, had a provision terminating the secretary’s authority to unitize by January 31, 1931. This temporary provision was replaced in March 1931 by a permanent change that adopted many of the same principles that had been included in the 1930 temporary amendment.[[69]](#footnote-70)65

The 1931 act authorized the secretary to enter into unitization agreements embracing federal lands where it was in the government’s best interest to do so. The statute provided that production from any well within the unitized area would constitute production from all of the leases committed to the unit.[[70]](#footnote-71)66

Further impetus towards unitized development of federally owned ***oil*** and gas pools was provided by amendments to the Mineral Leasing Act of 1920 enacted in 1935.[[71]](#footnote-72)67 These amendments authorized the secretary to condition the issuance of federal ***oil*** and gas leases on the lessee’s promise to commit the lease to a unit or cooperative plan should the secretary determine it necessary or advisable under the circumstances.[[72]](#footnote-73)68 Although there were inducements to join unit agreements, the Mineral Leasing Act of 1920, as amended through 1935, did not provide for the compulsory pooling or unitization of federal ***oil*** and gas leases.[[73]](#footnote-74)69 Further refinements were made in the voluntary pooling and unitization procedures in 1946, but no major changes were enacted.[[74]](#footnote-75)70 The federal government and the states were simultaneously recognizing the benefits that flowed from pooling and unitization regulatory measures so that the goals of conserving ***oil*** and gas, preventing waste, and protecting correlative rights could be achieved. The federal effort, however, focused on its role as a mineral owner, encouraging the efficient production of its resources, rather than as a regulator of the marketplace. Doherty’s plaintive cries for a federal compulsory unitization and pooling statute have gone unheeded to this day.[[75]](#footnote-76)71

In 1992, the federal government returned to the field of compulsory pooling and unitization in a limited way with the enactment of the National Energy Policy Act (EPACT).[[76]](#footnote-77)71.1 One small part of this massive bill deals with the ownership and development of coalbed methane gas.[[77]](#footnote-78)71.2 EPACT’s provisions relating to coalbed methane gas only cover “Affected States” which included at the time of its enactment Illinois, Indiana, Kentucky, Ohio, Pennsylvania, Tennessee and West Virginia.[[78]](#footnote-79)71.3 Each Affected State was given three years to adopt “a substantial program promoting the permitting, drilling and production of coalbed methane wells (including pooling arrangements)”[[79]](#footnote-80)71.4 Furthermore the Secretary of the Interior was given the power to adopt minimum spacing requirements for coalbed methane gas wells in states which did not disqualify themselves from affected state status.[[80]](#footnote-81)71.5 It also authorized the Secretary, upon application of the owner of coalbed methane gas, to establish spacing units for the drilling and operation of gas wells. The spacing units were to be generally uniform in size.[[81]](#footnote-82)71.6 Upon the issuance of a spacing order establishing a spacing unit, a second application could be filed requesting the Secretary to pool the interests within the designated spacing unit. Notice with an opportunity to be heard at a hearing is required before the pooling order is to be entered. Following the Oklahoma model, the statute provides that the compulsory pooled parties shall be allowed to make one of the following elections:

1. An election to sell or lease its coalbed methane ownership interest to the unit operator at a rate determined by the Secretary of the Interior as set forth in the pooling order.
2. An election to become a participating working interest owner by bearing a share of the risks and costs of drilling, completing, equipping, gathering, operating (including all disposal costs), plugging and abandoning the well, and receiving a share of production from the well.
3. An election to share in the operation of the well as a nonparticipating working interest owner by relinquishing its working interest to participating working interest owners until the proceeds allocable to its share equal 300 percent of the share of such costs allocable to its interest. Thereafter, the nonparticipating working interest owner shall become a participating working interest owner.[[82]](#footnote-83)71.7

EPACT confusingly deals with the problem of unleased mineral owners who do not make an election under the statute as effectively leasing their minerals to the unit operator under terms as set forth in the pooling order. Unfortunately, as written, the default option seemingly applies to working interest owners as well, who obviously cannot lease their own leased interests. The pooling order must also designate a unit operator and finally may not be issued if all of the parties claiming an ownership interest in the spacing unit have executed a voluntary pooling agreement.[[83]](#footnote-84)71.8 Also absent from the pooling provision is a way to divide up the production within the spacing unit. There is nothing which specifies that the division among the owners shall be on a surface acreage basis, which is the predominant, if not exclusive, formula used for pooling. There is likewise no mention of how the royalty owner’s interests are to be affected by the spacing order or the pooling order. The pooling provision is couched solely in terms of working interest owners which is defined by the statute to exclude non-cost bearing interests such as royalty.[[84]](#footnote-85)71.9 Because coalbed methane gas ownership is unclear, EPACT also provides for the creation of an escrow account in order to hold funds where there are potentially conflicting claimants to the ownership interests.[[85]](#footnote-86)71.10 Finally, the Secretary of the Interior is given the power to issue drilling permits and no well can be drilled through a coal seam without giving the coal owners notice and an opportunity to be heard.[[86]](#footnote-87)71.11

1. **Other Types of Conservation Regulation**

State and local governments have implemented, in addition to pooling and unitization statutes, a variety of regulatory schemes designed to prevent waste and/or protect correlative rights. Historically there have been five different categories of conservation legislation enacted:[[87]](#footnote-88)72 (1) waste prevention measures, (2) well-spacing limitations, (3) drilling operation rules, (4) maximum efficient rate (MER) limitations, and (5) prorationing. The following discussion of the origins of these traditional forms of conservation legislation is intended to provide the reader with a basic introduction and historical perspective; a more complete discussion of the most relevant conservation programs in their present form can be found in Sections 5.01–5.04 below.

1. **Waste Prevention Rules**

In most states the earliest form of conservation regulation merely prohibited ***oil*** and gas operators from committing acts relating to the physical waste of hydrocarbons. As problems in the ***oil*** patch increased, the definition of waste broadened to include some of the other categories of conservation regulation.

The Indiana statute challenged in the *Ohio* ***Oil*** case was just such a waste prevention statute.[[88]](#footnote-89)73 Statutes attempting to define waste usually covered some or all of the following types of activities:

1. Allowing the escape of ***oil*** or gas from one stratum to another;
2. Operating an ***oil*** well with an inefficient gas-***oil*** ratio;
3. Drowning with water any stratum capable of producing ***oil*** and gas in paying quantities;
4. Causing surface waste or loss, however caused;
5. Causing underground waste, including the operation of wells in excess of their maximum efficient rate;
6. Creating a fire hazard;
7. Permitting any gas well to burn wastefully;
8. Causing physical waste incident to drilling operations;
9. Allowing casinghead gas to escape from an ***oil*** well; and
10. Using gas for wasteful purposes.[[89]](#footnote-90)74

The Supreme Court has upheld the exercise of the state’s police power to prevent waste, not only in the production of ***oil*** and gas but also in the post-production use of the natural gas. In *Walls v. Midland Carbon Co.,*[[90]](#footnote-91)75 the Supreme Court upheld the validity of a statute that prohibited the use of natural gas in the manufacturing of carbon black when the gas wells were located within a specified distance of an industrial facility or an incorporated town.[[91]](#footnote-92)76 The court rejected the due process and equal protection claims of the gas owner and concluded that the state had a vital interest in conserving one of the resources of the state, notwithstanding the fact that the gas was owned by the lessee upon its capture.[[92]](#footnote-93)77

The statutory definitions of waste have expanded since the nascence of conservation regulation. Likewise, the judicial interpretations of what constitutes waste under particular statutory definitions have also changed over time. In *Michigan* ***Oil*** *Co. v. Natural Resources Commission,*[[93]](#footnote-94)78 the Michigan Natural Resources Commission had denied a drilling permit to the plaintiff on the basis that it would injure a herd of migratory elk. The statute authorized the commission to deny permits where drilling would cause waste.[[94]](#footnote-95)79 The plaintiff sought to limit the definition of waste to its meaning as understood in the ***oil*** and gas industry. The court rejected a limiting definition and read the statute to authorize the commission to consider environmental and other factors in determining whether or not to grant a drilling permit.[[95]](#footnote-96)80

As state conservation agencies have expanded their definition of waste to include environmental considerations, constitutional challenges have re-emerged. In *Miller Brothers v. Department of Natural Resources,*[[96]](#footnote-97)80.1 mineral owners and lessees asserted that the Department’s prohibition on ***oil*** and gas development in the Nordhouse Dunes Area of Michigan amounted to a taking of their property rights without just compensation—The Department had determined that because of the unique surface conditions of the area, any ***oil*** and gas development would constitute waste under the Michigan ***Oil*** and Gas Act.[[97]](#footnote-98)80.2 The trial court found that the decision amounted to an inverse condemnation because it had deprived the property owners of “all economically viable use” of their interest.[[98]](#footnote-99)80.3 Although the court relied on state law, the issues raised are analogous to those raised by the property owner in *Lucas* where the Supreme Court of the United States concluded that where a property owner is deprived of all beneficial use of the interest, a per se taking under the Fifth Amendment has occurred.[[99]](#footnote-100)80.4 If a mineral owner cannot get a permit to drill for ***oil*** and gas there has been a total deprivation of use.

The Department argued that a summary judgment was inappropriate because the order did not prevent several of the mineral owners from using directional drilling techniques to explore for and develop the ***oil*** and gas.[[100]](#footnote-101)80.5 The court rejected that claim, although it was clear that it was possible to extract at least some of the ***oil*** and gas through directional drilling.

It is also an axiom of inverse condemnation action for the property owner to seek a permit and then a variance before such a claim becomes ripe.[[101]](#footnote-102)80.6 Here the Department argued that no permit application had been filed. The court disagreed, noting that the order specifically precluded the issuance of a permit for ***oil*** and gas development within the dunes area. Requiring the mineral owner to seek a permit which would be automatically denied would be futile. Futile remedies are not required to be sought before an inverse condemnation claim may be brought.[[102]](#footnote-103)80.7

Following another *Lucas* principle, the Department argued that ***oil*** and gas development in the affected area would constitute a nuisance and therefore not be part of the owner’s property interest. Here there was a severance of the mineral and surface estate and the court applied traditional surface use doctrine to note that as long as the surface use was reasonably necessary to develop the mineral estate, it could be accomplished even if the surface estate suffered substantial damage.[[103]](#footnote-104)80.8

A key factual issue in any inverse condemnation action is how to measure the damages occasioned by the regulatory taking. These issues are particularly difficult when you are dealing with mineral rights, whose value, if not existence, may not be known at the time the regulatory taking occurs. Although property owners often assert that they are entitled to the full market value of the taken interest, it is clear that a governmental entity may not be forced to take fee simple absolute title if it chooses not to. By removing the regulatory prohibition, the government may convert a permanent taking into a temporary taking.[[104]](#footnote-105)80.9 In this case the typical temporary damages formulae which include rental value,[[105]](#footnote-106)80.10 option price,[[106]](#footnote-107)80.11 interest on lost profits,[[107]](#footnote-108)80.12 or before and after value,[[108]](#footnote-109)80.13 just did not neatly fit the situation where the information on the existence or size of the potential ***oil*** and gas reserves was quite incomplete.[[109]](#footnote-110)80.14 Because the prohibition on drilling in the dunes area was not permanent and could be removed at any time by the Department’s own actions, permanent damages based on before and after values were not appropriate. The court remanded back to the trial court the thorny issue of determining the appropriate measure of temporary damages.

The issue of the appropriate measure of damages for a temporary taking was decided in *Bass Enterprises Production Co. v. United States*.[[110]](#footnote-111)80.15 A federal ***oil*** and gas lessee had filed an Application for Permission to Drill (APD) which BLM denied because of uncertainty about the Waste Isolation Pilot Project (WIPP) needs for additional space. The court determined that a temporary taking had occurred since the lessee was ready and able to drill had the APD been issued. The court specifically rejected the fair rental value method for determining damages for a temporary taking because while the lessee was denied the right to drill for and produce ***oil*** and gas, there was no showing that there was any drainage so that the ***oil*** and gas remained in the ground. The court observed:

We cannot award plaintiffs a royalty interest, or the present value of the income stream. Both calculations would lead to a double recovery. Plaintiffs’ damages are measured by the interest they would have earned on the ***oil*** and gas profits during the period of the delay.[[111]](#footnote-112)80.16

In this case, there was an almost four year delay between the permit denial and the hearing. But the court eschewed making a specific finding on the issue of damages and instead requested the parties to stipulate to the damages within 30 days.[[112]](#footnote-113)80.17

In an unusual legal event, the government’s motion for reconsideration was granted and the Court of Federal Claims reversed its initial finding that there was a temporary taking by the denial of permits to drill.[[113]](#footnote-114)80.18 The reason for the court’s reconsideration was the Supreme Court decision in Tahoe-Sierra Preservation Council,[[114]](#footnote-115)80.19 which treated a moratorium on building permits not as a per se *Lucas* taking but as a regulation that requires the application of the Penn Central balancing test. Applying *Tahoe-Sierra* to the four-year delay in getting permits to drill, the court found that it should apply Penn Central. Upon the application of the Penn Central balancing test, the court concluded that there was no regulatory taking because the diminution in value due to the permit delay amounted to less than 5% of the total value of the property interest.[[115]](#footnote-116)80.20

1. **Well-Spacing Regulations**[[116]](#footnote-117)81

Under the common-law rule of capture there were no restrictions on the number or location of wells that a mineral owner could drill. The rule encouraged the drilling of as many wells as possible in order to avoid having hydrocarbons drain into neighboring wells.[[117]](#footnote-118)82 Whether the motivation to drill was based on a desire to capture a neighbor’s ***oil*** or to protect one’s own ***oil*** from being drained, the resulting overdrilling led to great waste and economic losses. Almost from the inception of the conservation movement, the ability to control the spacing and drilling of wells was considered indispensable to an effective conservation program.[[118]](#footnote-119)83 The first major state to adopt a well-spacing rule was Texas, where the Railroad Commission in 1919 adopted Rule 37, pursuant to recently enacted conservation legislation.[[119]](#footnote-120)84 Power to enforce the conservation legislation had been delegated to the Railroad Commission. As originally promulgated, the rule prohibited the drilling of wells less than 300 feet apart or less than 150 feet from an existing property line.[[120]](#footnote-121)85

Rule 37 is a good example of a spacing regulation because it specifies the minimum distance between wells or between the wells and the property line. It is also an example of a statewide spacing rule that applies throughout the state, in the absence of special or fieldwide spacing rules.[[121]](#footnote-122)86 In most cases, exceptions to spacing rules are allowed through an administrative variance or exception process.

Many states also provide for the relevant administrative agency to create spacing or drilling units. In many cases an agency will adopt state or fieldwide acreage limits within which a well, and only one well, can be drilled.[[122]](#footnote-123)87 In addition to drilling or spacing units, several state statutes authorize the administrative agency to create proration units. This type of regulation acts as a deterrent against overdrilling because it restricts the granting of the allowable to a minimum acreage unit based on the well’s ability to effectively drain the common source of supply.[[123]](#footnote-124)88 In some states the creation of drilling or spacing units does not automatically pool the ownership interests located within the designated unit.

The constitutionality of well-spacing statutes was challenged in *Patterson v. Stanolind* ***Oil*** *and Gas Co.*[[124]](#footnote-125)89 The Oklahoma Corporation Commission had, pursuant to statutory authority, created ten-acre drilling units on lands leased by the defendant from the plaintiff. The Oklahoma provision also provided for the automatic pooling of the interests within the drilling unit. The court rejected the plaintiff royalty owner’s claim that the well-spacing statute unconstitutionally deprived him of property without just compensation or without due process of law.[[125]](#footnote-126)90 The court made a classic distinction between the taking and the regulating of private property, suggesting that the exercise of the police power is valid where the private property interests are merely “restricted and qualified.” The court concluded:

All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exertion of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law.[[126]](#footnote-127)91

While states normally possess inherent police power authority, municipalities, in the absence of constitutional or statutory home rule provisions, have only such authority as is delegated to them by the state legislature.[[127]](#footnote-128)92 Where there is delegated authority and where the state has not preempted municipal regulation, cities are free under the umbrella of the state’s police power to enact drilling and operating ordinances.[[128]](#footnote-129)93 The municipal regulation must not be arbitrary or capricious or otherwise in violation of a constitutional right. For example, the municipal ordinance must not violate the taking clause of the constitution by preventing a mineral owner from exploiting his or her property while allowing others to drain the ***oil*** and gas from underneath his or her lands.[[129]](#footnote-130)94 In such cases the municipal ordinance is invalidated.

The municipal ordinance must also bear a rational relationship to the state police power objectives of preventing waste, conserving ***oil*** and gas or protecting correlative rights. If a municipality attempts to enact an ***oil*** or gas conservation ordinance which cannot be said to achieve those objectives it is an *ultra vires* act which will be invalidated. Such a result was ordered in *Great Plains Resource, Inc. v. City of Benton.*[[130]](#footnote-131)95 There the city had enacted a well spacing ordinance which required operators to drill offset wells in great numbers and in excess of that which was allowed by the state conservation agency. The city imposed stiff regulatory fees on each well application. The court found that the ordinance was arbitrary and invalid since it did not relate to its stated objective which was to prevent waste. The city did not offer any defense of the ordinance as a rational means by which to achieve the admittedly valid goal of preventing waste. In fact, the ordinance promoted waste by encouraging, if not requiring, overdrilling. As such it was an improper exercise of the police power.

1. **Drilling Regulations**

In § 3.01[1], the history and legal issues surrounding the well plugging and abandonment regulatory programs are discussed. In addition, many states were concerned with the safety problems inherent in drilling and producing ***oil*** and gas, and showed that concern through the regulation of drilling practices. These provisions were enacted for several purposes including the prevention of both surface and underground waste, protection of the public safety, and the prevention of pollution of surface and groundwater supplies.[[131]](#footnote-132)96 The typical statutory scheme provides for the conservation agency to issue drilling permits once the applicants have met all of the requirements set out in the statute or in the agency’s rules or regulations.

Many states now require some type of security or bond to be posted at the time the well permit application is filed. This bond or security can deal with well plugging responsibilities,[[132]](#footnote-133)97 or other environmental or pollution problems. In Florida, the applicant has a choice of making a payment ($4,000.00) into the Petroleum Exploration and Production Bond Trust Fund, or providing a bond to cover the costs of potential environmental damage.[[133]](#footnote-134)98 In a case in which the Department of Environmental Protection sought to impose a much more substantial bond requirement on a petroleum company than that required by statute, the court reversed the Department’s refusal to issue a well permit based on the alternative statutory requirements.[[134]](#footnote-135)98.1 Because of the fear of substantial damage caused by ***oil*** well pollution, the Board of Trustees of the Internal Improvement Trust Fund then sought to impose additional bonding requirements on well permits pursuant to a different statutory provision.[[135]](#footnote-136)98.2 The petroleum company had been awarded two offshore state ***oil*** and gas leases before the statute relating to bonding requirements was enacted. It attacked the Board’s attempt to apply the bonding requirements to its pre-existing leases. The courts agreed, finding that the state’s actions were an impairment of the obligation of contract, namely the ***oil*** and gas lease.[[136]](#footnote-137)98.3

The issuance of a well drilling permit may have an impact on whether or not a lease is kept alive. In *Gray v. Helmerich & Payne, Inc.,*[[137]](#footnote-138)98.4 a lessor sought to terminate a lease where the lessee had exercised the pooling clause to create a pooled unit three days prior to the end of the primary term. In those three days, the lessee leveled the drill site, began road construction, and installed a cattle guard. In addition, an application for a permit to drill was filed with the Railroad Commission. The Commission, however, did not issue the well drilling permit until well after the expiration of the primary term. In addition, no production occurred during the primary term. The lessor argued that without a Commission permit, no working interest owner could drill a well and therefore the primary term expired without drilling or production. Since the lease authorized both pooling and drilling operations, the court found that the lease was properly maintained beyond the primary term. The drilling operations provision did not require the receipt of a drilling permit. Preliminary or pre-drilling operations were sufficient under the express terms of the lease. The Commission’s action in not issuing the permit during the primary term could not affect the lease obligations unless the lease specifically called for the lessee to get a well drilling permit as a condition of keeping the lease alive.[[138]](#footnote-139)98.5

An analogous situation to *Gray* arose in the context of a coal lease in *Christian Land Corp. v. C. & C. Co.*[[139]](#footnote-140)98.6 The lease provided for an indefinite term so long as minimum annual royalties were paid. There was no production requirement. The lessee mined for several years but then ceased activities when the West Virginia Department of Energy revoked the mining permits for failing to comply with state regulations. Even with the loss of state mining privileges and the breach of several leasehold covenants, the court still did not find that the lessee had forfeited the leasehold estate. The court did, however, find that there was an abandonment of the lease caused by the lessee’s failure to diligently pursue operations. The lessee’s failure to remedy the state violations in order to be eligible for the required permits reflected an intent to abandon any future operations. Had the lessee sought to have its permits reinstated within a reasonable time of their revocation, the lease would have been capable of being maintained by the payment of the minimum annual royalties.

One of the three main objectives of the proposed Federal rule governing hydraulic fracturing operations on Federal and Indian leases concentrates on wellbore construction designed to prevent the encroachment of frac fluids into the underground formation.[[140]](#footnote-141)98.7 Wellbore integrity played an important role in the development of the regulation, along with issues relating to the disclosure of chemicals used in the hydraulic fracturing process and the disposal of produced or frac water.

1. **Maximum Efficient Rate (MER) Regulation**

Maximum efficient rate (MER) regulation is based on the engineering concept that each well has a rate of production that will maximize the amount of recoverable hydrocarbons by minimizing the loss of natural reservoir pressure.[[141]](#footnote-142)99 Because of the ever-changing nature of reservoir pressure, MER figures must change and reflect a range of options rather than a single number.[[142]](#footnote-143)100 MER regulation was stimulated by the federal effort to deal with wartime petroleum demand during World War II.[[143]](#footnote-144)101 In some states this federal effort remained after the war as a means of controlling production.[[144]](#footnote-145)102 MER also served as the only regulatory mechanism available to control production in those states where market demand prorationing was not authorized.[[145]](#footnote-146)103 Thus, MER regulation could serve either as an outer limit on production everywhere market demand prorationing existed, or as the only limit on production based on the general concept of waste prevention.

The definition of MER may have ramifications for severance tax purposes. In 1980 North Dakota by initiative adopted a state severance tax for ***oil*** and gas production. That legislation was amended by statute to provide an exemption from severance tax liability for production from “stripper well property.”[[146]](#footnote-147)103.1 That was defined as:

a property whose average daily production of ***oil***, … per well did not exceed ten barrels per day during any preceding consecutive twelve-month period.[[147]](#footnote-148)103.2

The issue in *Gofor* ***Oil****, Inc. v. State of North Dakota,*[[148]](#footnote-149)103.3 was how to define average daily production for determining Gofor’s right to an exemption for its unit production.

The North Dakota Industrial Commission by informal policy for 5 years had defined the term by taking twelve month production figures and dividing them by the actual days the wells were in production.[[149]](#footnote-150)103.4 Under that calculation Gofor was not exempt. In 1986 the Commission changed its policy and divided the production figures by 365 to determine average daily production. Obviously the change in Commission policy brought many more wells under the exemption.

Neither Gofor, the unit operator, nor Amoco, the purchaser of the ***oil*** paid the severance tax for the first 5 years until the Commission sent a notice of deficiency in 1986. At that time Gofor sought a severance tax exemption, not only for future production but also for past unit production. The Commission granted the exemption under the amended policy but refused to retroactively apply the amended policy to prior production. Gofor then filed this action seeking a refund of the tax payments. The court upheld the Commission’s power to determine MER or average daily production rate under the statute and concluded that the original informal policy was both authorized and reasonable.

1. **Market Demand Proration**

The most controversial form of conservation legislation is the prorationing system.[[150]](#footnote-151)104 Prorationing is essentially a division of the production of hydrocarbons within a common source of supply or a specified geographic area. It normally involves a three-step procedure: (1) A determination of the maximum allowable production, which means, in a market demand system, determining how much product will be purchased on the open market; (2) An allocation of total demand among the jurisdiction’s various common sources of supply; and (3) A formula for dividing each common source of supply’s share among the producing wells.[[151]](#footnote-152)105

Oklahoma was probably the first state to impose a statewide proration order in response to a tremendous glut of ***oil*** that had driven the price of ***oil*** down substantially in a very short period of time. The order limited production in the state to 700,000 barrels and allocated that production among the settled pools and the flush pools.[[152]](#footnote-153)106 This order was followed by proration orders in other states, including a series of Texas orders that began in 1930.[[153]](#footnote-154)107

The constitutionality of market demand prorationing was tested in Oklahoma and found valid in *Champlin Refining Co. v. Corporation Commission.*[[154]](#footnote-155)108 The court determined that it was within a state’s police power authority to prevent waste through a prorationing system that limited production to the amount of demand that was predicted for the product. There was no violation of either the taking or due process clauses, even when prorationing limited the owner’s ability to produce ***oil*** at its maximum efficient rate.[[155]](#footnote-156)109

Although the basic system of prorationing used by most states has been found to be constitutional, in certain circumstances a prorationing system or order may be found invalid when the conservation agency exceeds its statutory authority.[[156]](#footnote-157)109.1 Thus, where the Oklahoma Corporation Commission attempted to impose a state-wide proration order for unallocated gas wells, it was found to be *ultra vires* because the statutes only authorized prorationing on a common source of supply basis.[[157]](#footnote-158)109.2 The order was therefore invalidated and the regulatory scheme overturned.

Although each state had its own system for determining the prorationing numbers, most used similar factors to determine market demand volume for their production of ***oil***. The states considered information provided by the Federal ***Oil*** Conservation Board or the Bureau of Mines to determine the nationwide demand for ***oil***. This demand was broken down by states using a formula based on the historical production levels of various states. But the final determination of statewide demand was usually made using “nominations” from purchasers which estimated the amount of ***oil*** they would purchase in the relevant proration period. The statewide demand figure was usually ascertained following a public hearing process.[[158]](#footnote-159)110 which figure was then used to determine the amount of production from each field located within the state. In most cases no set formula was used, and the general standard was that the allocation be made on a reasonable basis and without discrimination.[[159]](#footnote-160)111 After the fieldwide allowables were set, each state agency allocated production among the wells located within each field. The goal of the well allowables was to give each owner the opportunity to produce his or her fair share from the common source of supply by preventing drainage *from the tract* that was not compensated for by drainage *to the tract.*[[160]](#footnote-161)112 While litigation in this area was widespread, the outcomes normally favored the agency’s application of its proration formula.[[161]](#footnote-162)113 In several states, including Texas, marginal wells were given special protection by statute or by administrative agency action.[[162]](#footnote-163)114

The use of market demand prorationing to restrict production could be categorized either as a conservation tool and by some, as a mechanism to maintain an artificially high market price for a barrel of ***oil***. Regardless of the categorization, market demand prorationing involved a substantial modification of the common-law rule of capture because it limited the amount of hydrocarbons that could otherwise be produced from a well.[[163]](#footnote-164)115 Prorationing itself, however, could not deal with the tremendous disparity between the supply of hydrocarbons and the demand for them. Thus, it spawned well-spacing regulations as well as the enactment of pooling and unitization statutes to deal with the continuing problems of waste, harm to correlative rights, and overdrilling.

The Law of Pooling and Unitization, 3rd Edition

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1. 12R. Sullivan, Handbook of ***Oil*** and Gas Law 251–252 (1955). *See also* S. Buckley, Petroleum Conservation 6 (1951). Conservation regulation is inextricably wound up with the engineering and geological principles that govern the recovery of ***oil*** and gas. *See also* Kaveler, *The Engineering Basis for and the Results from the Unit Operation of* ***Oil*** *Pools,* 23 Tulane L. Rev. 331 (1949); Moses, *The Constitutional, Legislative and Judicial Growth of* ***Oil*** *and Gas Conservation Statutes,* 13 Miss. L.J. 353, 379 (1941).

   In Wildgrass ***Oil*** & Gas Comm. v. Colorado ***Oil*** & Gas Conservation Comm’n, 447 F. Supp. 3d 1051 (D. Colo. 2020), *aff’d*, 843 Fed. Appx. 120 (10th Cir. 2021), the court recognized that the purposes of a compulsory pooling statute was to “allow for more efficient ***oil*** and gas drilling by decreasing waste and avoiding drilling of unnecessary wells.” Colo. Rev. Stat. § 34-60-116. As to the principal claim that the compulsory pooling procedure, as applied was constitutionally infirm, the court did not rule on the merits to the challenge to the compulsory pooling statute because it invoked the *Burford* abstention doctrine to dismiss the challenge. The court, on the merits, rejected the somewhat novel claim that the compulsory pooling process violates the plaintiffs’ First Amendment rights of freedom of association and being subject to the subsidization of private speech. *Wildgrass* and *Burford* were followed in dicta in Wolverine Energy Holdings, LLC v. Noble Energy Group, 2020 U.S. Dist. LEXIS 199916 (D. Colo. Oct. 27, 2020), *granting in part and denying in part plaintiff’s motion for reconsideration,* 2021 U.S. Dist. LEXIS 234305 (D. Colo. Jan. 25, 2021), *amended order*, 2021 U.S. Dist. LEXIS 234449 (D. Colo. Jan. 25, 2021), where the plaintiff was trying to engage in a collateral attack on a statutory pooling order by asserting that the lessee lacked the power to voluntarily pool the plaintiff’s acreage. The federal court concluded that it should not use its equity power to interfere with a state’s exercise of its police power under the Colorado ***oil*** and gas conservation statute. [↑](#footnote-ref-2)
2. 13The American Bar Association has published three volumes that explore in great detail the history of ***oil*** and gas conservation statutes at both state and federal levels. An understanding of these early efforts is necessary to an understanding of the development of pooling and unitization statutes. In this treatise, however, only a brief summary of the major historical trends and events can be noted. The following volumes provide a thorough and accurate historical background of the development of pooling and unitization statutes. ABA, Legal History of Conservation of ***Oil*** and Gas (1938); ABA, Conservation of ***Oil*** and Gas: A Legal History (Murphy ed. 1948); ABA, Conservation of ***Oil*** and Gas—1948–1958 (Sullivan, ed. 1960); Robert E. Hardwicke, Antitrust Laws, et al., v. Unit Operation of ***Oil*** or Gas Pools (1961) [hereinafter *Antitrust Laws* ]. [↑](#footnote-ref-3)
3. 14Ohio ***Oil*** Co. v. Indiana, 177 U.S. 190, 20 S. Ct. 576, 44 L. Ed. 729 (1900).

   *Ohio* ***Oil*** was cited for the proposition that “The purpose of unitization is to more efficiently capture underground ***oil*** and gas resources, which, by their nature, are not neatly divided between landowners on the surface. … Even in the absence of an agreement between a landowner and a prospector, states can make unitization for ‘securing a just distribution’ of resources and ‘preventing waste.’ ” Chambers v. Chesapeake Appalachia, LLC, 359 F. Supp. 2d 268, 272 (M.D. Pa. 2019). [↑](#footnote-ref-4)
4. 15For other early cases dealing with state conservation statutes, *see* Manufacturers’ Gas & ***Oil*** Co. v. Indiana Natural Gas & ***Oil*** Co.,155 Ind. 461, 57 N.E. 912 (1900); Townsend v. State, 147 Ind. 624, 47 N.E. 19 (1897). [↑](#footnote-ref-5)
5. 16177 U.S. at 190–191. In Townsend v. State, 147 Ind. 624, 47 N.E. 19 (1897), the Indiana Supreme Court upheld the state’s prohibition against the use of natural gas for flambeau lights when challenged on the theory that it was not within the police power of the state to regulate the use of private property. [↑](#footnote-ref-6)
6. 17177 U.S. at 210. The Court concluded:

   In view of the fact that regulations of natural deposits of ***oil*** and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the Supreme Court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the State of Indiana of a subject which especially comes within its lawful authority.

   *Id.* at 211–212. [↑](#footnote-ref-7)
7. 18177 U.S. at 210. The court said:

   Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to teach the like end by preventing waste.

   This broad notion of legislative power to prevent waste and/or protect correlative rights was also recognized in Cities Service Gas Co. v. Peerless ***Oil*** & Gas Co., 340 U.S. 179, 185, 71 S. Ct. 215, 95 L. Ed. 190 (1950) and Hunter Co. v. McHugh, 320 U.S. 222, 227–228, 64 S. Ct. 19, 88 L. Ed. 5 (1943).

   *Peerless* was cited to and relied on to uphold the Ohio compulsory unitization process in Paczewski v. Antero Res. Corp., 2019-Ohio-2641 (Ohio App.), *discretionary appeal denied*, 157 Ohio St.3d 1441, 2019-Ohio-4421. [↑](#footnote-ref-8)
8. 19La. Rev. Stat. Ann. § 30:9; Okla. Stat. tit. 52, § 87.1; Desormeaux v. Inexco ***Oil*** Co., 298 So. 2d 897, 50 O.&G.R. 18 (La. App. 1974); Ward v. Corporation Commission, 1972 OK 122, 501 P.2d 503, 42 O.&G.R. 473. In Mississippi, the court applied the concept of equitable or judicial pooling in Griffith v. Gulf Refining Co., 215 Miss. 15, 60 So. 2d 518, 1 O.&G.R. 1627 (1952), to reach a similar result. For a more detailed analysis of equitable or judicial pooling, *see* §§ 5.03[3], 7.03 *below.* [↑](#footnote-ref-9)
9. 20It may be somewhat ironic that Kansas is the last major producing state without a compulsory pooling statute, even though one of its cities provided the experiment in pooling, which, when judicially approved, stamped the compulsory pooling process with the imprimatur of constitutionality. Marrs v. City of Oxford, 24 F.2d 541 (D. Kan. 1928), *aff’d*, 32 F.2d 134 (8th Cir. 1929), *cert. denied*, 280 U.S. 573, 50 S. Ct. 29, 74 L. Ed. 625 (1929).

   It was another Kansas municipality, Winfield, that was apparently the first public entity to have a compulsory pooling ordinance. Its enactment was in 1927 and required a minimum area of either 90,000 square feet for unimproved property or 300,000 square feet for improved property in order to get a municipal well drilling permit. It also provided for the pooling of interests within the drilling permit areas. *1938 ABA History,* n.1 *above* at 55–56. The Winfield ordinance differed from the Oxford ordinance because it required the permit applicant to control the minimum area before he or she could apply for a permit. Under the Oxford ordinance any owner could seek a permit but he or she would be forced to pool his or her interests with the other mineral owners within the permit area, once the drilling permit was issued. *Id.* [↑](#footnote-ref-10)
10. 21Oklahoma City enacted an ordinance in 1929 and was followed by other Oklahoma cities shortly thereafter. *1948 ABA History,* n.1 *above* at 391–397. In 1935 the City of South Houston, Texas, enacted a compulsory pooling ordinance for drilling operations within its municipal boundaries. Tysco ***Oil*** Co. v. Railroad Commission, 12 F. Supp. 195, 202 (S.D. Tex. 1935). *See also* Rainwater v. Mason, 283 S.W.2d 435, 5 O.&G.R. 273 (Tex. Civ. App.—Amarillo 1955, *n.w.h.)*, describing a similar ordinance enacted in Post, Texas. Further discussion of the history of municipal ordinances can be found in Williams, *Compulsory Pooling and Unitization of* ***Oil*** *and Gas Rights*, 15 Sw. Legal Fed’n ***Oil*** & Gas Inst. 223 (1964). *See* § 4.05[2] *infra*. [↑](#footnote-ref-11)
11. 221935 N.M. Laws, Ch. 72. For a complete discussion of the early New Mexico statute, *see 1938 ABA History,* n.1 *above* at 106–107, 289–302. Part of the statute provided:

    … The pooling of properties or parts thereof shall be permitted, and, if not agreed upon, may be required in any case when and to the extent that the smallness of or shape of a separately owned tract would, under the enforcement of a uniform spacing plan or proration unit, otherwise deprive or tend to deprive the owner of such tract of the opportunity to recover his just and equitable share of the crude petroleum ***oil*** and natural gas in the pool; … All orders requiring such pooling shall be just and reasonable, and will afford to the owner of each tract in the pool the opportunity to recover or receive his just and equitable share of the ***oil*** and gas in the pool as above described … .

    *Id.* at 294.

    It is interesting to note that the author of the New Mexico chapter in the *1938 ABA History* did not discuss the compulsory pooling procedures contained in the 1935 legislation, although extensive analysis was included of the well-spacing and prorationing provisions of that legislation. *See also* Morris, *Compulsory Pooling of* ***Oil*** *and Gas Interests in New Mexico*, 3 Nat. Resources J. 316 (1963). [↑](#footnote-ref-12)
12. 231935 Okla. Sess. Laws, Ch. 59 as discussed in *1938 ABA History,* n.2 *above* at 209–210. [↑](#footnote-ref-13)
13. 24Marrs v. City of Oxford, 24 F.2d 541 (D. Kan. 1928), *aff’d*, 32 F.2d 134 (8th Cir. 1929), *cert. denied*, 280 U.S. 573, 50 S. Ct. 29, 74 L. Ed. 625 (1929). [↑](#footnote-ref-14)
14. 2524 F.2d at 541–542. The compulsory development of a common resource was not an unknown regulatory program at the time that Oxford, a city of some 750 people, enacted its ordinance. The Supreme Court of the United States had upheld the validity of several state and local governmental statutes or ordinances that required joint or cooperative development in drainage, irrigation, and surface stream dam projects. *See, e.g.,* Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 17 S. Ct. 56, 41 L. Ed. 369 (1886); Head v. Amoskeag Mfg. Co., 113 U.S. 9, 5 S. Ct. 441, 28 L. Ed. 889 (1885). *See generally* Williams, *Compulsory Pooling and Unitization on* ***Oil*** *and Gas Rights*, 15 Sw. Legal Fed’n ***Oil*** & Gas Inst. 223 (1964). [↑](#footnote-ref-15)
15. 26There was also some discussion of the substantive due process rights of the mineral and royalty owners, but the District Court relied in part on Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio Law Abs. 816 (1926), a case upholding a municipality’s right to zone as being dispositive of the issue. [↑](#footnote-ref-16)
16. 27Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio Law Abs. 816 (1926). [↑](#footnote-ref-17)
17. 2824 F.2d at 547–548. [↑](#footnote-ref-18)
18. 2932 F.2d at 140. The court said:

    If one or more lot owners have given a lease for which no permit is obtainable, their lessee may join a lessee who has a permit on the same block on terms that are fair to both lessor and lessee. If a lot owner has not given a lease he or she is protected by the asking in a fair proportion of the mineral produced by a permittee. The regulations make every effort to protect rather than to destroy rights. They extend equal opportunity to all who have an interest and eliminate the race between those having equal rights in a common source of wealth, so that some may not take all and leave others with nothing.

    *Id.*

    The notion that costs may be imposed upon a minority of landowners for the public benefit has been approved of by the Supreme Court of the United States for well over 100 years. In Wurts v. Hoagland, 114 U.S. 606, 5 S. Ct. 1086, 29 L. Ed. 229 (1885), the Supreme Court approved a New Jersey statute that authorized the drainage of lowlands upon the request of impacted landowners with the costs to be spread among all of the landowners whether they consented or not to the project. Such laws were adopted as early as the 18th century. *In accord*: Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 17 S. Ct. 56, 41 L. Ed. 369 (1896) (upholds statute creating irrigation districts which imposed assessments on all landowners whether they consented to the creation of the irrigation district or not). Likewise states regularly passed mill dam statutes which allowed a landowner to build a dam that might cause damage to other riparian landowners. Typically, as in Head v. Amoskeag Manufacturing Co., 113 U.S. 9, 5 S. Ct. 441, 28 L. Ed. 889 (1884), the statue also provided a mechanism by which an injured landowner could seek damages from the mill dam owner. No constitutional violations were found by such statutes. *Head, supra*. [↑](#footnote-ref-19)
19. 30Patterson v. Stanolind ***Oil*** & Gas Co., 1938 OK 138, 182 Okla. 155, 77 P.2d 83 (1938), *appeal dismissed*, 305 U.S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939). [↑](#footnote-ref-20)
20. 3177 P.2d at 85–86. *See also* Croxton v. State, 1939 OK 504, 186 Okla. 249, 97 P.2d 11 (1939). [↑](#footnote-ref-21)
21. 3277 P.2d at 89–90. For other cases upholding the validity of compulsory pooling statutes, *see* Gawenis v. Arkansas ***Oil*** & Gas Commission, 2015 Ark. 238, 464 S.W.3d 453; Hunter v. Justice’s Court, 36 Cal. 2d 315, 223 P.2d 465 (1950); Helmerich & Payne v. Roxana Petroleum Corp., 136 Kan. 254, 14 P.2d 663 (1932) (municipal ordinance); Hunter Co. v. McHugh, 11 So. 2d 495, 202 La. 97 (1943), appeal dismissed, 320 U.S. 222, 64 S. Ct. 19, 88 L. Ed. 5 (1943); Sylvania Corp. v. Kilborne, 28 N.Y.2d 427, 322 N.Y.S.2d 678, 271 N.E.2d 524, 39 O.&G.R. 438 (1971); ***Kerns*** v. Chesapeake Exploration, LLC, 762 Fed. Appx. 289, 2019 U.S. App. LEXIS 3450 (6th Cir. 2019), *aff’g* 2018 U.S. Dist. LEXIS 99180 (N.D. Ohio June 13, 2018) (applying Ohio’s compulsory pooling statute); Amis v. Bryan Petroleum Corp., 1939 OK 192, 185 Okla. 206, 90 P.2d 936. The initial attempt to well-space in California was struck down as unconstitutional because the non-drilling parties were not given the opportunity to participate through a compulsory pooling process. Bernstein v. Bush, 29 Cal. 2d 773, 177 P.2d 913 (1947). When the statute was amended to authorize the compulsory pooling of all interests within the spacing unit, the statute was upheld against a takings issue challenge. Hunter v. Justice’s Court, *op. cit.*

    In Paczewski v. Antero Res. Corp., 2019-Ohio-2641 (Ohio App.), *discretionary appeal denied*, 157 Ohio St.3d 1441, 2019-Ohio-4421, the court was dealing with a compulsory unitization statute but nonetheless referred to compulsory pooling and cases upholding compulsory pooling.

    In Wildgrass ***Oil*** & Gas Comm. v. Colorado ***Oil*** & Gas Conservation Comm’n, 447 F. Supp. 3d 1051 (D. Colo. 2020), *aff’d*, 843 Fed. Appx 120 (10th Cir. 2021), the court discusses the Colorado compulsory pooling statute at length in a suit brought by a neighborhood association seeking to invalidate a compulsory pooling order issued by the COGCC. Instead, the court dismissed most of the plaintiff’s claims based on the application of the *Burford* abstention doctrine that allows a federal court to dismiss complaints that raise complicated state regulatory schemes. On the merits, the court dismissed the plaintiffs’ somewhat innovative First Amendment claims that the compulsory pooling statute violated their freedom of association and was a subsidization of private speech. The court had some sympathy for the same claim made in *Citizens Allied*, *infra*, that the statute and regulations regarding the standards to be applied in reviewing a compulsory pooling application were too vague, but that claim was also dismissed on *Burford* abstention grounds. The Tenth Circuit affirmed the dismissal of the claims solely on *Burford* abstention grounds.

    In Citizens Allied for Integrity and Accountability, Inc. v. Schultz, 335 F. Supp. 3d 1216 (D. Idaho 2018), *motion for reconsideration denied*, 2019 U.S. Dist. LEXIS 16777 (D. Idaho Feb. 1, 2019), plaintiffs did not challenge the constitutionality of a compulsory pooling or integration statute, but did challenge the constitutionality of a specific pooling or integration order under Idaho Code § 47-320. The court concluded that the procedural due process rights of the unleased mineral owners were violated because the Idaho ***Oil*** and Gas Conservation Commission did not adequately explain why the options offered to the unleased mineral owners were “just and reasonable” as required by § 47-320.

    In an analogous situation involving the rights of a non-operating working interest owner, the Utah Supreme Court upheld a compulsory pooling order that rejected the non-operator’s proffered changes to the model form joint operating agreement that had been submitted by the operator as being just and reasonable under the terms of the statute. J.P. Furlong Co. v. Board of ***Oil***, Gas & Mining, 2018 UT 22, 424 P.3d 858. [↑](#footnote-ref-22)
22. 32.1Burtner-Morgan-Stephens Co. v. Wilson, 63 Ohio St. 3d 257, 586 N.E.2d 1062, 118 O.&G.R. 484 (1992). [↑](#footnote-ref-23)
23. 32.2Ohio Const. § art. II, § 28. [↑](#footnote-ref-24)
24. 32.3586 N.E.2d at 1065. Professor John Lowe in his Discussion Note in the ***Oil*** and Gas Reporter notes that the result will be a trap for the unwary buyers and sellers of mineral interests who may anticipate that royalty will be apportioned if their interests are pooled. 118 O.&G.R. 489–90. [↑](#footnote-ref-25)
25. 32.3aAm. Energy-Utica, LLC v. Fuller, 2018-Ohio-3250, 2018 Ohio App. LEXIS 3513, *discretionary appeal not allowed*, 2019-Ohio-345, 2019 Ohio LEXIS 276 (Feb. 6, 2019). [↑](#footnote-ref-26)
26. 32.3bPaczewski v. Antero Res. Corp., 2019-Ohio-2641 (Ohio App.), *discretionary appeal denied*, 157 Ohio St.3d 1441, 2019-Ohio-4421. *In accord*: Karas v. State, 1979 Ohio App. LEXIS 11669 (Ohio App. Sept. 11, 1979). [↑](#footnote-ref-27)
27. 32.4§§ 12.02 and 12.03[2] *below* for a complete discussion of the issue of risk penalties. [↑](#footnote-ref-28)
28. 32.5Bennion v. ANR Production Co., 819 P.2d 343, 116 O.&G.R. 401 (Utah 1991). [↑](#footnote-ref-29)
29. 32.6Waller Brothers, Inc. v. Exxon Corp., 836 F. Supp. 363, 126 O.&G.R. 265 (S.D. Miss), *aff’d*, 20 F.3d 469 (5th Cir. 1994). [↑](#footnote-ref-30)
30. 32.7*See also* Anderson v. Corporation Commission, 1957 OK 39, 327 P.2d 699, 7 O.&G.R. 72, 9 O.&G.R. 196 (Okla. 1957), *appeal dismissed*, 358 U.S. 642, 79 S. Ct. 536, 3 L. Ed. 2d 567, 9 O.&G.R. 196, 10 O.&G.R. 292 (1959); *In re* SAM ***Oil***, 817 P.2d 299, 116 O.&G.R. 417 (Utah 1991).

    In Gawenis v. Arkansas ***Oil*** & Gas Commission, 2015 Ark. 238, 464 S.W.3d 453, the Arkansas Supreme Court relied heavily on *Anderson* in rejecting an unleased mineral owner’s claim that Arkansas’ compulsory pooling or integration statute (Ark. Code Ann. §§ 15-72-303 and 15-72-304), constituted a regulatory taking. The unleased mineral owner in *Gawenis* was given four options to choose from in the proposed integration order. [↑](#footnote-ref-31)
31. 32.8J.P. Furlong Co. v. Board of ***Oil***, Gas & Mining, 2018 UT 22, 424 P.3d 858. [↑](#footnote-ref-32)
32. 33For a complete listing of all state pooling and unitization statutes, *see* Volumes 4 and 5 *infra.* The California compulsory pooling provisions are much more narrowly drawn than the other states and have had a much more limited role in conservation regulation than in most producing states. Cal. Pub. Res. Code §§ 3600–3609 at § 30.05A, *below*. The West Virginia compulsory pooling provisions do not apply to the various shale formations that have been exploited over the past several years. *See* Zachary H. Warder, *“Nay” to Forced Pooling: The Stagnation of West Virginia’s Natural Gas Industry*, 120 W. Va. L. Rev. 689 (2017).

    *See also* Frank Sylvester & Robert W. Malmsheimer, ***Oil*** *and Gas Spacing and Forced Pooling Requirements: How States Balance Energy Development and Landowner Rights*, 40 Dayton L. Rev. 47 (2015); Kevin L. Colosimo & Daniel P. Craig, *Compulsory Pooling and Unitization in the Marcellus Shale: Pennsylvania’s Challenges and Opportunities*, 83 Pa. B. Ass’n Q. 47 (2012); Sharon O. Flanery & Ryan J. Morgan, *Overview of Pooling and Unitization Affecting Appalachian Shale Development,* 32 Energy & M in. L. Inst. § 13.04 (2011). [↑](#footnote-ref-33)
33. 34The involvement of Doherty, an independent ***oil*** man, is recounted in R Hardwicke, *Antitrust Laws, et al. v. Unit Operation of* ***Oil*** *and Gas Pools* 1–13 (1961). [↑](#footnote-ref-34)
34. 35The letter is reprinted in toto in Robert E. Hardwicke, *Antitrust Laws, et al. v. Unit Operation of* ***Oil*** *and Gas Pools,* 179–190 (1961). The following excerpts highlight the major issues raised by Doherty, who was urging the creation of a federal administrative agency to regulate the ***oil*** industry in order to mandate conservation of our nation’s ***oil*** and gas:

    Under our present system we are bound to become a pauper nation so far as ***oil*** is concerned before the ***oil*** resources of many other countries have been seriously drawn upon … . I have been forced to the conclusion that only through the efforts of the Federal Government can the ***oil*** problem be solved … . The shocking depletion that has characterized our ***oil*** reserves is not due to the ease with which we can locate new pools but is due primarily to the fact that under our present unfortunate laws each pool as discovered must be immediately devastated … . Practically every evil of the ***oil*** business, and everything about which the public complain, is due to the fact that ***oil*** does not follow the usual law of property rights but belongs to the man who can capture it … . The discovery of an ***oil*** pool means that every landowner or lessee can take as much ***oil*** from this common pool as he can get, and there is always a frenzied scramble to bring the ***oil*** to the surface before somebody else can get it regardless of whether the market needs it or not.

    Simply put, “The goal of unitization ‘is to consolidate enough of the interests in a particular reservoir to allow production to be carried out in the most efficient manner [.]” EQT Prod. Co. v. Crowder, 241 W. Va. 738, 828 S.E.2d 800 (n.6) (2019), quoting from Gastar Exploration, Inc. v. Contraguerro, 239 W. Va. 305, 307 (n.1), 800 S.E.2d 891, 893 (2017), further quoting from James E. McDaniel, *Statutory Pooling and Unitization in West Virginia: The Case for Protecting Private Landowners*, 118 W. Va. L. Rev. 439, 455 (2015). *In accord*: Ascent Resources—Marcellus LLC v. Huffman, 851 S.E.2d 782 785 n.2 (W. Va. 2020). [↑](#footnote-ref-35)
35. 36Robert E. Hardwicke, *Antitrust Laws, et al. v. Unit Operation of* ***Oil*** *and Gas Pools* 33 (1961). [↑](#footnote-ref-36)
36. 37Several studies were commissioned in the late 1920’s to deal with the general problem of the waste of ***oil*** and gas. *See* Robert E. Hardwicke, *Antitrust Laws, et al. v. Unit Operation of* ***Oil*** *and Gas Pools,* 35–75 (1961). Among the groups studying the problem were the Federal ***Oil*** Conservation Board, which had been created only a few years earlier, the American Petroleum Institute, the Section of Mineral Law of the American Bar Association, and the American Institute of Mining and Metallurgical Engineers. The depth of the hostility towards Mr. Doherty is described in *id.* at 14–31. [↑](#footnote-ref-37)
37. 38Federal ***Oil*** Conservation Board, Report IV, 17–24 (1926). [↑](#footnote-ref-38)
38. 3954 Rep. A.B.A. 739–740 (1929). The Section’s report is discussed in depth in Merrill, *Stabilization of the* ***Oil*** *Industry and Due Process of Law*, 3 S. Cal. L. Rev. 396 (1930). Professor Merrill noted that California and New Mexico had already enacted voluntary unitization legislation. *Id.* at 398. (1929 Cal. Stat. Ch. 534, p. 193; 1929 N.M. Laws p. 132). [↑](#footnote-ref-39)
39. 4054 Rep. A.B.A. at 749–750. [↑](#footnote-ref-40)
40. 4154 Rep. A.B.A. at 763–765. [↑](#footnote-ref-41)
41. 4254 Rep. A.B.A. at 768–769. This provision was considered of utmost importance to the members of the Section who were afraid that individual leases might be lost pending the ultimate issuance of the order by the state, or that the effectiveness of the order would be substantially diminished by the drilling that took place between the time the order was requested and the time it was ultimately granted. 54 Rep. A.B.A. at 756. [↑](#footnote-ref-42)
42. 43*Handbook on Unitization of* ***Oil*** *Pools* (1930—Mid-Continent ***Oil*** & Gas Ass’n). [↑](#footnote-ref-43)
43. 44Am. Inst. of Min. & Metallurgical Engineers, Petroleum Div. 1930. [↑](#footnote-ref-44)
44. 45Robert E. Hardwicke, *Antitrust Laws, et al. v. Unit Operation of* ***Oil*** *and Gas Pools* 17–18 (1961), where the author describes in great detail the hearing of the Federal ***Oil*** Conservation Board on February 10–11, 1926. Doherty stood virtually alone in calling for mandatory federal legislation to conserve ***oil*** and gas, while many of the other speakers strongly disagreed both with the factual premise that existing practices were inefficient and with the proposed solution of governmental intervention. *Id.*

    The Federal ***Oil*** Conservation Board was created by President Coolidge on December 19, 1924. It was disbanded by President Roosevelt in March 1933 after issuing several reports on various aspects of the ***oil*** and gas industry. *1948 ABA History,* n.1 *above* at 681–691.

    In addition to the regulatory efforts, changes to the Mineral Leasing Act authorizing the United States to approve and impose unit agreements on the development of federally owned ***oil*** and gas has been described as a means of overcoming the “frantic, duplicative, and crazy-quilt exploration activities” in common sources of supply owned by the federal government. Entek GRB, LLC v. Stull Ranches, LLC, 763 F.3d 1252, 1255 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 1895, 191 L. Ed. 2d 763 (2015). In Entek GRB, LLC v. Stull Ranches, LLC, 113 F. Supp. 3d 1113 (D. Colo. 2015), *aff’d*, 840 F.3d 1239 (10th Cir. 2016), the court reafffirmed the holding in the earlier litigation that Entek was authorized to use the surface estate of Stull Ranches for unit purposes.

    Similar issues regarding waste due to the application of the Rule of Capture were discussed with regard to the North Dome Kettleman Hills Field in United States v. General Petroleum Corp., 73 F. Supp. 225 (S.D. Cal. 1946). [↑](#footnote-ref-45)
45. 46*See generally 1938 ABA History,* n.1 *above* for a complete description and analysis of the various state legislative enactments that affected the ***oil*** and gas industry preceding 1939. *See also* R. Hardwicke, Antitrust Laws, et al. v. Unit Operation of ***Oil*** and Gas Pools 75–77 (1961). [↑](#footnote-ref-46)
46. 47*See* § 5.01 *below.* [↑](#footnote-ref-47)
47. 48The sole exception to the diminished role of the federal government was the enactment of the Connally Hot ***Oil*** Act of 1935 (49 Stat. 30, now codified at 15 U.S.C. § 715 *et seq.*) that was a general prohibition against the interstate transportation of ***oil*** produced in violation of state ***oil*** and gas conservation laws. The Act did not create a system of federal prorationing, nor did it validate state prorationing statutes and regulation which had been declared invalid. It was a meager attempt by the federal government to deal with the glut of ***oil*** and gas caused in large part by the discovery and exploitation of the East Texas Field. *1948 ABA History,* n.1 *above* at 545–555. [↑](#footnote-ref-48)
48. 49Robert E. Hardwicke, Antitrust Laws, et al. v. Unit Operation of ***Oil*** and Gas Pools 96–97 (1961). The ***Oil*** States Advisory Committee was formally established in 1931 to deal with the concept of developing an interstate compact to resolve interstate ***oil*** problems. This committee held several meetings throughout the ***oil***-producing states in order to determine the extent of the need for an interstate compact. *1948 ABA History,* n.1 *above* at 545–555. [↑](#footnote-ref-49)
49. 50H.J. Res. 407, 49 Stat. 939 (1935). *See generally 1948 ABA History,* n.1 *above* at 556–570 for a discussion of the antecedent negotiations and 571–580 for a discussion of the early efforts of the commission. [↑](#footnote-ref-50)
50. 51Robert E. Hardwicke, Antitrust Laws, et al. v. Unit Operation of ***Oil*** and Gas Pools 99 (1961). [↑](#footnote-ref-51)
51. 52*Id.* at 99–100. IOCC Quarterly Bulletin, Vol. 1. #2 (July 1942). [↑](#footnote-ref-52)
52. 531945 Okla. Sess. Laws 162–170 codified at Okla. Stat. Ann. tit. 52, §§ 286.1 *et seq.* and repealed and reenacted in part at Okla. Stat. Ann. tit. 52, §§ 287.1 *et seq.* The compulsory unitization statute had first been introduced in 1941 and then reintroduced in 1943. In both cases, opposition to the compulsory unitization provisions led to an early death of the proposed act. *1948 ABA History,* n.1 *above* at 394–397. [↑](#footnote-ref-53)
53. 54*1948 ABA History,* n.1 *above* at 399. *See also* R. Sullivan, *Handbook of* ***Oil*** *and Gas Law* at 362–363 (1955). [↑](#footnote-ref-54)
54. 551951 Okla. Sess. Laws p. 136 *et seq.* The law is now codified at Okla. Stat. Ann. tit. 52, §§ 287.1 *et seq.* The 1951 act required the commission to define the area of the common source of supply or a portion thereof and prescribe with reasonable detail the plan of unitization. Each unit had to be limited to all or a portion of a common source of supply, and only so much as had been defined and determined to be productive of ***oil*** and gas could be included within the unitized area. [↑](#footnote-ref-55)
55. 56Palmer ***Oil*** Corp. v. Phillips Petroleum Co., 1951 OK 78, 204 Okla. 543, 231 P.2d 997 (1951), appeal dismissed, 343 U.S. 390, 72 S. Ct. 842, 96 L. Ed. 1022, 1 O.&G.R. 876 (1952). *See also* Williams v. Arkansas ***Oil*** & Gas Conservation Commission, 307 Ark. 99, 817 S.W.2d 863, 117 O.&G.R. 428 (Ark. 1991), where the court summarily rejected a takings clause challenge to a compulsory unitization order issued by the Commission. The takings issue is discussed at § 24.01[2] *infra*. *Williams* was overruled, on the issue of whether the Arkansas circuit court could take additional evidence in reviewing a decision, by the Arkansas ***Oil*** and Gas Commission in Great Lakes Chemical Corp. v. Bruner, 368 Ark. 74, 243 S.W.3d 285 (2006).

    For other cases upholding the constitutionality of compulsory unitization statutes and orders see: Koziara v. Commissioner, 86 T.C. 999 1986) (Michigan); ***Kerns*** v. Chesapeake Exploration, LLC, 762 Fed. Appx. 289, 2019 U.S. App. LEXIS 3450 (6th Cir. 2019) (Ohio); Bennion v. ANR Production Co., 819 P.2d 343, 348 (Utah 1991). [↑](#footnote-ref-56)
56. 57The court stated:

    In the first place the powers so granted can neither establish nor disestablish the unitization when established, because the power of establishment rests with the Corporation Commission. In such situation there is not a trace of legislative power exercised. This conclusion is fortified by the fact that even if the establishment were dependent upon the will of the lessees their exercise thereof would not be the exercise of legislative authority.

    231 P.2d at 1003. [↑](#footnote-ref-57)
57. 58The court said:

    On appeal the order of the Commission appealed from shall be regarded as prima facie valid, fair, reasonable and equitable, but if the order is found to be contrary to the clear weight of the evidence … . the same shall be vacated and set aside … . [T]here is cast upon the plaintiffs in error the burden of showing that the order in the respects challenged is contrary to the weight of the evidence.

    231 P.2d at 1007. [↑](#footnote-ref-58)
58. 58.1***Kerns*** v. Chesapeake Exploration, LLC, 762 Fed. Appx. 289, 2019 U.S. App. LEXIS 3450 (6th Cir. 2019), *aff’g* 2018 U.S. Dist. LEXIS 99180 (N.D. Ohio June 13, 2018). [*Editor’s Note*: One of the co-authors of this Treatise filed an amicus brief on behalf of the Ohio ***Oil*** & Gas Association supporting the constitutionality of the unitization statute.] [↑](#footnote-ref-59)
59. 58.2There is unfortunately some confusion in the Sixth Circuit opinion because throughout the opinion it uses the term “pooling” to describe the procedure and order while the actual order was a compulsory unitization order issued under Ohio Rev. Code. § 1509.28. The court also relies on a number of cases all dealing with compulsory pooling statutes and orders rather than compulsory unitization statutes and orders. The reasoning of the Sixth Circuit, however, applies equally to compulsory pooling or unitization statutes. [↑](#footnote-ref-60)
60. 58.3762 Fed. Appx. at 296, quoting from Patterson v. Stanolind ***Oil*** & Gas Co., 1938 OK 138, 182 Okla. 155, 77 P.2d 83, 89. [↑](#footnote-ref-61)
61. 58.4762 Fed. Appx. at 297, quoting from Chance v. BP Chemicals, 77 Ohio St. 3d 17, 670 N.E.2d 985 (Ohio 1996). [↑](#footnote-ref-62)
62. 58.5While noting that *Chance* involved the injection of fluids into underground formations while in this case you have a permanent structure in the form of a pipe, the court did not view that difference sufficient to plead a property interest. 762 Fed. Appx. at 297 n.2. [↑](#footnote-ref-63)
63. 59For example, Arkansas adopted its compulsory unitization statute in 1951, shortly after a court decision held that its conservation agency could not compel unitization under the general waste prevention authority granted by the statutes. Dobson v. Arkansas ***Oil*** & Gas Commission, 218 Ark. 160, 235 S.W.2d 33 (1950). 1951 Ark. Acts § 134 now codified at Ark. Code Ann. §§ 15-72-310-15-72-315, reproduced in § 30.04A *below*.

    An attack on the Ohio compulsory unitization process (Ohio Rev. Code. § 1509.28) was dismissed on non-constitutional grounds in State *ex rel.* ***Kerns*** v. Simmers, 153 Ohio St. 3d 103, 2018-Ohio-256, 101 N.E.3d 430. The plaintiffs who owned mineral interests within an area unitized by an order of the Division of ***Oil*** and Gas Resources appealed the order to the Ohio ***Oil*** & Gas Commission which affirmed the Division’s decision. Instead of seeking state court review, the plaintiffs filed this mandamus action with the Ohio Supreme Court. The court found that there was an adequate remedy available to the plaintiffs, namely seeking to have the order held to be unconstitutional as a taking of their mineral interests, so that the extraordinary remedy of a writ of mandamus was not justified. [*Editor’s Note*: One of the co-authors of this Treatise submitted an amicus brief supporting the position taken by the State and the ***oil*** and gas operator.] [↑](#footnote-ref-64)
64. 60Western Gulf ***Oil*** Co. v. Superior ***Oil*** Co. 92 Cal. App.2d 299, 206 P.2d 944 (1949); Dobson v. Arkansas ***Oil*** & Gas Commission, 218 Ark. 160, 235 S.W.2d 33 (1950).

    The lack of a compulsory unitization statute in Texas has been explored in depth in J. Weaver, *Unitization of* ***Oil*** *and Gas Fields in Texas: A Study of Legislative, Administrative and Judicial Policies* (1986). Professor Weaver’s major thesis is that compulsory unitization was not needed in Texas because the Railroad Commission engaged in other conservation practices that caused mineral lessees to enter into voluntary unitization agreements or face shut-down orders. [↑](#footnote-ref-65)
65. 61For a more detailed history of the federal pooling and unitization efforts, see *1948 ABA History,* n.1 *above;* L. Hines, *Unitization of Federal Lands* (1953); Cox, “Unitization—Communitization,” *Law of Federal* ***Oil*** *and Gas Leases,* § 18.02 (1986); Ryan, “Current Problems in Federal Unitization With Particular Reference to Unit Operation Agreements,” 2 *Rocky Mtn. Min. L. Inst.* 157 (1956). [↑](#footnote-ref-66)
66. 6241 Stat. 437 *et seq.* (1920) (current version at 30 U.S.C. §§ 181 *et seq.* (1982)). [↑](#footnote-ref-67)
67. 63*1948 ABA History,* n.1 *above* at 603–604; Cox, *Unitization and Communitization,* Law of Federal ***Oil*** and Gas Leases, 18-5 to 18-6 (1986). The unitization process for the North Dome Kettleman Hills Field is described in United States v. General Petroleum Corp., 73 F. Supp. 225 (S.D. Cal. 1946). [↑](#footnote-ref-68)
68. 6446 Stat. 1007 (1930) (current version at 30 U.S.C. § 226 (1982)). While the North Dome Kettleman Hills Field was the catalyst for the legislative changes, the Little Buffalo Basin Field in Wyoming was the first federal unitization agreement to be finalized, beating out the Kettleman Hills agreement by some 25 days. These two unit agreements were the only agreements entered into under the authority of the 1930 legislation. Cox, *Unitization and Communitization,* Law of Federal ***Oil*** and Gas Leases, 18-6 (note 2) (1986). [↑](#footnote-ref-69)
69. 65Act of March 4, 1931, 46 Stat. 1523 (1931) (current version at 30 U.S.C. § 226 (1982)). [↑](#footnote-ref-70)
70. 66*1948 ABA History,* n.1 *above* at 604. The same forces that were encouraging unitization in the private sector led officials of the Department of the Interior to seek unitization for federal ***oil*** and gas development. An interpretation of the Mineral Leasing Act of 1920 provided a forum for the department to applaud the great benefits of unitized production and decry the problems of waste and overdrilling that were plaguing the entire domestic ***oil*** and gas industry. 56 I.D. 174, 178 (1937). [↑](#footnote-ref-71)
71. 6749 Stat. 674 *et seq.* (1935) (current version at 30 U.S.C. § 221 *et seq.* (1982)). [↑](#footnote-ref-72)
72. 6849 Stat. 674 *et seq.* (1935) (current version at 30 U.S.C. § 221 *et seq.* (1982)). [↑](#footnote-ref-73)
73. 69There was an attempt by the secretary to require all ***oil*** and gas lessees to form unitized operations through a series of administrative regulations, but the attempt to compel unitization failed when the great difficulties in achieving such a wide-ranging program were made apparent to the secretary. Cox, *Unitization and Communitization,* Law of Federal ***Oil*** and Gas Leases, 18-9 (1986). [↑](#footnote-ref-74)
74. 7060 Stat. 952 *et seq.* (1946) (current version at 30 U.S.C. § 226 (1982)). [↑](#footnote-ref-75)
75. 71A federal compulsory unitization program would have created substantial problems had it been instituted. A major obstacle would have been the needed incorporation of state property and ***oil*** and gas jurisprudence into the federal program. Only by reference to state ownership rules could a federal pooling or unitization statute be implemented. In addition, there is no substantive body of federal law relating to title and ownership of land or minerals. As such, the various state rules would either have to be expressly preempted or each state’s individualized way of dealing with title and ownership issues would have to be incorporated into the federal program. While such problems are not insurmountable, they do create substantial impediments to the success of the program. [↑](#footnote-ref-76)
76. 71.1Pub. L. No. 102-486, 106 Stat. 2986, codified at 42 U.S.C. §§ 13, 201-13, 556 (1994). [↑](#footnote-ref-77)
77. 71.242 U.S.C. § 13368 (1994). [↑](#footnote-ref-78)
78. 71.3EPACT required the Secretary of the Interior to publish a list of affected states that met certain statutory criteria, but specifically included a number of states where substantial coalbed methane gas was being developed including Alabama, Colorado, New Mexico and Utah. 42 U.S.C. § 13, 368(b) (1994). The list was published at 58 Fed. Reg. 21589 (1993). EPACT allows for states to remove themselves from the list of affected states. A number of states have thus been removed from the list since 1993. Elizabeth McClanahan, *Coalbed Methane: Myths, Facts and Legends of Its History and the Legislative and Regulatory Climate Into the Twenty-First Century*, 48 Okla. L. Rev. 471, 520 (1995). [↑](#footnote-ref-79)
79. 71.442 U.S.C. § 13, 368(c) (1994). [↑](#footnote-ref-80)
80. 71.542 U.S.C. § 13, 368(e). [↑](#footnote-ref-81)
81. 71.642 U.S.C. § 13, 368(f). [↑](#footnote-ref-82)
82. 71.742 U.S.C. § 13, 368(g). *See* Chapter 12 *below* for a complete discussion of how states deal with elections for working interest and unleased mineral owners. [↑](#footnote-ref-83)
83. 71.842 U.S.C. § 13, 368(g). [↑](#footnote-ref-84)
84. 71.942 U.S.C. § 13, 368(p). [↑](#footnote-ref-85)
85. 71.1042 U.S.C. § 13, 368(h). [↑](#footnote-ref-86)
86. 71.1142 U.S.C. § 13, 368(k). The various theories under which coalbed methane gas ownership is determined is reviewed in McClanahan, n.71.3 *above.* *See also* Martin & Kramer, Williams and Meyers ***Oil*** and Gas Law § 219 (LexisNexis Matthew Bender). [↑](#footnote-ref-87)
87. 72Professor Sullivan identified, in addition to pooling and unitization statutes, six separate categories of conservation regulation. These included (1) well spacing, (2) drilling operations, (3) maximum efficient rate (MER) limitations, (4) prorationing, (5) ***oil***/gas ratios, and (6) volumetric withdrawals. R. Sullivan, Handbook of ***Oil*** and Gas Law 285–286 (1955). [↑](#footnote-ref-88)
88. 73Ohio ***Oil*** Co. v. Indiana, 177 U.S. 190, 20 S. Ct. 576, 44 L. Ed. 729 (1900). The Indiana statute prohibited the escape of natural gas into the open air for a period longer than two days. *Id.* The statute also dealt with the problem of well abandonment and plugging. 177 U.S. at 191 (n.1). [↑](#footnote-ref-89)
89. 74A good example of an early statutory definition of waste comes from a 1929 Michigan conservation statute reported in ABA, Legal History of Conservation of ***Oil*** and Gas 78–79 (1938). It stated:

    “Waste”… includes (a) escape of natural gas in commercial quantities into the open air from a stratum recognized as a natural gas stratum, (b) the intentional drowning with water of a gas stratum capable of producing gas in commercial quantities, (c) underground waste, (d) the permitting of any natural gas well to wastefully burn, (e) the wasteful use of such gas.

    To contrast with those early efforts, the modern statutory definition of waste is often quite lengthy. A good example is the Texas statutory definition of waste. It states:

    (a) The term “waste” among other things, specifically includes: (1) the operation of any ***oil*** well or wells with an inefficient gas-***oil*** ratio and the commission may determine and prescribe by order the permitted gas-***oil*** ratio for the operation of ***oil*** wells; (2) drowning with water a stratum or part of a stratum that is capable of producing ***oil*** or gas or both in paying quantities; (3) underground waste or loss, however caused and whether or not the cause of the underground waste or loss is defined in this section; (4) permitting any natural gas well to burn wastefully; (5) creation of unnecessary fire hazards; (6) physical waste or loss incident to or resulting from drilling, equipping, locating, spacing, or operating a well or wells in a manner that reduces or tends to reduce the total ultimate recovery of ***oil*** or gas from any pool; (7) waste or loss incident to or resulting from the unnecessary, inefficient, excessive, or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this section or the provisions of this chapter that were formerly a part of Chapter 26, Acts of the 42nd Legislature, 1st Called Session, 1931, as amended, to require repressuring of an ***oil*** pool or to require that the separately owned properties in any pool be unitized under one management, control, or ownership; (8) surface waste or surface loss, including the temporary or permanent storage of ***oil*** or the placing of any product of ***oil*** in open pits or earthen storage, and other forms of surface waste or surface loss including unnecessary or excessive surface losses, or destruction without beneficial use, either of ***oil*** or gas; (9) escape of gas into the open air in excess of the amount necessary in the efficient drilling or operating of the well from a well producing both ***oil*** and gas; (10) production of ***oil*** in excess of transportation or market facilities or reasonable market demand, and the commission may determine when excess production exists or is imminent and ascertain the reasonable market demand; and (11) surface or subsurface waste of hydrocarbons, including the physical or economic waste or loss of hydrocarbons in the creation, operation, maintenance or abandonment of an underground hydrocarbon storage facility.

    Tex. Nat. Res. Code Ann. § 85.046.

    Alaska delegates to the Alaska ***Oil*** and Gas Conservation Commission (AOGCC) have the power to investigate the waste of ***oil*** and gas. Alaska Stat. § 31.05.030. Alaska Stat. § 31.05.060 requires the AOGCC to hold a hearing on a citizen petition filed with it alleging that waste has occurred. In French v. Alaska ***Oil*** & Gas Conservation Comm’n, 498 P.3d 1026 (Alaska 2021), the AOGCC received a petition alleging waste and then did not hold a hearing since it determined that waste had not occurred because the pipeline leak involved hydrocarbons that had already been severed. The Alaska Supreme Court, however, said that the AOGCC not only had jurisdiction over the citizen petition but was required to hold a hearing before determining that no waste had occurred. [↑](#footnote-ref-90)
90. 75Walls v. Midland Carbon Co., 254 U.S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1920). [↑](#footnote-ref-91)
91. 76254 U.S. at 315. [↑](#footnote-ref-92)
92. 77The court stated: “The determining consideration is the power of the state over, and its regulation of, a property in which others besides the companies may have rights, and in which the state has an interest to adjust and preserve, natural gas being one of the resources of the state.” 254 U.S. at 319. [↑](#footnote-ref-93)
93. 78Michigan ***Oil*** Co. v. Natural Resources Commission, 406 Mich. 1, 276 N.W.2d 141, 62 O.&G.R. 313 (1979), *cert. denied*, 444 U.S. 980, 100 S. Ct. 482, 62 L. Ed. 2d 407 (1979). *See also* Hawley v. Board of ***Oil*** & Gas Conservation, 297 Mont. 467, 2000 MT 2, 993 P.2d 677, 146 O.&G.R. 162, where the court found that the Board had statutory authority to issue a shut-in order for an operator’s wells when the operator had not complied with prior Board orders relating to ***oil*** leaking from tanks, flow lines, and pits. [↑](#footnote-ref-94)
94. 79Mich. Comp. Laws § 319.2 defined waste to include: “… the unnecessary damage to or destruction of the surface, soils, animal, fish or aquatic life.” [↑](#footnote-ref-95)
95. 80276 N.W.2d at 147. The fact that the lessee would be utilizing the best drilling techniques available and would also be producing at an efficient rate could not override the commission’s finding that damage to the elk would follow even if the proposed safeguards were implemented. [↑](#footnote-ref-96)
96. 80.1Miller Brothers v. Department of Natural Resources, 203 Mich. App. 674, 513 N.W.2d 217, 128 O.&G.R. 518, *review denied*, 447 Mich. 1038, 527 N.W.2d 513 (1994). [↑](#footnote-ref-97)
97. 80.2513 N.W.2d at 219, citing Mich. Comp. L. § 319.4 reproduced at § 30.22A *below.* [↑](#footnote-ref-98)
98. 80.3513 N.W.2d at 219. For recent Supreme Court jurisprudence relating to the vexing problem of defining when a taking has occurred see Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). In addition, states have been active in enacting legislation which purports to require compensation when governmental regulation “goes too far.” *See, e.g.,* Tex. Gov’t Code § 2007.001 *et seq.* (1995). [↑](#footnote-ref-99)
99. 80.4Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). [↑](#footnote-ref-100)
100. 80.5A similar argument was made by a governmental entity in Tarrant County Water Control & Improvement Dist. Number One v. Haupt, Inc., 854 S.W.2d 909, 119 O.&G.R. 854 (Tex. 1993), *on remand,* 870 S.W.2d 350, 134 O.&G.R. 308 (Tex. App.—Waco 1994). The Texas Supreme Court decided that the takings issue had to be reconsidered in light of its view of the reasonable accommodation doctrine which restricts the right of mineral owners to use the surface as freely as the more traditional reasonable use test. It concluded that if directional drilling or other techniques could be feasibly used to extract the ***oil*** and gas under the surface reservoir, no taking would occur. [↑](#footnote-ref-101)
101. 80.6MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986); Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). *Hamilton Bank* was overruled in part in Knick v. Township of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019), but only insofar as it had required inverse condemnation claims to be first filed in state court. *See also* Barlow & Haun, Inc. v. United States, 118 Fed. Cl. 597 (Fed. Cl. 2014), *aff’d*, 805 F.3d 1049 (Fed. Cir. 2015) (takings claim is not ripe where federal ***oil*** and gas lessee has not filed an application for permit to drill).

     *See also* Maguire ***Oil*** Co. v. City of Houston, 243 S.W.3d 714, 169 O.&G.R. 48 (Tex. App.—Houston [14th Dist.] 2007, rev. denied) (permit revocation decision by city official satisfied the *Hamilton Bank* test so applicant did not have to seek a waiver or variance from the city council prior to filing its inverse condemnation claim).

     The ripeness doctrine as it applies to regulatory takings claim is discussed in more detail at § 24.01[2] *infra*. [↑](#footnote-ref-102)
102. 80.7The futility exception to the ripeness defense has been recognized in land use regulatory takings cases. Southern Pacific Transportation, Inc. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 502 U.S. 943, 112 S. Ct. 382, 116 L. Ed. 2d 333 (1991).

     The futility exception to the ripeness/exhaustion rule for inverse condemnation claims was applied in Trail Enterprises, Inc. v. City of Houston, 255 S.W.3d 105 (Tex. App.—Waco 2008), *rev’d on other grounds*, City of Houston v. Trail Enterprises, Inc., 300 S.W.3d 736 (Tex. 2009).

     *See also* Maguire ***Oil*** Co. v. City of Houston, 243 S.W.3d 714, 169 O.&G.R. 48 (Tex. App.—Houston [14th Dist.] 2007, rev. denied). But in City of Houston v. Trail Enters., 377 S.W.3d 873, 175 O.&G.R. 274 (Tex. App.—Houston [14th Dist.] 2012), the same Court of Appeals reversed a jury verdict finding an inverse condemnation.

     After a trial on the merits of the regulatory takings claim that awarded Maguire ***Oil*** $2 million in damages, the Court of Appeals affirmed the judgment nearly 20 years after the initial litigation was commenced. City of Houston v. Maguire ***Oil*** Co., 342 S.W.3d 726 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). [↑](#footnote-ref-103)
103. 80.8513 N.W.2d at 221. [↑](#footnote-ref-104)
104. 80.9First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). [↑](#footnote-ref-105)
105. 80.10Yuba Natural Resources, Inc. v. United States, 904 F.2d 1577, 112 O.&G.R. 9 (Fed. Cir. 1990). [↑](#footnote-ref-106)
106. 80.11Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (N.J. 1968). [↑](#footnote-ref-107)
107. 80.12Prince George’s County v. Blumberg, 44 Md. App. 79, 407 A.2d 1151 (Md. Ct. Spec. App. 1979). [↑](#footnote-ref-108)
108. 80.13Wheeler v. City of Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990). [↑](#footnote-ref-109)
109. 80.14*See generally,* Comment, *Just Compensation or Just Damages: The Measure of Damages for Temporary Regulatory Takings in Wheeler v. City of Pleasant Grove,* 74 Iowa L. Rev. 1243 (1989). [↑](#footnote-ref-110)
110. 80.15Bass Enterprises Production Co. v. United States, 45 Fed. Cl. 120, 144 O.&G.R. 86 (1999). [↑](#footnote-ref-111)
111. 80.1645 Fed. Cl. at 124. [↑](#footnote-ref-112)
112. 80.17The authors would imagine that it might take more than 30 days to determine damages given all of the unknowns and extrapolations involved in calculating the “profits,” if any, that would accrue from the drilling of a hypothetical well four years earlier with a changing natural gas market and unknown productive capabilities. [↑](#footnote-ref-113)
113. 80.18Bass Enters. Prod. Co. v. United States, 54 Fed. Cl. 400 (2002). [↑](#footnote-ref-114)
114. 80.19Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). States may by statute or the common law impose requirements on governmental bodies before they can validly adopt a moratorium as part of their land use regulatory program. In Jeffrey v. Ryan, 37 Misc. 3d 1204(A), 2017 N.Y. Misc. LEXIS 4684 (Sup. Ct. 2012), the court invalidates a municipal ordinance that sought to place a two-year moratorium on ***oil*** and gas exploration, production, and storage operations because the City did not show that the ordinance was: “1. in response to a dire necessity; 2. reasonably calculated to alleviate or prevent a crisis condition; and 3. that the municipality is presently taking steps to rectify the problem,” relying on Belle Harbor Realty Corp. v. Kerr, 35 N.Y.2d 507, 364 N.Y.S.2d 160, 323 N.E.2d 697 (1974). [↑](#footnote-ref-115)
115. 80.2054 at 404. [↑](#footnote-ref-116)
116. 81For a complete discussion of well-spacing regulations, *see* § 5.02 *below.* Early views on well-spacing regulations are presented in Clyde, *Problems of Regulatory Agencies in Administering Conservation Statutes—With Particular Reference to Well Spacing*, 7 Rocky Mtn. Min. L. Inst. 165 (1962); Hardwicke, ***Oil*** *Well Spacing Regulations and Protection of Property Rights in Texas*, 31 Tex. L. Rev. 99 (1952); Juhan, *Administration of the Texas and Colorado* ***Oil*** *and Gas Conservation Statutes*, 31 Dicta 98 (1954); Meyers, *Common Ownership and Control in Spacing Cases*, 31 Tex. L. Rev. 19 (1952). [↑](#footnote-ref-117)
117. 82*See* § 2.02 *above.* [↑](#footnote-ref-118)
118. 83*See, e.g.,* Robert E. Hardwicke, “***Oil*** Well Spacing Regulations and Protection of Property Rights in Texas,” 31 *Tex. L. Rev.* 99 (1952); Moses, “The Constitutional, Legislative and Judicial Growth of ***Oil*** and Gas Conservation Statutes,” 13 *Miss. L.J.* 353 (1941); Williams, “Conservation of ***Oil*** and Gas,” 65 *Harv. L. Rev.* 1155 (1952). [↑](#footnote-ref-119)
119. 84*1938 ABA History,* n.1 *above* at 218–219. Rule 37 originally read as follows: “No well for ***oil*** or gas shall hereafter be commenced nearer than three hundred (300) feet to any other completed well on the same or adjoining tract or farm; and no well shall be drilled nearer than one hundred and fifty (150) feet to any property line … .” Hardwicke, “***Oil*** Well Spacing Regulations and Protection of Property Rights in Texas,” 31 *Tex. L. Rev.* 102 (1952). [↑](#footnote-ref-120)
120. 85*See* n.84 *above.* Both Rule 37 and the 1919 conservation legislation were the results of a widely perceived view that there was a substantial amount of waste occurring in the development of several major fields and that governmental intervention was required in order to prevent the loss of the ***oil*** and gas. *1938 ABA History,* n.1 at 218 *above.* [↑](#footnote-ref-121)
121. 86*See, e.g.,* Louisiana Statewide Order No. 29-E. *See* § 5.02[1] *below.* [↑](#footnote-ref-122)
122. 87*See, e.g.,* Okla. Stat. Ann. tit. 52, § 87.1. [↑](#footnote-ref-123)
123. 88*See, e.g.,* N.M. Stat. Ann. §§ 65-3-14, 14.5. *See* § 5.03 *below* for a complete discussion of drilling, spacing, and proration units. [↑](#footnote-ref-124)
124. 89Patterson v. Stanolind ***Oil*** and Gas Co., 1938 OK 138, 182 Okla. 155, 77 P.2d 83 (1938), appeal dismissed, 305 U.S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939). [↑](#footnote-ref-125)
125. 9077 P.2d at 89. [↑](#footnote-ref-126)
126. 9177 P.2d at 89–90. For other cases upholding well spacing and other conservation statutes against constitutional attack, *see, e.g.,* Brown v. Humble ***Oil*** & Refining Co. 126 Tex. 296, 83 S.W.2d 935, 87 S.W.2d 1069 (1935); Helmerich & Payne v. Roxana Petroleum Corp., 136 Kan. 254, 14 P.2d 663 (1932). The blending of takings analysis and substantive due process is a problem that modern courts still face with somewhat inconsistent results. Classic taking issues are resolved through an ad hoc balancing approach that takes into account the loss to the private individual. *See, e.g.,* Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472, 93 ***Oil*** & Gas Rep. 300 (1987); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). The questions raised in a substantive due process attack are different. *See* Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

     In Bernstein v. Bush, 29 Cal. 2d 773, 177 P.2d 913 (1947), the California Supreme Court held a well-spacing statute unconstitutional as applied to the denial of an offset well permit application. The statute was later amended to force-pool or apportion production from the affected area. As amended, the well-spacing statute withstood constitutional attack in Hunter v. Justice’s Court, 36 Cal. 2d 315, 223 P.2d 465 (1950). [↑](#footnote-ref-127)
127. 92*See, e.g.,* Belgum v. City of Kimball, 163 Neb. 774, 81 N.W.2d 205, 7 O.&G.R. 1225 (1957); West Frankfort v. Fullop, 6 Ill. 2d 609, 129 N.E.2d 682, 5 O.&G.R. 685 (1955). [↑](#footnote-ref-128)
128. 93*See, e.g.,* Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir.), *cert. denied*, 284 U.S. 634, 52 S. Ct. 18, 76 L. Ed. 540 (1931); Marrs v. City of Oxford, 24 F.2d 541 (D. Kan. 1928), *aff’d*, 32 F.2d 134 (8th Cir.), *cert. denied*, 280 U.S. 573, 50 S. Ct. 29, 74 L. Ed. 625 (1929); Eason ***Oil*** Co. v. Uhls, 1974 OK 1, 518 P.2d 50, 47 O.&G.R. 161 (Okla. 1974). [↑](#footnote-ref-129)
129. 94*See, e.g.,* Phillips Petroleum Co. v. Mecom, 395 S.W.2d 828, 23 O.&G.R. 695 (Tex. Civ. App. 1965), *writ ref’d n.r.e.* [↑](#footnote-ref-130)
130. 95Great Plains Resources, Inc. v. City of Benton,127 Ill. App. 3d 971, 82 Ill. Dec. 807, 469 N.E.2d 341, 83 O.&G.R. 495 (1984). [↑](#footnote-ref-131)
131. 96Robert Sullivan, *Handbook of* ***Oil*** *and Gas Law* 292 (1955). [↑](#footnote-ref-132)
132. 97*See* § 3.01[1] *above*. [↑](#footnote-ref-133)
133. 98Fla. Stat. Ann. § 377.2425 in § 30.09A *below*. [↑](#footnote-ref-134)
134. 98.1Coastal Petroleum Co. v. State Department of Environmental Protection, 649 So. 2d 930, 131 O.&G.R. 137 (Fla. Dist. Ct. App.), *review denied*, 660 So. 2d 712 (Fla. 1995). [↑](#footnote-ref-135)
135. 98.2Fla. Stat. Ann. § 253.571. [↑](#footnote-ref-136)
136. 98.3Coastal Petroleum Co. v. Department of Environmental Protection, 672 So. 2d 574 (Fla. Ct. App. 1996); Coastal Petroleum Co. v. Chiles, 672 So. 2d 571 (Fla. Ct. App. 1996). Courts are especially wary when states attempt to modify their own contracts for their own benefit as the state was trying to do after it executed the ***oil*** and gas leases without a substantial bond requirement. *See e.g.,* U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977). [↑](#footnote-ref-137)
137. 98.4Gray v. Helmerich & Payne, Inc., 834 S.W.2d 579, 125 O.&G.R. 418 (Tex. App. 1992, writ denied). [↑](#footnote-ref-138)
138. 98.5Similar issues can arise in well commencement leases. Typically most courts do not require the lessee to get a well drilling permit in order to have “commenced” a well. *See* 4 P. Martin & B. Kramer, *Williams & Meyers* ***Oil*** *and Gas Law* §§ 606.1, 618.1 (Matthew Bender). [↑](#footnote-ref-139)
139. 98.6Christian Land Corp. v. C. & C. Co., 188 W. Va. 26, 422 S.E.2d 503, 123 O.&G.R. 358 (1992). [↑](#footnote-ref-140)
140. 98.7Wyoming v. United States Department of the Interior, 136 F. Supp. 3d 1317 (D. Wyo. 2015). The regulations can be found at 80 Fed. Reg. 16,128–16,222 (Mar. 26, 2015). [↑](#footnote-ref-141)
141. 99R. Sullivan, *Handbook of* ***Oil*** *and Gas Law* 315–316 (1955). *See also* S. Buckley, *Petroleum Conservation* 151–163 (1951); Bruce, *Maximum Efficient Rate—Its Use and Misuse in Production Regulation*, 9 Nat. Resources L. 441 (1976); Culbertson, *Determination of MER in Texas*, XI Interstate ***Oil*** Compact Quarterly Bull. 23 (May 1952).

     For a complete discussion of modern MER regulation, *see* § 5.01[2] *below.* [↑](#footnote-ref-142)
142. 100Culbertson, “Determination of MER in Texas,” XI Interstate ***Oil*** Compact Quarterly Bull. 23 (May 1952). [↑](#footnote-ref-143)
143. 101*See generally 1948 ABA History,* n.1 *above* at 669–670. The Office of Petroleum Coordinator of the Petroleum Administration of War first mandated MERs in January 1984. *Id.* [↑](#footnote-ref-144)
144. 102California used MER regulation because there was no statutory authority for market demand proration regulation. *1948 ABA History,* n.1 *above* at 316. [↑](#footnote-ref-145)
145. 103Colorado, Illinois, Mississippi, Montana, and Wyoming are several examples of states that used MER regulation. R. Sullivan, *Handbook of* ***Oil*** *and Gas Law* 315–316 (1955). [↑](#footnote-ref-146)
146. 103.1N.D. Cent. Code § 57-51.1-03(2). [↑](#footnote-ref-147)
147. 103.2N.D. Cent. Code § 57-51.1-01(5). [↑](#footnote-ref-148)
148. 103.3Gofor ***Oil***, Inc. v. State of North Dakota, 427 N.W.2d 104, 102 O.&G.R. 416 (N.D. 1988). [↑](#footnote-ref-149)
149. 103.4For a discussion of the issues relating to agency use of informal policies in place of formal rules, *see* § 4.03[2] and § 24.05[2] *below.* [↑](#footnote-ref-150)
150. 104Prorationing had its greatest effect on the production of ***oil***, rather than natural gas. Caused in part by the substantial imbalance between the demand and supply of ***oil***, state prorationing systems attempted to stabilize the price of ***oil*** by limiting the production of ***oil*** at the wellhead. *See 1938 ABA Legal History,* n.1 *above* at 126–127, 223–252 for a discussion of the Oklahoma and Texas efforts at prorating ***oil*** production. With the Arab ***oil*** embargo of the 1970s, however, the underlying circumstances that led to the imposition of ***oil*** prorationing disappeared, and thus effective ***oil*** prorationing has not taken place during the past two decades.

     On the other hand, the prorationing of natural gas production has continued, and to a limited extent, expanded in the past two decades because of the nature of the gas production and transportation system. In 1986 the University of Colorado published a symposium issue on natural gas prorationing which explores in depth the prorationing systems in the major gas producing states. Symposium, “Workshop on Natural Gas Prorationing and Ratable Take Regulation,” 57 *U. Colo. L. Rev.* 149 (1986).

     The modern developments in prorationing are discussed in § 5.01[3] *below.* The literature on prorationing in its early days is legion. *See, e.g., 1948 ABA History,* n.1 *above;* R. Sullivan, *Handbook of* ***Oil*** *and Gas Law* 311–335 (1955); Byrd, *Conservation Approach—General Effect Upon Contractual and Property Rights*, 10 Sw. Legal Fed’n ***Oil*** & Gas Inst*.* 1 (1959); Hardwicke, *Market Demand as a Factor in the Conservation of* ***Oil***, 1 Sw. Legal Fed’n ***Oil*** & Gas Inst*.* 320 (1949); Marshall & Meyers, *Legal Planning of Petroleum Production*, 41 Yale L.J*.* 33 (1931); Vafai, *Market Demand Prorationing and Waste—A Statutory Confusion*, 2 Ecology L.Q. 118 (1972). [↑](#footnote-ref-151)
151. 105R. Sullivan, *Handbook of* ***Oil*** *and Gas Law* 311 (1955). For other definitions, *see* 8 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers,* ***Oil*** *and Gas Law,* 695–696 (1988). Professors Williams and Meyers define prorationing as follows: “Restriction of production by a state regulatory commission, usually on the basis of market demand. The commission determines what amount shall be produced in a state during a given period of time and then allocates this total amount among the producing fields in the state (field allowables) and then allocates the field allowable to the various leaseholds within the field (lease and well allowables).” [↑](#footnote-ref-152)
152. 106*1938 ABA History,* n.1 *above* at 155–157. [↑](#footnote-ref-153)
153. 107*Id.* at 222–238. Proration as a conservation measure, however underwent its trial by fire shortly after the East Texas Field discovery. The problems in Texas led to the declaration of martial law in the East Texas Field as then governor Ross Stirling attempted to enforce a series of proration orders designed to prop up the price of ***oil***, which had severely plummeted following the discovery of the East Texas Field. *Id.* at 234–236. *See also* J. Weaver, *Unitization of* ***Oil*** *and Gas Fields in Texas: Legislative, Administrative and Judicial Policies* 37-68 (1986). [↑](#footnote-ref-154)
154. 108Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062 (1932). In Texas a challenge to some early proration orders in federal court was initially successful, but after *Champlin* the federal constitutional issues were no longer a viable argument. MacMillan v. Railroad Commission, 51 F.2d 400 (W.D. Tex. 1931)*, rev’d per curiam and dismissed,* 287 U.S. 576, 53 S. Ct. 223, 77 L. Ed. 505 (1932). [↑](#footnote-ref-155)
155. 109286 U.S. at 233–234. *See also* Bennett v. Corporation Commission, 157 Kan. 589, 142 P.2d 810 (1943); Julian ***Oil*** & Royalties Co. v. Capshaw, 1930 OK 452, 145 Okla. 237, 292 P. 841 (1930); Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W.2d 941 (1944). [↑](#footnote-ref-156)
156. 109.1For a discussion of the *ultra vires* issue in administrative agency actions, *see* § 24.02[2] *below*. [↑](#footnote-ref-157)
157. 109.2Conoco, Inc. v. Corporation Commission, 1988 OK 27, 764 P.2d 516, 100 O.&G.R. 567 (Okla. 1988). [↑](#footnote-ref-158)
158. 110Robert Sullivan, Handbook of ***Oil*** and Gas Law 318–320 (1955). *See also* Ely, *The Conservation of* ***Oil***, 51 Harv. L. Rev. 1209, 1213–1215 (1938); Hardwicke, *Market Demand as a Factor in the Conservation of* ***Oil***, 1 *Sw.* Legal Fed’n ***Oil*** & Gas Inst. 320 (1949); Marshall & Meyers, *Legal Planning of Petroleum Production*, 41 Yale L.J. 33 (1931). *See also* Peppers Refining Co. v. Corporation Commission, 1947 OK 128, 198 Okla. 451, 179 P.2d 899 (1947). [↑](#footnote-ref-159)
159. 111Robert Sullivan, Handbook of ***Oil*** and Gas Law 320–321 (1955). In Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W.2d 941 (1944), the court noted that the commission could not discriminate between fields when it allocated the fieldwide allowables. [↑](#footnote-ref-160)
160. 112Robert Sullivan, Handbook of ***Oil*** and Gas Law 322 (1958) quotes from the Model Conservation Act’s provisions on well allocations:

     Whenever the Commission limits the total amount of ***oil*** and gas which may be produced in any pool in this state to an amount less than that amount which the pool could produce if no restriction was imposed … , the Commission shall allocate or distribute the allowable production among the several wells or producing properties in the pool on a reasonable basis, preventing or minimizing reasonable avoidable drainage from each developed area not equalized by counter drainage, so that each property will have the opportunity to produce or receive its just and equitable share, subject to the reasonable necessities for the prevention of waste. [↑](#footnote-ref-161)
161. 113*See, e.g.,* Julian ***Oil*** and Royalties Co. v. Capshaw, 1930 OK 452, 145 Okla. 237, 292 P. 841 (1930); Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73 (1939); Railroad Commission v. Fain 161 S.W.2d 498 (Tex. Civ. App. 1942), *writ ref’d w.o.m. See also 1948 ABA History,* n.1 *above* at 489–507; Summers, *Legal Rights Against Drainage*, 18 Tex. L. Rev. 27 (1939); Walker, *Property Rights in* ***Oil*** *and Gas and Their Effect Upon Police Regulation of Production*, 16 Tex. L. Rev. 370 (1938). [↑](#footnote-ref-162)
162. 114Texas enacted two marginal well protection statutes while it was going through its difficult period of prorationing in the early 1930’s. J. Weaver, *Unitization of* ***Oil*** *and Gas Fields in Texas: A Study of Legislative, Administrative and Judicial Policies,* 58–60, 63–68 (1986). [↑](#footnote-ref-163)
163. 115Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062 (1932). [↑](#footnote-ref-164)