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# OIL AND GAS

by

Ernest E. Smith\*

OF the variety of oil and gas problems which Texas courts dealt with during the survey period, five seem of special interest: (1) conflicts between holders of different types of interests in mineral land, (2) issues involving the termination of interests in oil and gas, (3) the estoppel by deed doctrine, (4) interpretation of the Mineral Interest Pooling Act, and (5) the scope of the Railroad Commission's regulatory power.

## I. CONFLICTS BETWEEN HOLDERS OF DIFFERENT TYPES OF INTERESTS IN MINERAL LAND

Perhaps the most durable source of controversy between holders of different types of interests in mineral land has been injury to the surface owner's estate as a result of operations of the mineral fee owner.<sup>1</sup> *Winslow v. Duval County Ranch Co.*<sup>2</sup> involved such a dispute. The plaintiff, alleging that the operations of the defendant-lessees were polluting the surface of its land, obtained a temporary injunction restraining the defendants from pumping, flowing, or producing any oil or gas from their leases. In dissolving the injunction, the Beaumont court of civil appeals relied primarily upon two factors. The first was the scope of the injunction, which the court deemed unnecessarily broad for the accomplishment of the plaintiff's stated objectives. Rather than prohibiting operations resulting in the pollution of the surface, the order prohibited all production. The second and related factor was the order's failure to distinguish among the defendants. The plaintiff's ranch, which was approximately 100,000 acres in size, had been leased for oil and gas development during the nineteen-twenties, and the defendants' leaseholds were the result of assignments of small portions of the original large leases. As the evidence indicated, there was no joint operation by the defendants of their leaseholds, which were as much as twenty miles apart. Given the apparently wide differences both in location and in the manner of operation of the defendants, the court, not surprisingly, concluded that the trial judge abused his discretion in applying the same sweeping injunction to all the defendants.

The most troublesome aspect of the case was alluded to but not decided by the court because of the nature of the injunction. The issue for determination was whether, under the accommodation doctrine,<sup>3</sup> a court is justified

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1. See, e.g., Comment, *Land Uses Permitted an Oil and Gas Lessee*, 37 TEXAS L. REV. 889 (1959), for a discussion of the various contexts in which such a controversy can arise.

2. 519 S.W.2d 217 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

3. See *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971). See also Smith, *Oil and Gas, Annual Survey of Texas Law*, 29 Sw. L.J. 109, 109-14 (1975).

in prohibiting production if the court's order results in the termination of an oil and gas lease. An affirmative answer was given in an earlier case, *Speedman Oil Co. v. Duval County Ranch Co.*,<sup>4</sup> which involved the same plaintiff, but different lessees. The court there, in upholding an injunction apparently identical to the one litigated in the instant case, justified its result primarily on the ground of preventing negligent injury to the surface. The defendant's equipment was apparently so deteriorated that its continued use in any capacity and under any circumstances would result in unnecessary pollution of the surface. In such a situation an injunction prohibiting further use of such equipment seems fully justifiable, even though the practical result is the termination of the defendant's lease. As the court in *Winslow* suggested, however, such an injunction is considerably less sweeping than one which prohibits all production. In view of the doctrine that the mineral estate is the dominant estate,<sup>5</sup> it is difficult to see how the accommodation doctrine could ever support an order restraining the undisputed owner of a lease from producing in any manner whatsoever.

An entirely different type of dispute was involved in *Portwood v. Buckalew*,<sup>6</sup> where the court was primarily concerned with the obligation owed by the holder of the executive right to the owners of the nonparticipating mineral interests. The controversy grew out of a series of partition agreements entered into in 1948 and 1954, under which the surface of the land in question was divided in kind among the heirs to the property, but the mineral estate was retained in undivided interests. Each surface owner received the exclusive executive right with respect to leasing the minerals beneath the surface of his land, but was required to share all royalties, bonuses, and delay rentals with the holders of the nonparticipating mineral interests in proportion to their ownership. Three of the surface owners, defendants in the suit, had executed leases which contained not only royalty and bonus provisions, but also extensive provisions for the payment of surface damage. These included per acre payments which, depending upon the lease in question, varied in amount from \$2.50 an acre to \$26.00 an acre, and overriding royalties which, in at least one lease, equalled a one-fourth gross production interest. The plaintiff brought suit on behalf of her minor children, who owned nonparticipating interests in the three tracts, to compel a sharing of these additional benefits.

The Tyler court of civil appeals, in upholding the lower court's decision for the plaintiff, held that the defendants had failed in their obligation to exercise the utmost fair dealing with the plaintiff's interest. The basis for the obligation is not entirely clear from the court's opinion. One basis suggested by the court is the family relationship between the parties to the litigation. The partition arrangement was the result of a family agreement, and although the details of the family relationship are not set out, the court suggests that a fiduciary duty arose from it. However, an entirely distinct

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4. 504 S.W.2d 923 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

5. See, e.g., *Warren Petroleum Corp. v. Martin*, 153 Tex. 465, 271 S.W.2d 410 (1954), noted in 7 BAYLOR L. REV. 188 (1955).

6. 521 S.W.2d 904 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.).

basis for the defendant's obligation is also suggested. The court indicated that an obligation to use utmost fair dealing is always an incident of the relationship between a holder of an executive interest and the holders of non-participating interests. This position is, of course, not entirely free from doubt. Indeed, one might well ask why a party to an arm's-length transaction should reasonably expect more of the other party—in this instance the holder of the executive right—than that he act in good faith in exercising his right. Certainly, neither commentators nor courts are in agreement on the standard of conduct that should be required of the holder of the executive right.<sup>7</sup> The court in *Portwood*, in adopting the utmost fair dealing standard, was apparently heavily influenced by one of the earliest articles on the subject.<sup>8</sup> The author there argued that such a standard was an appropriate compromise between a fiduciary obligation, which ran counter to the probable intent of the parties, and the good faith standard, which failed to provide adequate protection to the non-participating interests. The requirement of utmost fair dealing is, on the other hand, consistent with the parties' probable expectation that the holder of the executive right will not totally disregard the interests of the owners of the non-participating interests, and will not act entirely from his own self-interest.

In reaching its result, the Tyler court did not need to resolve the issue of the proper standard to apply insofar as the claim to the overriding royalties was concerned. It is well established that a payment from production which will continue throughout the life of the lease is a royalty, regardless of the terminology used in the lease creating the royalty.<sup>9</sup> Since the partition agreements provided for the sharing of royalties with the plaintiffs, their claim could have been asserted even if the defendants, in exercising their exclusive right to execute oil and gas leases, had owed no duty whatsoever to the plaintiffs. However, the surface damage provisions raised a different question. The court, while conceding that the holder of the executive right was entitled to provide for surface damages which would be payable only to himself, stated that his standard of conduct in doing so was that of an ordinary prudent surface owner in the exercise of a high degree of care. In applying this standard, the court apparently placed the burden of proof on the holder of the executive right, indicating that there was no evidence that damage to the surface in the amounts received by the defendants could reasonably have been anticipated by the defendants. Hence, the defendants were providing for a payment which otherwise would have been included in the bonus. Since such conduct violates the utmost fair dealing standard, the plaintiffs were entitled to share in such payments.

## II. TERMINATION OF INTERESTS IN OIL AND GAS

Questions concerning the termination of various interests in oil and gas were involved in three cases which reached the appellate level. One of the

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7. See R. HEMINGWAY, *THE LAW OF OIL AND GAS* § 2.2 (1971); 2 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 339.2 (1975), and the cases cited therein.

8. Jones, *Non-Participating Royalty*, 26 *TEXAS L. REV.* 569 (1948).

9. See, e.g., *Griffith v. Taylor*, 156 Tex. 1, 291 S.W.2d 673 (1956); *Lane v. Elkins*, 441 S.W.2d 871 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.).

cases involved the termination of an oil and gas lease, another the termination of a mineral royalty interest reserved by a deed, and the third brought into question the termination of state granted mineral awards.

In *Hancock v. Texaco, Inc.*,<sup>10</sup> some, but not all, of the parties named as lessors in an oil and gas lease attempted to effect a forfeiture of the rights of the lessee as to their undivided interests in the property covered by the lease. The lease provided that if the lessee were to be in default of a drilling covenant, written notice by the lessor would be effective in bringing about such a forfeiture. By virtue of the stipulations made by the parties to the action, the sole legal question upon which the validity of the attempted forfeiture rested was whether all of the parties listed in the lease as lessors were required to join in the notice of default, or if it was possible for only those lessors who wished to join to give the required notice and thereby achieve a forfeiture as to their respective undivided interests. After considering the wording of the lease, which the court found unambiguous, and noting that the parties had given a special designation to the term "lessor,"<sup>11</sup> that the parties had provided that the "lessor" warranted title to the entire unit,<sup>12</sup> that the "lessor" was to receive a gross royalty, and that all parties had signed the lease collectively above the designation "lessor,"<sup>13</sup> the Corpus Christi court of civil appeals concluded that notice of default under the terms of the lease must be given by all parties named as "lessor" in order to be effective.

The court's decision is hardly surprising. The parties to an oil and gas lease normally think of the lease as a unit which, if terminated, will end either in its entirety or as to specific acreage covered by the lease. An intent on the part of the signatories that the lease could terminate as to some, but not all, undivided interests seems unlikely at best. In such a situation a lessee who had obtained production would be faced with the prospect of having to pay the owners of such interests their proportionate share of the net profits from the production.<sup>14</sup> Depending on the circumstances, the interest owners might be in an equally undesirable position. If the prospects for production were remote, they would find it difficult, if not impossible, to lease their mineral interests to anyone but the original lessee.<sup>15</sup>

In a fact situation virtually opposite to *Hancock v. Texaco* the Dallas

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10. 520 S.W.2d 466 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

11. In the opening clause of the agreement all of the parties-lessor were listed collectively, and it was noted that they would thereafter be referred to as "Lessor." In addition, in a later clause of the lease there were specific provisions made for the individual lessors to take certain actions in enumerated situations, thereby reinforcing the premise that "Lessor," as it was used in the remainder of the lease, was a collective term. *Id.* at 468-69.

12. The court found significant the fact that no single party-lessor could warrant fee simple title to the entire unit and, therefore, this wording of the lease strongly indicated that "Lessor" was a collective term encompassing all parties-lessor. *Id.* at 469.

13. As opposed to a notation "as Lessor" beside the signature of each of the parties-lessor, which would indicate they were not signing the lease collectively. *Id.*

14. See *White v. Smyth*, 147 Tex. 272, 214 S.W.2d 967 (1948), noted in 27 TEXAS L. REV. 863 (1949).

15. See generally *Smith, Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests*, 43 TEXAS L. REV. 129, 130-34 (1964).

court of civil appeals held that the attempt by one of three owners of a lease to exercise an option to renew was a nullity; the lessor could not be forced to accept the renewal of only an undivided one-third interest in the lease.<sup>16</sup> The decision in *Hancock* is obviously supported by other precedent as well. In *Parker v. Parker*,<sup>17</sup> for example, the court gave an identical meaning to the word "lessor" when used in a lease signed by the owners of several contiguous tracts. Furthermore, from a more generalized perspective, the *Hancock* decision is in line with the doctrine in Texas that if a forfeiture provision of a lease is capable of two constructions, the construction which will prevent a forfeiture is to be given preference.<sup>18</sup>

*Guaranty National Bank & Trust v. May*,<sup>19</sup> the second case involving the duration of an interest in oil and gas, was an action for a declaratory judgment that a mineral royalty interest reserved by a deed had terminated. In reaching its decision, the Corpus Christi court of civil appeals stayed carefully within the boundaries of the facts presented by the case, distinguishing the decision in *Williamson v. Federal Land Bank*<sup>20</sup> and refusing to extend the rules established by *Southland Royalty Co. v. Humble Oil & Refining Co.*<sup>21</sup> and *Spradley v. Finley*.<sup>22</sup>

The court in *May* initially addressed itself to an interpretation of the language creating the royalty interest to determine whether it was, as the royalty owners contended, perpetual. Refusing to hold that the royalty interest became perpetual by implication,<sup>23</sup> and finding that the wording of the agreement did not expressly make it so,<sup>24</sup> the court determined that the royalty interest was a twenty-year term interest which would be kept in existence beyond that period only by continued production. Therefore, the twenty-year period having passed, resolution of the case turned upon a finding as to whether the production on the lease was sufficient to continue the royalty interest. The lease consisted of 401.22 acres and the royalty interest in question covered 200 of those acres. It was undisputed that current production from a well on neighboring land, which had been pooled with a portion of the leased land not subject to the royalty interest, had extended the primary term of the lease. The royalty interest owners argued

16. *Lander v. Wedell*, 493 S.W.2d 271 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

17. 144 S.W.2d 303 (Tex. Civ. App.—Galveston 1940, writ ref'd).

18. See *Ryan v. Kent*, 36 S.W.2d 1007 (Tex. Comm'n App. 1931, jdgmt adopted); *Colby v. Sun Oil Co.*, 288 S.W.2d 221 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.).

19. 513 S.W.2d 613 (Tex. Civ. App.—Corpus Christi 1974, no writ).

20. 326 S.W.2d 560 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.).

21. 151 Tex. 324, 249 S.W.2d 914 (1952).

22. 157 Tex. 260, 302 S.W.2d 409 (1957).

23. See *Sharp v. Fowler*, 151 Tex. 490, 252 S.W.2d 153 (1952).

24. The term of the reservation was "for a period of twenty (20) years from the date thereof, unless oil, gas or other minerals are being produced at that time . . ." The additional wording pertinent to the court's decision that production at the end of twenty years would not keep the royalty interest in existence in perpetuity was "If, at the expiration of twenty (20) years from the date hereof, no oil, gas or other minerals are being produced then, and in that event this reservation and retention of a 1/16th of the minerals shall be and become null and void and of no further force and effect and shall revert to and become the property of the owner of the surface of said land." 513 S.W.2d at 617.

that since the lease was held by production, there must be production on their interest which, they contended, was spread throughout the lease. In rejecting this argument and deciding that the royalty interest had terminated, the court pointed out that the crucial element in this case was the fact that the tract upon which production was continuing had never been unitized with the land covered by the royalty interest in question. The owner of the producing tract had given only a limited ratification to the lease which expressly prevented unitization or pooling of his royalty interest with royalties owned by others in the tracts covered by the lease.

Had there been total unanimity of the parties in joining to create a unit under the lease, as was present in *Williamson*, or if any of the land covered by the royalty interest had been included in the producing tract or part of the unit containing the producing tract, as in *Southland* and *Spradley*, the court would have reached an opposite conclusion. But, the facts of the case being as they were, the court was unwilling to extend the present case law in order to decide that the royalty interest was not terminated.

*Cobra Oil & Gas Corp. v. Armstrong*<sup>25</sup> involved a rather narrow statutory interpretation and application. It was an action seeking a declaratory judgment that Cobra was entitled to make certain payments to the State of Texas on mineral awards covering approximately 5,524 acres in West Texas and proceed with development work on those tracts. The controversy in *Cobra* centered around two issues: the meaning of the wording in article 5395<sup>26</sup> which set the time at which payments were due the state on mineral awards, and the procedure necessary on the part of the land commissioner to effectuate a termination of previously granted mineral awards for failure on the part of the recipient to make timely payments as required by statute.

Cobra received the awards in June and July of 1967 but did not tender its first payment until November 28, 1967. Cobra had construed the language of article 5395 to require that the first payment was to be made during the month of January next following the date of the award, while the land commissioner was of the opinion that the wording required the first payment to be made within thirty days after the issuance of the award.<sup>27</sup> The Austin court of civil appeals, in adopting the interpretation given the statute by the land commissioner, followed the majority opinion in the supreme court decision upon writ of mandamus which had been previously filed by Cobra on this same issue.<sup>28</sup> The other argument advanced by Cobra was that even if the payments it tendered were past due under the terms of the statute, they were still timely because they were prior to any recorded act of forfeiture on the part of the state. This argument was based upon the fact that at the time Cobra tendered payment on the mineral awards the land commissioner

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25. 520 S.W.2d 830 (Tex. Civ. App.—Austin 1975, no writ).

26. TEX. REV. CIV. STAT. ANN. art. 5395 (1962), *repealed*, ch. 16, § 10, [1967] Tex. Laws 35. Rights acquired under art. 5395 prior to repeal are not affected by repeal. TEX. REV. CIV. STAT. ANN. art. 5421c-10, § 10 (Supp. 1975-76).

27. Article 5395 provided in pertinent part that, "The owner of each claim shall pay . . . in advance after the award and during the month of each succeeding January of each year thereafter . . ." *Id.*

28. *Cobra Oil & Gas Corp. v. Sadler*, 447 S.W.2d 887 (Tex. 1968).

had only orally declared a forfeiture as to Cobra's awards and his staff was still in the process of making an official record of that forfeiture. The court, in a broad pronouncement, ruled that the declaration of a forfeiture by the commissioner was a discretionary act under the statutes and the recording of the declaration only ministerial in nature, and, more specifically, that a forfeiture under article 5397<sup>29</sup> may be officially declared orally by the commissioner when that oral declaration is followed by the prompt recording of the oral declaration.

### III. ESTOPPEL BY DEED

In *Kelln v. Brownlee*<sup>30</sup> the defendant, who owned an undivided 151 acres in specific tracts contained within section 59, executed an oil and gas lease which was ultimately assigned to the Cabot Corporation. Several years later, the defendant executed and delivered to the plaintiff a mineral deed purporting to convey 50/640ths of the mineral interests in all of section 59. Another mineral deed, which the defendant executed ten years after the first one, also purported to convey a 50/640ths interest to all of section 59. In 1966 the lessee designated all of section 59 a pooled leasehold, drilled a well, and obtained gas production in commercial quantities. This dispute arose over the amount of royalty to which the plaintiffs were entitled. They argued that they should receive 100/640ths of the 1/8th royalty reserved in the lease, rather than the 100/640ths of 151/643rds of the 1/8th royalty argued for by the defendant. The Amarillo court of civil appeals, in holding for the plaintiffs, relied principally upon the doctrine of estoppel by deed. Although the defendant did not own an interest in the entire section at the time the two deeds were given, he subsequently acquired such an interest by virtue of the lessee's decision to pool all interests within section 59. It has been established since *Veal v. Thomason*<sup>31</sup> that pooling effects a cross-conveyance among the owners of mineral interests in the tracts involved. Having acquired an interest in the minerals he had previously purported to convey, the defendant was now estopped to assert his title in derogation of title of the plaintiffs.<sup>32</sup>

The application of the estoppel by deed doctrine in *Kelln* did not give the plaintiffs the same interest purportedly transferred to them by the deeds from the defendant. Since the interest in the entire section received by the defendant as the result of the cross-conveyance doctrine was limited to the duration of the pooling agreement, the plaintiffs' interest in the entire 640 acres will continue only as long as the pooling agreement remains in effect. Although it is clear that a grantee cannot invoke the estoppel by deed doctrine to acquire an interest in land other than that covered by the deed,<sup>33</sup>

29. TEX. REV. CIV. STAT. ANN. art. 5397 (1962), *repealed*, ch. 16, § 10, [1967] Tex. Laws 35. Rights acquired under art. 5397 prior to repeal are not affected by repeal. TEX. REV. CIV. STAT. ANN. art. 5421c-10, § 10 (Supp. 1975-76).

30. 517 S.W.2d 568 (Tex. Civ. App.—Amarillo 1974, no writ).

31. 138 Tex. 341, 159 S.W.2d 472 (1942); *see* Comment, *The Legal Effect of Voluntary Pooling and Unitization: Theories and Party Practice*, 35 TEXAS L. REV. 401 (1957).

32. *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940).

33. *Forrest v. Hanson*, 424 S.W.2d 899 (Tex. 1968).



there seems to be no convincing reason why the doctrine should not be effective to pass to the grantee a lesser interest in the land than the one purportedly conveyed.

#### IV. THE MINERAL INTEREST POOLING ACT

The only case dealing with the Mineral Interest Pooling Act,<sup>34</sup> during the period covered by the survey, raised the question whether an offset operator, whose land is not included within the unit, has standing to appeal a Railroad Commission order compelling the formation of a unit. In *Superior Oil Co. v. Railroad Commission*<sup>35</sup> Kimball Production Company had applied to the Railroad Commission for an order compelling the pooling of its interest with that of several adjoining landowners to form a 459-acre unit. Notice of the application was apparently given not only to the owners of land which would be included within the proposed unit, but also to other operators within the field, including the appellant, Superior Oil Company, which had an offset well on a tract abutting the proposed unit. Superior, which had contested the application before the Railroad Commission on the ground that over 300 acres of the land within the unit were nonproductive, sought to appeal the order granting the application. The El Paso court of civil appeals, in upholding the district court's dismissal of the appeal, held that Superior was not a "person or party at interest aggrieved" under section 2(g) of the compulsory pooling act and hence had no standing to appeal.

The court advanced two principal reasons in support of its conclusion. The first was predicated upon the primary purpose of the compulsory pooling statute, which was to provide a remedy for the owner of a tract which was so small that the allowable allocated to his tract would make it financially impractical for him to drill on it.<sup>36</sup> The act accomplished this objective by allowing such an owner to compel other owners of small tracts to join with him in forming a single, standard-sized drilling unit. In view of this purpose, the court suggested that the only persons or parties who can be considered aggrieved by an order compelling pooling are those whose interests have been included within the pooled unit. Secondly, the court pointed to the Texas Supreme Court's decision in *Railroad Commission v. Miller*,<sup>37</sup> which construed section 2(g) as inapplicable to an order denying compulsory pooling. Since section 2(g) is an exception to section 8 of article 6049c,<sup>38</sup> the general appeal provision governing Railroad Commission orders, it should be construed narrowly.

Although the court did not engage in an analysis of the precise language of the Act, the terminology as used in it does provide some support for the

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34. TEX. REV. CIV. STAT. ANN. art. 6008c (Supp. 1975-76).

35. 519 S.W.2d 479 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.).

36. See generally Smith, *The Texas Compulsory Pooling Act, Part I*, 43 TEXAS L. REV. 1003 (1965).

37. 434 S.W.2d 670 (Tex. 1968).

38. Section 8 of art. 6049c stipulates that any person seeking to challenge a Railroad Commission order must file his suit in Travis County, whereas section 2(g) of the Mineral Interest Pooling Act provides that any challenge to an order affecting compulsory pooling should be filed in the district court of the county where the land is located. TEX. REV. CIV. STAT. ANN. art. 6049c, § 8 (1962).

court's conclusion. The phrases "owners in the unit" and "interested party" or "party at interest" are used several times in the statute. Although this might initially suggest that a "party at interest" who is entitled to appeal is not identical with an owner of an interest within the unit, the terms are not used in such a way as to make clear that the legislature necessarily assigned different meanings to them. For example, section 2(c) requires thirty days' notice to be given "to all interested parties, including notice by publication if there are unknown owners or owners whose whereabouts are unknown . . . ." If this section evinces an intent to differentiate between interested parties, including operators outside the proposed unit, and owners of land within the proposed unit in the giving of notice once an application to pool has been filed, the reason for doing so is certainly far from clear. Section 2(d) suggests even more strongly that no difference in meaning was assigned to the two phrases. That section provides that if there is a dispute over the apportionment of drilling and completion costs within a unit, the Commission shall determine the allocation of such costs "among working interest owners after due notice to interested persons." In the context of section 2(d), it is difficult to see why a person whose land is not within the unit should receive notice of a hearing concerned solely with the allocation of costs for which he is not liable.

Although arguments can be advanced in support of the court's decision, the result nonetheless seems questionable. The lack of any apparent pattern or rationale in the use of the phrase "parties at interest" is consistent with a conclusion that it includes persons other than owners within the unit when it is used in the appeal provision. Certainly the interpretation of very similar language in the general appeal statute, section 8 of article 6049c, supports a broad definition of the term. A long series of cases under that statute has held it applicable to any person whose property rights will be substantially affected, either immediately or ultimately, by a Railroad Commission order.<sup>39</sup> Thus, persons whose land will suffer major uncompensated drainage as a result of an order have been held entitled to appeal under section 8, even though their tracts do not abut the land subject to the contested order.<sup>40</sup> In view of Superior's allegation that most of the land within the pooled unit is unproductive, it would unquestionably fall within this definition; for an allowable based on unproductive acreage would necessarily result in drainage from adjoining oil and gas land.

The ultimate result of the case may well be to force a party in Superior's position to bring an appeal under section 8 of article 6049c, which it appears to have standing to do under the traditional interpretation of that statute. This would present the unfortunate situation of the same administrative hearing giving rise to an appeal in two separate courts, which might well reach entirely opposite conclusions. Hence, the efficiency of judicial admin-

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39. *Rudco Oil & Gas Co. v. Gulf Oil Corp.*, 169 S.W.2d 791 (Tex. Civ. App.—Austin 1943, writ ref'd w.o.m.); *Murphy v. Turman Oil Co.*, 97 S.W.2d 485 (Tex. Civ. App.—Austin 1936, writ ref'd); *Empire Gas & Fuel Co. v. Railroad Comm'n*, 94 S.W.2d 1240 (Tex. Civ. App.—Austin 1936, writ ref'd).

40. *Wrather v. Humble Oil & Ref. Co.*, 147 Tex. 144, 214 S.W.2d 112 (1948).

istration would seem to point toward an opposite result in the case. The *Miller* case does not necessarily stand in the way of such a result. It does, it is true, state a policy in favor of a narrow interpretation of section 2(g). On the other hand, its holding is based solely upon the *type* of order that can be challenged under that section; the question of what persons or parties have standing to bring the challenge was neither raised nor suggested.

#### V. THE REGULATORY POWERS OF THE RAILROAD COMMISSION

Two important cases involving the regulatory powers of the Railroad Commission were decided during the survey year, both concerning the Commission's power to allocate natural gas supplies within the state under the Cox Act.<sup>41</sup> In *Railroad Commission v. City of Austin*<sup>42</sup> the Texas Supreme Court held that the Commission's regulatory powers were strictly limited by the legislature, that its power to allocate did not extend to gas which was not owned by a natural gas utility, and that the Commission itself, not the courts, must determine how to exercise its regulatory powers.

The dispute in *City of Austin* began when LoVaca Gathering Company was unable to meet its deliveries to the cities of Austin and San Antonio and to the Lower Colorado River Authority (LCRA) because of the shortage of natural gas and because LoVaca had transferred ownership of gas reserves to various industrial customers. Since the gas from those reserves was flowing in LoVaca's pipelines, the cities and LCRA petitioned the Railroad Commission to suspend delivery of the gas and to reallocate the supply of gas which had been assigned away by LoVaca. Instead, the Commission dismissed the docket and concurrently announced a statewide hearing to determine whether the available supply of gas could be allocated on a statewide basis. The Commission believed that, while it had the power to allocate gas that belonged to LoVaca, it had no power to determine title to the gas, to void the assignments, to make retroactive rules affecting the transferred reserves, or to suspend delivery of gas from the reserves. The cities and LCRA then filed suit in the Travis County district court seeking to have their petition reinstated. The district court held that the Commission had the power to go behind the assignments and to allocate the supply of gas flowing in any LoVaca pipeline. This holding was affirmed by the court of civil appeals.<sup>43</sup>

Had the court of appeals' decision been allowed to stand, the Railroad Commission would have been given, by implication, broad powers over non-utility owned gas—powers which are not expressed within the Cox Act, which limits allocation to utility owned gas.<sup>44</sup> However, the Texas Supreme Court rejected this finding of implied regulatory powers. It was true that LoVaca's gas could be allocated by the Commission, but any dispute concerning title to the gas must be determined by a court. Neither the

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41. TEX. REV. CIV. STAT. ANN. arts. 6050-66 (1962).

42. 524 S.W.2d 262 (Tex. 1975).

43. 512 S.W.2d 345 (Tex. Civ. App.—Austin 1974), *discussed in Smith, Oil and Gas, Annual Survey of Texas Law*, 29 SW. L.J. 109, 116-17 (1975).

44. TEX. REV. CIV. STAT. ANN. art. 6053 (1962).

rulemaking power given to the Commission,<sup>45</sup> nor the provisions concerning discriminatory contracts,<sup>46</sup> could be used to justify allocation of non-utility owned gas. Furthermore, the court held that it had no authority to require the Commission to make a rule ordering LoVaca to augment its supply of gas. The Commission's rulemaking power is a "broad and specific grant of power, and it is not the function of the court to direct the Commission specifically as to how it should exercise its jurisdiction."<sup>47</sup>

The supreme court's decision in *City of Austin*, while limiting the Railroad Commission's power to act in the event of title disputes, actually strengthens the independence of the Commission in its regulation of the diminishing natural gas supply held and transported by utilities.<sup>48</sup> That independence was reinforced by the supreme court's second decision involving Railroad Commission powers, *Houston Lighting & Power Co. v. Railroad Commission*.<sup>49</sup>

The Houston Lighting & Power Company (HLP) used natural gas in generating electricity. In its contracts with its supplier, HLP was given priority over industrial customers in the event the supplier was unable to meet its deliveries to all customers. After the execution of this contract, the Railroad Commission initiated a curtailment program and entered an order to HLP's supplier which reversed the delivery priority set out in the contract. HLP thus suffered a large reduction in supply and was forced to burn expensive alternative fuels. HLP argued that the Railroad Commission had no statutory authority to establish priorities for its supplier. The supreme court, relying upon *City of Austin*, held that the Commission was authorized to set priorities according to the end-use to be made of the gas. The argument that the priority program deprived HLP of valuable contract rights was eliminated by the court, which held that the contract should be read to incorporate the regulatory authority of the Commission as provided by the statutes at the time of the execution of the contract.<sup>50</sup> The only question remaining was the validity of the priority program chosen by the Commission with regard to the public interest. The court noted that the program assigned the lowest priority of use to large consumption of gas as boiler fuel in a situation where the use of alternate fuels was feasible, and indicated that this low priority had long been recognized by the Federal Power Commission. After reviewing the Railroad Commission's order requiring curtailment of gas consumption and, thereby, forcing electric companies to shift to the use of alternate fuels, the court found that it was neither unreasonable nor arbitrary and, therefore, was a valid exercise of the Railroad Commission's authority.<sup>51</sup>

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45. *Id.*

46. *Id.* art. 6057.

47. 524 S.W.2d at 281.

48. The supreme court's recognition of the need for the Commission's independence from court interference is shown in its discussion of the Commission's action in dismissing the original docket. One of the important reasons for dismissing was to set a statewide hearing and to prevent the cities and LCRA from gaining beneficial treatment for the south Texas area in a time of statewide shortage. See 524 S.W.2d at 279.

49. 529 S.W.2d 763 (Tex. 1975).

50. *Id.* at 766; see *Haby v. Stanolind Oil & Gas Co.*, 228 F.2d 298 (5th Cir. 1955).

51. 529 S.W.2d at 767-68.