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State Regulation of Oil and Gas Pools on State, Federal, Indian and Fee Lands

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STATE REGULATION OF OIL AND GAS POOLS
ON STATE, FEDERAL, INDIAN
AND FEE LANDS

INTRODUCTION

In San Juan County, New Mexico, are two oil and gas pools, each embracing fee, state, federal and Indian lands. Both pools are being operated in conformance with special regulations established by the New Mexico Oil Conservation Commission. Joint ownership in leased lands and royalty interests is not uncommon in the law of oil and gas, but it is a unique situation when not only one, but two, producing areas contain tracts owned by all of the types of private and non-private landowners known to the American law of property. The role of the state regulatory agency under circumstances of this sort is the subject with which this paper is concerned.

Part I. STATE REGULATION OF LEASE OPERATIONS
ON INDIAN LANDS

In the late 1940's oil was discovered in San Juan County on land adjacent to that belonging to the Navajo Indians. The Indians leased their land in San Juan County to non-Indian lessees, presumably using lease forms similar to those suggested by McLane in his book, *Oil and Gas Leasing on Indian Lands*. The land was drilled and produced under regulation of the New Mexico Oil and Gas Conservation Commission, which promulgated the plan governing both Indian and non-Indian lands in the two San Juan Basin pools. In the fall of 1961 the Oil and Gas Conservation Commission issued orders, effective December 1961, shutting in certain wells on Indian lands if the operators of the wells did not stop flaring gas.

The orders of the Commission probably will not be questioned. If the lessees of the Indian minerals should protest the authority of the Commission, it is likely that the Indians and the federal government will cooperate with the state in its efforts to conserve oil and gas. If, however, Congress does not act

1. Letter of November 12, 1951, from Richard S. Morris, formerly Attorney for New Mexico Oil Conservation Commission, Santa Fe, New Mexico, to student editor, Natural Resources Journal.
5. Despite disavowals by government officials (See note 92, *infra*), many state authorities apparently think there is great danger that the federal government will preempt
and the federal Indian regulatory agencies and the Indians refuse to cooperate, the question of whether the state may regulate the production of oil and gas on Indian lands as a part of their statewide regulatory program remains.

On this question there is no case authority. Writers on the subject admit that they are unable to make any reliable prediction concerning the courts' answer to the question. This paper will attempt to support the proposition that the state has power to regulate oil and gas production on Indian lands.

**Legislative Grants of Power**

By the Treaty of 1868 a tract of land, subject to the control of the federal government, was set aside for the use and occupation of the Navajo Indians.

When New Mexico applied for statehood, Congress took steps to insure that the Indians would not be subjected to state domination insofar as the control of their lands was concerned. The Enabling Act of 1910 provided that the New Mexico Constitution contain a provision disclaiming any rights to the lands lying within the boundaries of an Indian reservation, and that until the Indian title to the land was extinguished, it would be subject to the absolute jurisdiction and control of Congress. Pursuant to the mandate of Congress, in order to fulfill the statehood requirements, New Mexico adopted Article XXI § 2, New Mexico Constitution, disclaiming any right to the lands lying within the boundaries of Indian reservations so long as Indian title had not been extinguished. The New Mexico Supreme Court has interpreted this provision as meaning that the state lacked the power to govern either Indian

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the control of the state over drilling and production on Indian lands. While the state should have no objection to federal conservation regulation which imposes stricter standards than do the state regulations, many state authorities believe that if the federal government is allowed to assert its authority over the conservation of oil and gas on Indian lands, it may someday completely oust the state regulatory agencies from Indian lands. See Bennett, Introduction, Powers and Attitudes of the United States on the Conservation of Oil and Gas, 5 Rocky Mt. Min. Law Inst. 43 (1960).

6. McLane, supra note 2, at § 160. Bennett, supra note 2, indicates that a case questioning state jurisdiction has arisen in Colorado, and that the court found adversely to the state. (However, he cites no authority and the writer has been unable to find the case.)

7. McLane, supra note 2, at § 160, believes that the state has no power to govern the production on Indian lands. Contra, Allen, State Conservation of Oil and Gas, 5 Rocky Mt. Min. Law Inst. 59 (1960).

8. Treaty with the Navajo Indians, 15 Stat. 667 (1868).

9. Although the treaty does not specifically grant to the Indians the minerals underlying the land, it has been held that a grant such as this one conveys to the Indians both mineral and surface estate. Cohen, Federal Indian Law 312 (1942). Neither an Indian tribe nor an individual Indian retaining his wardship status owns Indian property in fee simple. The Indians do, however, have a legally enforceable interest in the land. Title to the property is not treated as though the land were public property belonging to the United States or as though it were the private property of the Indians, but it has some of the characteristics of each of these types of ownership. Cohen, id. at 287.

lands or Indians living on the reservation. Consequently, since the passage of Article XXI § 2, in the absence of an authorizing act of Congress, the state has seldom been able to exercise jurisdiction over the reservation Indians or Indian lands.

Article 1 § 10 of the United States Constitution gives Congress the power to make treaties with the Indians. These treaties have been held to have the same dignity as treaties contracted with a foreign nation. Although Congress has the power to enact legislation which conflicts with the treaty, neither Congress nor the executive branch of the government may divest an Indian tribe of land granted by treaty.

The enjoyment of Indian property by the Indians has always been subject to the policy that Indians are wards of the government and are to be protected by it. Likewise, the alienation of Indian lands, including Indian mineral lands, has always been under the strict control of the federal government. Furthermore, Congress has provided that no grant, lease, or other conveyance of Indian property should be of any validity unless entered into pursuant to the Constitution. Incorporated tribes, however, have been given the power to lease tribal lands.

Indian tribes are distinct, independent political communities and, as such, are qualified to exercise powers of self-government. They derive this power by reason of their original tribal sovereignty rather than by virtue of a delegation of power from the federal government. The leading case affirming the sovereignty of the Indians over their own affairs is Worcester v. Georgia. In that case, Chief Justice Marshall held that the federal government, as protector of the Indians, has complete control over Indian affairs, but the Indians nevertheless have inherent powers of sovereignty which they can exercise so long as those powers are not inconsistent with the actions of Congress.

The Worcester doctrine has been modified to the extent that the states have been allowed to assume jurisdiction over Indian affairs where essential tribal relations will not be involved, and where the rights of the Indians will not be jeopardized. The Supreme Court has said that, absent federal legislation, the test which the Court will use is whether the state action infringes upon the right of reservation Indians to make their own laws and to be governed by them.

15. Id. at § 2.33. See also 25 U.S.C. 474, 477 (1958).
16. § 2.33. See also 31 U.S.C. 515 (1832).
18. Id., at 220.
In the case of Williams v. Lee, the Supreme Court indicated only three ways in which a state with an enabling act such as New Mexico's could exercise control over Indian affairs: (1) If the exercise of these powers will not interfere with essential tribal relations, and will not jeopardize the rights of the Indians to govern themselves; (2) if Congress expressly grants it the power to do so; and (3) if Congress has, by statute, given those states whose enabling act prohibits them from exercising jurisdiction over Indian lands the power to amend their constitution so as to accept jurisdiction over Indian affairs. Thus, by exercising this power of amending its constitution, New Mexico could confidently assert its authority over Indian affairs in this state.

There has been no act of Congress, however, which grants the State of New Mexico the power to govern drilling and production of oil and gas on Indian lands, nor has New Mexico seen fit to amend its constitution so as to assume jurisdiction over Indian affairs. The express disclaimer of jurisdiction in the New Mexico Constitution remains intact.

If the State of New Mexico is to be allowed to regulate drilling and production of oil and gas on Indian lands, the courts will have to find either that the constitutional prohibition no longer is applicable in determining the state's jurisdiction over Indian affairs, or that the regulation of drilling and the production of oil and gas on Indian lands does not involve essential tribal relations or jeopardize the rights of the Indians.

New Mexico Constitution, Art. XXI, § 2 provides:

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by Indians or Indian tribes, and that until the title of such Indian tribe shall have been extinguished the same shall be and remain subject to the disposition and under the absolute control of the Congress of the United States. (emphasis added).

If, within the meaning of this section, Indian title is extinguished, the state will no longer be prohibited from exercising its jurisdiction over Indian lands. The New Mexico court, in construing this section of the Constitution, has never construed the word "extinguished" literally, although the question of what constitutes extinguishment of Indian title has been before the court twice. Each time the court has limited its rule to the specific conveyance which

19. Id., at 220,221.
22. N.M. Const. art. 21, § 2.
23. Ibid.
was said to constitute an extinguishment of Indian title. It has never said that in order for Indian title to be extinguished, the Indians must convey the land in fee simple. From the silence of the court perhaps we can infer that a conveyance of some interest less than a fee simple will constitute an extinguishment of Indian title.

In *Your Food Stores, Inc. v. Village of Espanola*, the Village of Espanola argued that the Santa Clara Indians, by leasing some of their land to the plaintiff, had divested themselves of their right to possession, dominion, and control over the land during the term of the lease. They further argued that this gave the Village of Espanola the power to annex the leased land to the village and to tax the plaintiff. The Court rejected this argument, holding that the mere granting of a lease did not extinguish Indian title.

In *State v. Begay*, the defendant was arrested for drunken driving on a highway constructed by the state across Indian land. The court held that the state had a mere easement across Indian lands; that beneficial title to the land still remained in the Indians. Therefore, because of New Mexico's constitutional limitation, the state had no jurisdiction over the crime.

It is well settled that the granting of an oil and gas lease operates as a conveyance of an interest in real property. One authority extends this rule to apply to Indian lands as well. The exact nature of the interest conveyed, however, will depend upon the theory of ownership of oil and gas which is applicable to Indian lands.

The two major theories as to the ownership of oil and gas are: (1) "non-ownership"; and (2) "ownership-in-place." In non-ownership states, oil and gas are considered fugacious minerals and the absolute ownership of the land carries with it the exclusive right to drill on the premises and to retain, as absolute owner, all of the oil and gas that is reduced to possession by production. Under this theory the oil and gas lessee would take an interest similar to an easement or a *profit a prendre.* The interest conveyed would be analogous to that conveyed in the *Begay* case, supra, and granting a lease under this theory would not constitute an extinguishment of Indian title which would allow the state to assume control over the production of oil and gas from the land.

In those states which follow the ownership-in-place theory, however, oil and gas are considered a part of the land; and absolute ownership of the land carries

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27. 63 N.M. 409, 320 P.2d 1017 (1958).
29. McLane, Oil and Gas Leasing on Indian Lands § 85 (1955).
with it the ownership of oil and gas in place. This is the theory followed in New Mexico, where also, an "unless" lease creates an indeterminate fee in the lessee, thereby giving him an interest in the land sufficient to support a suit to quiet title. And although the lessee is considered a co-tenant with the lessor, the lessee has the dominant estate and the lessor the servient estate, insofar as the use of the surface estate is necessary to carry on the operations provided in the lease.

Under the latter theory, to determine that the Oil and Gas Conservation Commission has jurisdiction over Indian lands the courts will have to find: (1) that the New Mexico theory of oil and gas ownership applies to abutting Indian lands, and (2) that the granting of an "unless" lease extinguishes Indian title within the meaning of the New Mexico Constitution. If extinguishment is found, the prohibition of Article XXI § 2 will no longer apply, and the state will then have the power to exercise its authority over those Indian lands which are subject to oil and gas leases.

Although the New Mexico Supreme Court still adheres to the art. XXI § 2 "title method" of determining state jurisdiction over Indian lands, it has admitted that jurisdiction may be obtained (despite the constitutional limitation) through an extension of the Worcester doctrine.

In Draper v. United States, the United States Supreme Court had the opportunity to construe enabling act legislation similar to that embodied in the New Mexico Constitution. It said there that the statute should not be construed as completely prohibiting state jurisdiction over Indian affairs, but should be limited to prohibiting the state from exercising jurisdiction over lands which had been allotted to the Indians, but alienation of which was still subject to federal control. The Court concluded that, despite the wording of the enabling act, the state still had jurisdiction over Indian affairs, subject only to the limitation set out above and the Worcester doctrine.

The Court in Kake Village v. Egan reaffirmed the holding of the Draper case.

Draper and Williams indicate that "absolute" federal jurisdiction is not invariably exclusive jurisdiction. The momentum of substantially

32. Sullivan, supra note 29.
34. Ibid.
35. Ibid.
40. 369 U.S. 60 (1962). Metlaktla Indians v. Egan, 369 U.S. 45 (1962), and its com-
identical past admission legislation touching Indians carries the settled meaning governing the jurisdiction of states over Indian property to the Alaska Statehood Act in light of its legislative history. . . . The disclaimer of right and title by the State was a disclaimer of a proprietary rather than a governmental interest. . . .

Following the Worcester doctrine as it has been extended in the Williams case and in Kake Village v. Egan, it is not necessary to conclude that merely because the locus of an event is Indian territory the exercise of state jurisdiction is prohibited. Over the years the decision in Worcester has been modified to allow state control over Indian affairs where essential tribal relations are not involved and where the rights of the Indians will not be jeopardized.41

The instant problem would seem to fit within one of these extensions of the Worcester doctrine. The conservation of oil and gas is primarily a matter of state concern. The state has the duty to conserve the mineral resources within the state regardless of where in the state they may be situated.

Once the Indians have leased their lands for oil and gas purposes they are relegated to the position of parties with only a proprietary interest in land. When oil and gas is discovered and produced, they are entitled only to their share of the proceeds of production. It cannot be argued that the regulation of drilling and production on Indian lands interferes with essential tribal relations or jeopardizes the rights of the Indians. The state, under its police power, is merely protecting the rights of the Indians as well as those of the state, and is not trying to place them in a position inferior to that of state citizens.

It would seem that the jurisdiction of the state is concurrent with that of the federal government, since Congress has not sought to preempt the state from exercising its power over Indian lands insofar as the regulation of the production of oil and gas is concerned.42 Therefore, until Congress acts, the state should have the power to regulate drilling and production on Indian lands as a part of a state-wide regulatory program.

Joel M. Carson

Part II. STATE REGULATION OF LEASE OPERATIONS ON FEDERAL LANDS

In neither of the two New Mexico pools described in the Introduction did the New Mexico Oil Conservation Commission exert its regulatory powers because the various landowners’ properties had been pooled. Rather, the Commission had earlier recognized and designated both pools, for administrative purposes, when only one or two wells had been brought in or were contemplated in the two areas. When new wells were developed and the pools expanded, the Commission merely continued to exercise the jurisdiction it had previously assumed. Special rules and regulations were formulated for governing production and operation of the wells constituting the pools, after the lessees had applied for approval to develop the additional wells.43

Not in these two pools—nor, indeed, in any case concerned with federal land in this state in which the Oil Conservation Commission has promulgated special rules and regulations for development or production, or has created exceptions to well locations or acreage production—has any question ever arisen with respect to the propriety of the Commission’s assumption of jurisdiction or its exercise of regulatory powers.

Section 65-3-5, N.M. Stat. Ann. (1953) outlines the powers and duties of the New Mexico Oil Commission. Included in that section is the following language:

> It shall have jurisdiction and control of and over all persons or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas.

(Emphasis added.)

Undoubtedly this provision has given comfort to the New Mexico commissioners who, almost since the inception of the conservation legislation, have assumed to regulate development, operation and production of oil and gas on any and all lands located within the limits of the state. As a matter of practice, however, the New Mexico Oil Conservation Commission has worked very closely with the United States Geological Survey in formulating many of its policies and it has, in the main, conformed its rules to government requirements when establishing rules for development and operations on federal lands.44

It is also likely that the state regulatory board has relied upon the provision of the federal lease forms which requires federal land lessees to drill “in conformity with any system of well-spacing or . . . allotments affecting the . . .

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43. Letter from Mr. Morris, supra note 1.
44. Letter, supra note 1. Also, see Malone, Conservation of Oil and Gas: A Legal History (Murph ed. 1949) where, at 332, he states the proposition in opposite terms, i.e., that “The USGS [which is charged with supervision of lease operations on federal lands] cooperates fully with the Commission in having its operators conform to requirements equivalent to those of the Commission.”
area in which the leased lands are situated, which is authorized ... by applicable law or by the Secretary of the Interior."\(^4\)\(^5\) (Emphasis added.)

The language of the statute, plus that of the lease forms, seems to indicate fairly clearly that regulation by a state agency is contemplated by the federal government, and is acceptable.

Quite obviously, however, constitutional questions exist in the state's exercise of regulatory powers, insofar as the federal lands are concerned. It will be the attempt of this Part II to determine what some of the answers are likely to be should the matter ever be litigated.

**The State's Police Power**

It has long been recognized that state conservation programs constitute an exercise of the state's valid police powers,\(^4\)\(^6\) which may be applied to public land areas within the state\(^4\)\(^7\) "at least when there is no legislation by Congress on the subject."\(^4\)\(^8\) As with other areas, however, in which state and federal laws may conflict, the state cannot regulate if Congress already has legislated in the area of oil and gas development on federal lands.\(^4\)\(^9\) There are not particular statutes granting general jurisdiction over public lands to the federal government\(^5\)\(^0\) but it has been suggested that the Mineral Leasing Act\(^5\)\(^1\) is an expression of congressional intent to create federal control over the production of minerals sufficient to preclude regulation of the same subject by a state agency,\(^5\)\(^2\) at least as it pertains to development of the public lands.

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**Footnotes:**


46. Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900); Walls v. Midland Carbon Co., 254 U.S. 300, 324 (1920); Patterson v. Stanolind Oil & Gas Co., 305 U.S. 376 (1939).


52. Malone, Oil and Gas Leases on United States Government Lands, Southwestern Legal Foundation Second Annual Institute, Oil and Gas Law and Taxation 309 (1951). At 338, the author reports that "it is the position of the United States that the State has no authority to restrict production" or otherwise control operation of Federal leases, but that state regulation is permitted by the government as a matter of "comity." The same notion is apparent in Hunt v. United States, 278 U.S. 96, 100 (1928), where the Court summarized the government's view, stating that although the Solicitor General "does not concede the authority of the [lower] court to make this determination [that the United States could permit its officers to kill deer within federal game reserves in Arizona if the licenses were granted not in violation of state game laws] he is content to let the decree stand."

One writer insists that in the absence of specific jurisdictional legislation, jurisdiction over public lands, not acquired from or ceded by the states, within the state's boundaries, must be reserved to the federal government in the state's enabling act or the land is "subject to the ordinary jurisdiction of the State." Laurent, Federal Areas Within the
Leaving aside the proposition that federal legislation in the future might oust the state of the jurisdiction it now claims, it therefore appears that only the Mineral Leasing Act now provides whatever jurisdiction the federal government may assert.

Certainly the Mineral Leasing Act is "legislation by Congress" which, if the required grant of jurisdiction is included within it, would supersede local police regulations directed toward control of production on the public domain. Several important cases reflect the theory that the power granted to Congress by the Constitution to dispose of and regulate the property of the public domain precludes any state from exercising a similar power, whether or not the federal government has so acted with regard to the property. The mere repose in the federal government of the power to control, dormant though it may lie, has been construed to be an exclusive power with which a state cannot interfere. Thus, the government's conclusion that it acquiesces in state regulation merely as a matter of comity seems to be supported by those decisions. With regard to state conservation laws affecting mineral development on lands within the states, a survey of some of the provisions of the Mineral Leasing Act might help to resolve the extent, or limits, of the New Mexico Oil Conservation Commission's power to regulate those pools which include lands owned by the United States.

The Mineral Leasing Act: Congressional "Usurpation of the Field"?

Section 1 of the Mineral Leasing Act of 1920 makes certain lands of the public domain subject to lease by citizens, corporations, and States or Territories "under such rules and regulations as shall be prescribed by the Secretary of the Interior." Clearly, this authorization establishes the Secretary as the agent of the federal landowner for executing the lease. It is not so clear, in the absence of operating "rules and regulations" directed toward regulation of the same subjects covered by local conservation statutes, that jurisdictional control of conservation matters has been preempted merely by the authorizing language of the Act.

Another section of the Mineral Leasing Act specifically recognizes the necessity of preventing waste, and provides for forfeiture of the lease if waste is


53. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." U.S. Const., art. IV, § 3.

54. E.g., Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) (government enjoined use of federal lands in Utah by defendant who had not secured permission of government but was operating under state authority).


permitted in violation of the section. To date no general federal conservation statute has been enacted, but there have been occasions when the government has issued orders or rules requiring conservative action by the lessee which had not been required by the state regulatory body. Federal courts have upheld the rules of the Department, and have construed them to have the force and effect of law. To the extent, then, that conservation "rules" have been issued by the federal government, although they may be of specific rather than general application, the courts have sustained the theory that there has been a pre-emption of local statutes "in conflict" with the governmental rule directed toward the same subject of control.

If the preceding reasoning be tenable, then the provisions of Section 30 and 32 of the Mineral Leasing Act cannot be reconciled with the decisions or interpretations suggested, for in Section 3061 the proviso reads:

That none of such provisions shall be in conflict with the laws of the State in which the lease property is situated,

and Section 32, which confers federal regulatory power in this language:

That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things to carry out and accomplish the purposes of this Act. . . . (Emphasis added.)

also limits that authority by the proviso contained in the Section, which reads:


59. On October 10, 1958, the Department of Interior ordered the lessees and operators of federal and Indian leases to shut down most of their producing oil wells in the Aneth area of Utah because huge quantities of concomitant gas produced were being wasted by flaring. The Utah regulatory commission knew of the flaring, and had permitted it. Apparently both the state commission and the lessees accepted the order of the Department without judicial protest since a report of the case does not appear in any of the reporters (including Oil and Gas Report).

In Forbes v. United States, 125 F.2d 404 (9th. Cir. 1942), the court upheld an order of the Department of Interior which required a lessee to plug a well if the lessee refused to maintain it as a water well, and upon lessee's failure to comply, granted the United States costs against the lessee for having to have it done by another. See earlier cases of Hodgson v. Mountain & Gulf Oil Co., 297 Fed. 269, 273 (Wyo. 1924), aff'd 20 F.2d 1022 (8th Cir. 1927) (Dept. of Interior rule prescribing conduct of proceedings under the act "considered as having the force and effect of statute"); Hodgson v. Midwest Oil Co., 297 Fed. 273, 276 (Wyo. 1924), aff'd, 17 Fed.2d 71 (8th Cir. 1927) (regulations [prescribed by the Interior Department] should be given the full force and effect of statutes, when not inconsistent with or repugnant to the [Act] itself").

60. See cases cited in note 59, supra.


62. The provisions of the section which the proviso requires shall not be in conflict with state law include: "Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed. . . ."

Provided, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property of assets of any lessee of the United States. (Emphasis added.)

Whereas Section 16 of the Act seemingly confers regulatory powers which customarily have been considered complete and exclusive, Sections 30 and 32 appear to reserve primary, or at the very least, concurrent, jurisdiction in the states.

The provisions of Section 30 and 32 are consistent with the recognition given by Congress, in all legislation affecting federal lands since 1866, to the states' jurisdiction and control over rights in non-navigable waters on the public domain. If there is a reasonable analogy between state regulation of water rights and its use on federal lands, and state regulation of oil and gas production on federal lands, then the disregard with which the federal government has held state control in the water area in recent years has clearly evidenced the Court's approval of the "pre-emption-of-the-field" theory. Under the powers of the

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64. When Congress explicitly noted the state's right to tax as being included in the proviso, it gave emphasis to longstanding federal recognition that there are many governing rights properly exercised by the various states, among which is the right to regulate in the interest of conservation.

65. E.g., Federal Communications Act, 48 Stat. 1068 (1934): "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions"; Labor Management Relations Act, 61 Stat. 140 (1947): "The Board shall have authority . . . to make, amend, and rescind . . . rules and regulations as may be necessary to carry out the provisions of this subchapter." (Section 16 of the Mineral Leasing Act is set out in the text at note 16, supra.) Where the authority of the NLRB was challenged, with respect to its exclusive jurisdiction over labor questions involving interstate commerce, the Court held that the state's power was completely superseded, and it could not act on a matter which the NLRB declined to hear if the NLRB did not specifically elect to cede jurisdiction under a provision of the Act, Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957).

As one case points out, however, it is perhaps arguable that the "occupation of the field" doctrine has no application to other than those fields wherein the constitutional grant of power to the federal government is exclusive, "as in its right to protect interstate commerce and to control international relations." Albertson v. Millard, 106 F. Supp. 635 (E.D. Mich. 1952), quoted by the dissent in Pennsylvania v. Nelson, 350 U.S. 497 (1956). It is perhaps as valid to require that the pre-emption argument be available only in those areas where the government has never permitted regulation by the states, viz., protecting interstate commerce or controlling international relations.

property clause which is the clause upon which the government rests its assertion of jurisdiction over conditions of lease operations on the public land, the Federal Power Commission was permitted to ignore local law in the issuance of a license to construct a hydroelectric power plant on reserved public lands, although Section 27 of the Federal Power Act explicitly provides that state laws must be complied with before the Commission may grant such licenses. If anything, the provision of the Federal Power Act which recognizes state's rights is even stronger than are the provisions of the Mineral Leasing Act. Yet the Supreme Court approved the action of the Federal Power Commission, over the objections of the State of Oregon, on the theory that the government owns all the water flowing through public and reserved lands and can, therefore, controls its development in whatever manner it decides, even in conflict with local laws and interests.

Another federal statute, the Taylor Grazing Act, purported to reserve to the states unimpaired authority to enact and enforce existing and prospective local statutes pertaining to the public health and welfare, but when the state prosecuted a rancher under an Idaho law which prohibited sheep grazing on ranges previously occupied by cattle, the Idaho federal court construed that provision of the Act as not applying to the use of the "federal public range" if the rancher had a federal grazing license. Rather, those licensees were subject only to enforcement of the police power of the state where circumstances arise as to the conduct of those bordering on breaches of the peace and the

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67. U. S. Const., art. IV, § 3 note 12, supra.
70. Ordinarily, the FPC justifies its pre-emption of control under the navigation power of the commerce clause (although the "general welfare" and "sovereign immunity" theories also have been useful). Since, however, the Oregon river upon which the plant was to be constructed was a non-navigable stream, the Court could not conscientiously rest its approval of FPC licensing on the "navigable stream" precedents. It therefore made the distinction between "reserved" and "public lands" in deciding that the government had a superior proprietary right which, under the argument of Nebraska v. Wyoming, 325 U. S. 589 (1945), were never surrendered to the states under the 1866 and subsequent acts, but merely subjected them to the control of the states so long as the United States should acquiesce; and that as concerns a "reservation" (as opposed to "public lands"), through which the Deschutes River flowed, the Desert Land Act of 1877 had no application. This distinction, despite the specific and unambiguous proviso in Desert Land Act that surplus water supply on the public lands, not navigable, remain free for appropriation and use of the public, subject to existing rights!
72. "Nothing in this chapter shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulations, nor shall the police power of the respective States be, by this chapter, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect." 48 Stat. 1275, 43 U.S.C. § 315n (1958).
avoidance of physical conflicts between cattle and sheep owners in case of invasion of cattle ranges by sheep herders, and in the protection of the health or public welfare,

and the police power was then applicable only "when not in conflict with the Federal Constitution or statutes." 73 The court said further:

The Taylor Grazing Act grants exclusive authority to the Secretary of the Interior to grant permits or licenses for the use of grazing livestock upon the federal public domain, and, when that is done, one having such a permit or license to graze sheep upon a designated range is protected from any attempt of the state to exclude such use by him of the public range. 74

To paraphrase this sort of language and apply it to state rules of oil well production and operation which may be contrary to the operational terms of the lease granted under the Mineral Leasing Act, the result inescapably would be a finding that the Act protects the lessee "from any attempt of the state to [prevent] such use by him of the public [mineral deposits]."

A recent decision sets up three criteria for finding exclusive jurisdiction in the federal government, where a state statute proscribes the same conduct as is covered by a federal statute. 75 Chief Justice Warren stated the first test to be whether "the scheme of federal regulation is so pervasive as to make reasonable inference that Congress left no room for the States to supplement it." 76 Obviously this test is not met in the field of conservation regulation of oil and gas production, since the federal government has promulgated only the Connally Hot Oil Act 77 (which is considered a conservation measure as well as an exercise of the power to regulate interstate commerce). Also, it has issued orders or regulations affecting conservation on only a very few occasions, and even these have been of specific rather than general application. 78 It is apparent that Congress and the Department of Interior have, indeed, "left room for the States to supplement" the existing federal conservation legislation.

As a second test, Chief Justice Warren indicates that where federal statutes "touch a field in which the federal interest is so dominant" the federal system is assumed "to preclude enforcement of state laws on the same subject." 79 Once again, it cannot truly be said that federal interest dominates in the area of oil and gas conservation, else why has the federal government been content to extend "comity" to state regulation without also attempting to assert that dominant interest by supplementing the "Hot Oil" Act with additional legislation?

74. Ibid.
76. Id., at 502.
78. See note 59, supra.
It might also be noted that even the "Hot Oil" Act is a recognition of state conservation legislation, for the "contraband oil" which is prohibited from being shipped in interstate commerce is defined by the Act to be that oil available in excess of the proration laws of the states. This recognition of the limitations set by the states can be interpreted as a tacit acknowledgment of the state's dominant interest in conservation.

The third touchstone applied by the Chief Justice is whether enforcement of state acts presents "serious danger of conflict with the administration of the federal program." It would magnify the roles which limited legislation and conservation orders by the federal government have played to classify those acts as a "federal program."

Accordingly, under Chief Justice Warren's analysis in the Nelson case, the claim of federal "occupation of the field" would necessarily fall.

Unfortunately, nothing is gained by resolving the question of pre-emption. Although the answer supports the state's control as a proper exercise of its police powers, it does not sustain the argument that the state's control is exclusive. Nor does it aid in concluding that the right exercised by the state is one that would prevail over future conservation measures enacted by the federal government, if those laws are passed pursuant to constitutional authority. None of the state's assertions of superior or exclusive jurisdiction, therefore, are valid unless the state can invoke the doctrines of estoppel or waiver to support its claims.

**Acquiescence, Estoppel and Waiver**

The argument that the government is estopped by its non-action has not often been made, and no cases have been found in which the assertion prevailed. A state attempting to rely on the long acquiescence of the United States, to prevent its present declaration of federal control, would be faced with the discouraging result in a case which is peculiarly analogous. In *Light v. United States*, a Colorado rancher permitted his cattle to graze on the public lands for a long period of time before the government insisted that he obtain the permit required by a federal statute for such use of the land. He refused, and asserted that the government's knowledge and acquiescence in his prior conduct estopped it from enforcing an injunction against his grazing usage. But the government's failure to object conferred no vested right on the user, said the Court, nor did it "deprive the United States of recalling any implied license under which the land had been used" because "the United States can prohibit absolutely or fix the terms on which its property may be used."

80. *Id.*, at 505.
83. 220 U.S. 523 (1911).
84. *Id.*, at 535.
85. *Id.*, at 536.
In an early suit by the United States for recovery of proceeds from an illegal sale of government property, laches was pleaded as the defense. The Court said there that, despite several years' delay in bringing suit, laches was no bar to recovery since, in such situations, the rule "Nullum tempus occurrit regi" applied.

In *Utah Power & Light Co. v. United States*, the government sought permanent injunction against the plaintiff's occupancy of public lands without its permission, although the occupancy was in accord with state regulation. The plaintiff urged that it had expended huge sums of money in construction, with the presumed knowledge of the government, and that the United States "neither objected to nor protested against the use of its land." The Court observed that "long acquiescence does not legalize an unwarranted appropriation." In that case, plaintiff purported to act in the name of the state of Utah. Presumably, the same observation would apply to any argument of acquiescence actually made by a state conservation commission.

**Conclusion**

A survey of the cases yields little that is helpful in support of a state's claim to superior or exclusive jurisdiction in conservation matters, as they affect federal lands within its boundaries. As we have seen above in other connections, constitutional questions of the federal power to supervise and prescribe the operations which may be conducted on public lands invariably have been answered in favor of the United States. The property clause of the Constitution has most often been relied upon to justify the government's assertion of power, but it is

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87. *Id.*, at 134.
88. "Time does not run against the King." *Id.*, at 135.
89. 230 Fed. 328 (8th Cir. 1915), aff'd in part and rev'd on other grounds, 243 U.S. 389, (1917).
90. 230 Fed. 328, 339 (8th Cir. 1915).
92. States would have little difficulty in establishing acquiescence. Note, for example, the remarks of a former Under-Secretary of the Interior in a paper prepared for delivery before a western conference in 1958, in which he stated the Department's position concerning federal jurisdiction, as follows: "Aside from the Congressional assent to the Interstate Compact, perhaps the most specific and direct application of the Federal powers in support of the states' conservation programs is that contained in the Connally 'Hot Oil' Act. But here again, the Federal Power is not exercised in usurpation or invasion of the sovereign powers of the States, but rather in a direct method of implementation of those powers through approval of State limitations on supply to the extent that they burden interstate commerce."

The Under-Secretary continued, with regard to the Department's shut-down order in the Aneth area (see note 18, supra): "It was not founded upon any purpose or intention to interfere with or supersede the exercise of the police powers of the State of Utah." *Bennett, Jurisdiction, Powers, and Attitude of the United States on Conservation of Oil and Gas, 5 Rocky Mountain Mineral Law Institute 43 (1959).*

93. See notes 83-86, and 89-90, supra.
by no means its only weapon at hand. Several other provisions of the Constitution can be invoked as its source of power: The Connally Hot Oil Act is an excellent example of the power vested by the Commerce Clause—and the statute’s constitutionality has never been challenged in the Supreme Court. Dictum, at least, sustains the General Welfare Clause as authority for the federal government to disturb rights vested by the states “limited only by the requirement that [the power] shall be exercised for the common benefit as distinguished from some mere local purpose.”94 Under the power to declare war and provide for the common defense,95 this country has seen, in two world wars, how regulation of the oil industry peremptorily be placed in the hands of a federal commission, and all matters pertaining to development and production subjected to its control.96

But even under the broad war power, which presented the only situations identical to the topic under discussion, there was no clash between federal and state interests. There never has been a case in New Mexico oil and gas history where the superior jurisdiction of either the federal government or the state has been at issue. Moreover, it is unlikely that such a case will ever arise.

The policy of this state, followed since the Oil Conservation Commission was first established, has been to require the operator to obtain approval of the federal government in all agreements pertaining to development of the public lands. There are no cases to indicate that the United States has at any time been dissatisfied with the conservation measures required by the New Mexico commission; New Mexico has been willing and agreeable that its regulations conform to the sort of regulations that the Department of Interior will approve, presumably because it, too, approves the federal requirements. Furthermore, with regard to pooled areas, the Mineral Leasing Act provides a means for the state agency’s exclusive control, of which the agency could attempt to avail itself if it felt that such an expression of control is necessary or desirable.97

It is, however, difficult, and perhaps presumptuous, to predict future regulation. An examination of precedent surely forces the conclusion that the federal government can indeed counteract state regulation of operations on public lands if it chooses to do so. It is also true that present indications point toward little, if any, possibility that control by the states shall be destroyed by federal pre-emption. But encroachments made in the field of natural gas production

95. U. S. Const., art. I, § 8, cls. 1 and 11.
97. Section 17(b) of the Mineral Leasing Act, 30, U.S. §§ 226e (1958) contains the provision that “Any [pooling] plan authorized by the preceding paragraphs, which includes lands owned by the United States, may, in the discretion of the Secretary, contain a provision whereby authority is vested in the Secretary of the Interior, or any such person, committee, or State or Federal officer or agency as may be designated in the plan. . . .” (Emphasis added.)
cannot be ignored, and some state conservation officials have less confidence than the writer in a future federal "hands-off" policy. The Federal Power Commission holds broad powers of regulation in the natural gas field of production, transportation, and sale. These powers have been exercised to set the price of gas at the wellhead, to regulate interstate gas pipeline companies and to allocate markets among the companies. Its authority and regulations hamper the exercise of regulatory powers of the various states with regard to natural gas. It is not within the scope of this discussion to elaborate upon the influence of the Federal Power Commission on state conservation measures since that, in itself, could well form the topic of a separate paper, but it is fairly clear that such influences have not, as yet, either been directed toward nor felt in the areas of development and production of oil.

Ultimately, however, the inquiry into the constitutionality of New Mexico's regulation of oil production and development on federal lands—considering past history of the federal-state relationship in this field, not only in New Mexico but in all states where conservation measures are practiced—would seem to be chiefly academic. In view of the parallel conservation goals of the federal and state governments, as expressed in statutes, documents and in case law, as well, and of the cooperative efforts of both governments as they have always been expended in New Mexico, it is difficult to hypothesize the situation that would result in so marked a departure by either body from present aims and methods of achieving them, as to create a change in their mutual confidence in the present manner of control.

MARY C. WALTERS

Part III. THE LESSEE'S DILEMMA: DOES THE FORCE MAJEURE CLAUSE SOLVE THE LESSEE'S RISK OF LEASE TERMINATION WHEN GOVERNMENTAL REGULATION RESULTS IN A CESSATION OF PRODUCTION AFTER THE PRIMARY TERM EXPIRES?

In the area of the law dealing with relief from termination or forfeiture of an oil or gas lease for the lessee's failure to strictly comply or fulfill his obliga-

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98. In a letter from Mr. Morris dated February 23, 1962, for example, he raises the point that "the Commission purports to prorate gas and otherwise control various aspects of natural gas production," and concludes: "Our actions in this regard are somewhat futile since the gas allowable that we establish are governed by purchasers' requirements which in turn are directly fixed by the Federal Power Commission. The FPC, by promulgating a very few additional rules, could substantially destroy all of the State's power to regulate natural gas—and it would be but one step further for that body to assume jurisdiction of oil production."

99. See text at notes 44 and 92, supra.

100. With the exception, of course, of the occasion when the government should exercise its war power, in which case it is highly unlikely that the government's policies and production requirements would be so repugnant that the state agency would protest its orders thereunder.
tions under the terms of the lease, "the general conclusion seems to be that equity will grant relief from termination of an 'unless' lease, or from forfeiture of an 'or' or other lease, for non-payment of delay rental, where it appears the leaseholder had fully intended to pay the full amount, but, without gross negligence, and because of accident, mistake, inadvertence, mischance, etc., failed to do so strictly on time."\(^{101}\)

In this same area courts have been willing to grant relief to the lessee when he is faced with losing his lease because of his inability to comply strictly with its terms as a result of unforeseen natural or mechanical forces.\(^{102}\) Thus, when production must temporarily cease after the expiration of the primary term because of such unforeseen forces, the courts tend to deny cancellation of the lease.\(^{103}\) But when cessation of production after the primary term expires as the result of promulgation and enforcement of governmental regulations, the lessee has not been treated so favorably in many instances. The law is far from settled in this particular situation; but certain steps may be available to the lessee for his protection.

In the context of this symposium, perhaps the most pressing question is: What is the oil and gas lessee's legal position when a state regulatory board issues an order which results in the cessation of production after the primary term of the lease has expired? A related question is: When the cessation of production is due to the issuance and enforcement of an invalid order, is the lessee's legal position different from that where the cessation is the result of the issuance and enforcement of a valid order?

Before attempting to determine the lessee's liabilities in the situations above, the authority in the state to regulate the oil and gas industry must be admitted. Courts have consistently held that the police power of the state includes not only power to regulate for the promotion of public health, good morals and good order, but also the right to regulate and promote development of industry and the utilization of natural resources so necessary to the wealth and prosperity of the state.\(^{104}\) Thus, in Superior Oil Co. v. Foote,\(^{105}\) it was held "that the state may enact regulatory laws for and prescribe methods of extracting oil and gas for the purposes of conservation, the efficient utilization of reservoir energy, and the protection of the correlative rights of all owners in a common source of supply. But the statute must not be arbitrary or unreasonable, and the regulation must have a direct, substantial, and reasonable relation to the statutory purpose." Moreover, it was held in Cities Service Gas Co. v. Peerless Oil &

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101. 5 A.L.R.2d 993, 994-95.
104. Ohio Oil Co. v. Indiana (No. 1), 177 U.S. 190 (1900).
105. 214 Miss. 857, 59 So.2d 85, 93 (1952).
Gas Co.\textsuperscript{106} that a statutory grant of power to a state board to regulate the taking of natural gas from a common source of supply, to prevent waste, protect the public interest and the interest of those having a right to produce from the common source, is not invalid as violative of the Fourteenth Amendment or the Commerce Clause of the Federal Constitution.

**Effect of Valid Governmental Interference With Lease Provisions**

Most oil and gas leases today provide, in the habendum clause, that the lease shall remain in force for a certain number of years as the primary term; and shall continue in force after the primary term so long as oil, gas, or other mineral is produced by the lessee from the land. Under such a habendum clause, does the lease terminate upon the cessation of production, after the expiration of the primary term, when cessation is the result of valid governmental interference?

In *Clifton v. Koontz*\textsuperscript{107} the court denied cancellation of the lease. Although the habendum clause did not expressly provide that production must continue in paying quantities, the lessor sought cancellation of the lease upon the theory that production in paying quantities had ceased, since the lessee had operated the lease “in the red” over a 16-month period. Evidence established that rules and regulations of the state regulatory commission resulted in the limited production and that, but for these rules and regulations, sufficient production could have been obtained to show a profit.

The court agreed with the lessor that production in paying quantities must continue because such an obligation arose from “the law or natural equity,”\textsuperscript{108} but felt the lower court was clothed with a great latitude of discretion in deciding whether an existing well on a lease had or had not ceased to produce in paying quantities.\textsuperscript{109} The appellate court agreed; and held that the trial court was entitled to take into consideration the effect of the rules and regulations of the state regulatory commission upon production, and to conclude that, but for such rules and regulations, a profitable production would have been possible to obtain. This latter conclusion, perhaps, presents the main reason for the court’s denying a cancellation of the lease.

Nevertheless, the Kansas Supreme Court, in *Berline v. Waldschmidt*,\textsuperscript{110} denied lessee’s petition to extend the terms of a mineral lease, which would otherwise expire, for the period of time that war-time regulations made it unlawful to drill a test well on the leased land. The specific question involved was whether a court of equity could and should extend or suspend the running of the term of a mineral deed under circumstances of this nature.\textsuperscript{111} The lessee contended that application of the equitable doctrine of “commercial frustration”

\begin{footnotesize}
\textsuperscript{106} 340 U.S. 179 (1950).
\textsuperscript{107} 305 S.W.2d 782 (Tex. Civ. App. 1957).
\textsuperscript{108} Id. at 788.
\textsuperscript{109} Ibid.
\textsuperscript{110} 159 Kan. 585, 156 P.2d 865 (1945).
\textsuperscript{111} Id. at 867.
\end{footnotesize}
required the court to suspend operation of the contract and extend its terms for
the period of time that he was precluded by war-time regulations from drilling
a test well on the land, until it was again lawful to drill on a five-acre tract.

The court, however, ruled that the particular circumstances and conditions
of each case would govern whether the doctrine would apply, noting that or-
dinally it would be relevant to excuse payment by the defaulting party where
the object or purpose of a contract was frustrated or its enjoyment prevented
by law. While recognizing that the doctrine was developed to give relief to the
parties in a situation where they could not reasonably protect themselves against
the happening of subsequent events through the terms of the contract, the court
held that it has no application in a situation where the subsequent event alleged
to have caused the frustration was reasonably foreseeable, and could have been
controlled by the contract.\footnote{112}

The use of a force majeure clause was in that case considered to be the proper
vehicle for avoiding this particular contingency, or any other which could have
been reasonably foreseen or controlled. Through failure to include the force
majeure clause, the court held that the lessee assumed the risk of government
regulation, because it was foreseeable. As a result, the doctrine of commercial
frustration was not permitted as a defense.\footnote{113}

Although there are no cases in New Mexico involving an oil and gas lessee
prevented by governmental regulation from performing according to the terms
of the lease, an analogous situation was decided in \textit{Wood v. Bartolino}.\footnote{114} In
New Mexico, if a lease "by its terms provides that the lease shall extend for a
period of five years, and as long thereafter as oil and gas, or either of them,
is produced by the lessee," it conveys real property.\footnote{115} Also, it is settled New
Mexico law that a leasehold for a term of years is an interest in land.\footnote{116}

In the \textit{Wood} case the defendant leased a building for a term of years to be
used solely as a filling station. Shortly thereafter, government war-time rules,
regulations, and orders froze sales of automobiles, tires and tubes, and rationed
the sale of gasoline, and the operation of the filling station became unprofit-
able.\footnote{117} The lessee, attempting to abandon the business, argued that the lease
had been terminated because of commercial frustration resulting from the gov-
ernment war-time regulations. Instead of denying relief on the theory that
the lessee assumed the risk of government regulation (as the Kansas court did
in \textit{Berline v. Waldschmidt, supra}), the court held that the doctrine of com-

\footnote{112} \textit{Ibid.}
\footnote{113} \textit{Id.}, at 868-69.
\footnote{114} 48 N.M. 175, 146 P.2d 883 (1944).
\footnote{115} \textit{Terry v. Humphreys}, 27 N.M. 564, 575-76, 203 Pac. 539 (1922).
\footnote{116} \textit{State ex rel. Truitt v. District Court}, 44 N.M. 16, 27, 96 P.2d 710, 715 (1939).
\footnote{117} 48 N.M. 175, 177, 146 P.2d 883, 884 (1944). "The parties, at the time the lease
contract was entered into, did not contemplate, and could not reasonably have contem-
plated, that such laws, rules and regulations would be enacted, promulgated or enforced,
or that they would materially and substantially change the conditions of the business
operated in the leased premises."
mercial frustration was not applicable to release a lessee from his obligation to pay rent, since the application of the doctrine was limited to those situations where government regulations had either made the contemplated purpose of the lease illegal, or prohibited it absolutely. The court expressed doubt whether the doctrine should apply to a lease of an interest in land. This question was not decided, since the court found that the government war-time regulations did not absolutely prohibit the sale of gasoline, oil, tires, etc., nor did they deprive the lessee of the use of the premises as a filling station.

Following the Wood case, it would seem that if an oil and gas lessee in New Mexico is to be relieved of his obligation under the terms of the lease, when government regulations prevent him from performing, courts will grant relief, if at all, only in those situations where the government regulations have made illegal the conduct of business contemplated by the parties. However, even in those limited situations relief might be denied, since it is still an open question in New Mexico whether the doctrine of commercial frustration applies to a lease of an interest in land.

Haby v. Stanolind Oil and Gas Co.\textsuperscript{118} is a case directly on the question of the lessee’s legal position when a state regulatory board acts without authority, and the regulation results in a cessation of production. There, the lessors sought to have the court declare an oil and gas lease terminated insofar as it covered their land. The lease had a primary term of ten years which was to continue as long as oil, gas, or other mineral was produced from the land under lease. After the expiration of the primary term, the state regulatory commission issued an order proscribing production unless the casing-head gas were put to one of four designated uses. The lessee found all four uses to be economically impracticable, so it shut off the well for nine months, at which time the commission’s order was held invalid by the Texas Supreme Court.

A provision in the lease saved it from terminating if, after production had ceased from any cause, the lessee commenced additional operations within 60 days. It was this clause upon which the case was decided. Even though the lessee’s cessation of production and failure to commence additional operations were the direct results of the Commission’s invalid order, the lease was held to have automatically terminated upon the expiration of the 60-day period. The commission’s order did not excuse non-performance.

The foregoing cases illustrate the courts’ concern with whether courts should confine themselves to a construction of the terms of the lease, or whether they should apply equitable considerations which would avoid forfeiture in such situations.

The Texas court in the Clifton case, supra, spoke as though it was applying equitable principles when it denied cancellation of the lease. However, Walker\textsuperscript{119} insists that in Texas, where the oil and gas lease is a determinable

\textsuperscript{118} 228 F.2d 298 (5th Cir. 1955).
\textsuperscript{119} Walker, “The Nature of the Property Interests Created by an Oil and Gas Lease
fee, equitable principles are theoretically inapplicable to the termination of the lessee's estate which is effected by the habendum clause in the lease.

The United States Court of Appeals, Fifth Circuit, agreed with Walker in *Empire Gas & Fuel Co. v. Saunders*, and the same court reaffirmed this position in the *Haby* case, supra, i.e., that the equitable rule of relieving against forfeiture has no application, simply because there is nothing to be forfeited since the lease ceases to exist by its own terms.

Despite the fact that the *Clifton* decision is a very recent one, later than the *Haby* decision, and that they may be irreconcilable, it may be possible to predict New Mexico's course from these Texas decisions. Both states have many similar rules of oil and gas law. For example, both follow the rule of "ownership in place" in regard to the nature of the interest of the landowner, and the rule that the oil and gas conveys an interest in land. It is probable, therefore, that New Mexico courts will agree with *Haby* that equitable rules relieving against forfeiture have no application to an oil and gas lease which requires production to continue in paying quantities after the expiration of the primary term, even though cessation of production after the expiration of the primary term results from governmental interference.

If it is correct to refer to the doctrine of commercial frustration as a rule of special equitable relief, it would seem to follow that Texas, and probably New Mexico courts, will hold that it is not applicable to an oil and gas lease. If, instead, the doctrine is correctly referred to as a rule governing the construction of contracts, Texas and New Mexico courts will probably decline, also, to hold that the doctrine is applicable to an oil and gas lease because of the rule of strict construction of the various lease clauses, developed by the oil industry, against the lessee and in favor of the lessor.

How do these conclusions affect the New Mexico or Texas oil and gas lessee who holds under a lease that contains a habendum clause such as those discussed above? Apparently, the lessee will be faced with the loss of his lease when governmental interference, valid or invalid, results in cessation of production after expiration of the primary term, unless he has some saving contractual provision in the lease.

**Effect of Force Majeure Clause—Fee Lands**

The *force majeure* clause is a saving clause by which the lessee can avoid the termination of his lease. Originally, this clause, being narrowly defined, was

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120. 22 F.2d 733, 735 (5th Cir. 1927).


restricted to acts of God, but the definition today is much broader. Typically it lists specific conditions beyond the control of the lessee which, unless contracted against, might result in termination of the lease. For example, some clauses enumerate as exculpatory "storm, flood, or other acts of God, fire, war, rebellion, insurrection, riot, strikes, differences with workmen, or failure of carriers to transport or furnish facilities for transportation"; any "rule, regulation, order or requirement of any governmental commission, body or representative having or asserting jurisdiction"; and "any cause whatsoever beyond the control of the lessee," just to name a few. Force majeure clauses may consist of one short sentence or may extend to several paragraphs. The length depends upon the number of conditions which will cause the clause to come into effect to relieve the lessee of his obligations, and the detail with which the lessee's rights upon the occurrence of the condition are enumerated. One author emphasizes that great care should be taken in specifying the conditions which will cause the clause to come into effect, and in specifying the rights available to the lessee when one or more of the conditions occur, thus reducing the possibility of litigation to a minimum.

No reason is apparent why the lessee of fee lands should be unable to get a force majeure clause included in any lease he enters into, since the lessee normally has the better bargaining position when dealing with a fee lessor.

State Lands and the Force Majeure Clause

When the lessor is the state, however, the lessee may experience difficulty in obtaining a lease containing a force majeure clause. For instance, the state of New Mexico uses a form lease which the Commissioner of Public Lands is authorized to execute. It does not contain a force majeure clause, but it does include other saving clauses, such as the one which provides that by paying double rental the lessee may continue the lease in full force and effect for a certain period of time even though production cease from any cause. Evidently the lessee will be without relief unless the specific conditions occur that are provided against in the saving clauses of this form lease. He could, of course, seek the Public Land Commissioner's approval to include a force majeure

124. Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal.2d 228, 174 P.2d 441, 447 (1946). "Force majeure" or..."vis major" is not necessarily limited to the equivalent of an act of God, but the test is whether under the particular circumstances there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence, diligence and care."

125. Merrill, "Lease Clauses Affecting Implied Covenants," Second Annual Institute on Oil and Gas Law and Taxation 141, 191 (1951).


clause in his lease, but whether such approval can be obtained is a question upon which there are no decisions.

Federal and Indian Lands and the Force Majeure Clause

When Indian lands are involved the lessee may also have difficulty in obtaining a lease containing a force majeure clause because, again, although there are standard form leases for Indian Tribal Lands, Allotted Indian Lands, Oklahoma Osage Reservation, etc., none of these contain a force majeure clause. Since the Secretary of the Interior or his agent is responsible for the general supervision and administration of Indian affairs, the lessee is faced with persuading the Secretary to include a force majeure clause in the lease. How successful the lessee would be is mere speculation.

The lessee will be met with the same problem when he attempts to lease oil and gas lands from the federal government. Form 4-213 is the lease prepared by the government for non-competitive leases, for competitive leases, and for renewal and exchange leases. This form does not include a force majeure clause and the federal regulations governing oil and gas leases on public lands do not incorporate such a clause by reference.

Now, suppose that the lessee leases oil and gas lands from the federal government but no force majeure clause is included in the provisions of the lease. Let us assume, also, that production is obtained on the lease during the primary term, and that after the expiration of the primary term the federal government issues an order to the lessee to shut in his wells because his methods of operation and production are wasteful, even though he is complying with all state oil and gas regulations.

This supposition raises two questions: (1) Can the federal government regulate the production of oil and gas from federal lands, even though the lessee has complied with the state's comprehensive plan for regulation and conservation of production? (2) Does the lessee's lease terminate as a result of the cessation of production caused by enforcement of the order?

The first question has been discussed elsewhere in this article. Pursuing the analysis of the federal government's right to regulate, it follows that the lessee's lease will terminate in the absence of a force majeure or some other saving clause. It is doubtful that a court would accept the only valid argument the lessee could make: that since the federal government is responsible for the

130. McLane, Oil & Gas Leasing on Indian Lands, 278-300. (1955).
133. 43 C.F.R. § 192.54 (1959).
135. The specific provisions of this lease form are set out in Hoffman, Oil & Gas Leasing on the Public Domain 309 (1951).
137. See Part II, supra.
cessation of production and is a party to the lease, the lessee is entitled to relief from non-performance for the reason that one party to the lease cannot preclude performance by the other party which, under the terms of the lease, it is entitled to, and then claim that the lease has terminated for non-performance. Thus, although this principle is applicable where both parties to the lease are actual persons, or where one party is a person and the other a corporation, the government's assertions that it was protecting the public's interest and was exercising a valid power to regulate undoubtedly would prevail.\textsuperscript{138}

No doubt the same result would obtain with regard to leases of Indian lands, since the Indians are wards of the federal government. Probably even a stronger argument for the same result is the fact that there can be no dispute regarding the federal government's exclusive jurisdiction over Indian affairs.

In New Mexico, because of the comity extended between state and federal regulatory agencies, the lessee's position apparently is not very precarious, even though he does not have the \textit{force majeure} clause to insure his protection. So long as this tacit agreement exists between the federal and state governments, the lessee has little to worry about; but if this relationship should cease, the lessee then will very likely lose his lease, in the absence of a saving contractual provision. But when the lessee is dealing with a fee lessor, he can adequately protect himself from the risks of governmental interference by including the \textit{force majeure} clause in the provisions of the lease.

\textbf{Conclusion}

The problems discussed above may also appear when all of the lands under lease or a part of them are pooled under a compulsory pooling statute, or when the lands or a part of them are unitized under a unitization statute. For a discussion of those problems, Mr. S. J. Sheinberg has written an excellent law review article concerning the applicability of the \textit{force majeure} clause under those circumstances,\textsuperscript{139} to which the writer would refer readers of this paper.

\textbf{C. Gene Samerson}

\textsuperscript{138} Research of the cases reveals no decisions involving this issue.