INTRODUCTION

Conservation and regulation of our diminishing natural resources are matters of great public concern. Along with the increased public need to control the development of these resources, the rights of those holding interests must be protected. For example, A, B, and C own adjoining lots, beneath which lies a single oil reservoir. Each adjoining owner has a right to an equitable share of the oil produced from the reservoir. However, this right is restricted by the state’s interest in conserving oil resources. State regulations limit the oil produced from each reservoir by prescribing the location and number of wells. If only A is permitted to drill a well, then B and C should have protection for their right to a share of the oil produced.

The right of adjoining mineral owners to an equitable share of oil production is termed a “correlative” right.1 The Supreme Court of Oklahoma recently defined correlative rights as a convenient method of

“indicating that each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil and gas therefrom by lawful operations conducted on his own land, limited, however, by duties to other owners not to injure the source of supply and by duties not to take an undue proportion of oil and gas.” (Citation omitted).2

This article will explore the manner in which the Nebraska supreme court has interpreted state oil and gas regulations to protect the correlative rights of individuals while maintaining conservation of state resources. Specifically, the Nebraska supreme court has accomplished this by: (1) permitting pooling of mineral interests within a legal subdivision,3 absent the establishment of a spacing unit;4 and (2) permitting pooling to apply retroactively to

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* This article is based on a paper submitted to the Rocky Mountain Mineral Law Foundation. We extend our appreciation to the Foundation for its permission to publish this article. — Ed.
3. See text at note 17 infra.
4. See text at note 18 infra.
the date of initial production — both in apparent contradiction of statutory language permitting such pooling only upon establishment of a spacing unit.

HISTORY

The physical characteristics of oil and gas present problems in defining the rights of adjoining mineral owners. The accumulation of oil and gas in reservoir pockets imparts a physical location to such minerals, but migration may occur without regard to surface lines of ownership. Because of the migratory nature of oil and gas, some courts adopted the rule that oil and gas belonged to the person who "captured" it. This "Rule of Capture" provided that a landowner obtained title to all oil and gas produced from wells drilled upon his land, regardless of whether part of these resources migrated from an adjoining owner's land.

By 1900, two different theories emanating from the rule of capture had developed to define oil and gas rights. The ownership-in-place theory held that oil and gas rights are identical to solid mineral rights. A landowner may own in fee simple all oil and gas which lay beneath his property. However, if migration occurs, title to the oil and gas will be lost under the rule of capture.

Second was the exclusive-right-to-take (nonownership) theory. Here a mineral owner holds an incorporeal interest. He owns no present vested interest in the oil and gas in place. His interest is merely a license to explore and extract these migratory resources. The rule of capture is particularly applicable under this theory.

Regardless of the theory utilized in describing the nature of oil and gas ownership, their migratory quality demanded the application of the rule of capture. Every owner had the right to drill as many wells as he desired at any location upon his land. However, so did his neighbor. But since ownership did not vest in the resources until actually "captured," each owner felt compelled to drill as

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5. See, e.g., Townsend v. State, 147 Ind. 624, 628-29, 47 N.E. 19, 21 (1897). See also 1 H. Williams & C. Meyers, Oil and Gas Law § 203.1, at 36 (1971) [hereinafter cited as Williams & Meyers — Law].
6. Hardwicke, The Rule of Capture and Its Implications as Applied to Oil and Gas, 13 Texas L. Rev. 391, 393 (1935). See also Williams & Meyers — Terms at 396-98.
8. F. Thelease, H. Bloomenthal & J. Geraud, Cases and Materials on Natural Resources 736 (1965) [hereinafter cited as Thelease, Bloomenthal & Geraud]; Williams & Meyers — Terms at 316.
10. Williams & Meyers — Terms at 316.
11. Thelease, Bloomenthal & Geraud at 736; Williams & Meyers — Law § 203.1, at 32; Williams & Meyers — Terms at 286.
many wells as possible to protect against drainage by adjacent property owners.\textsuperscript{12}

It became apparent that the rule of capture was impeding efficient production and conservation.\textsuperscript{13} The uncontrolled drilling of wells resulted in overabundance. Haphazard drilling of wells also contributed to the physical waste of these resources.

Oil and gas contained in underground reservoirs are under great pressure. This pressure provides the means by which these resources are forced to the surface. Once this pressure is dissipated, primary production is no longer possible. Haphazard drilling quickly dissipates reservoir pressure, leaving unsalvaged oil which would have been recoverable if proper drainage techniques had been employed.\textsuperscript{14} So long as the rule of capture remained unrestricted, waste and overproduction were inevitable.

The judiciary gradually devised the “correlative rights” doctrine, thereby modifying the rule of capture. These correlative rights included:

\begin{quote}
(T)he right against waste of extracted substances, against spoilage of the common source of supply, against malicious depletion of the common source of supply, and the right to a fair opportunity to extract oil or gas.\textsuperscript{15}
\end{quote}

Each owner has a legal privilege to take oil and gas by lawful operations conducted on his own land, limited only by the correlative rights of adjoining landowners.

The correlative rights doctrine was ineffective in achieving state goals designed to conserve natural resources. Consequently, statutes were enacted requiring efficient production and conservation of oil and gas.\textsuperscript{16}

\section*{WELL LOCATION AND WELL SPACING}

In Nebraska, two methods have been used to limit the number of wells that may be drilled in a designated area. The first method, commonly termed “well location,” designates well sites. Well sites are established by a statewide pattern of uniformly-sized legal subdivisions.\textsuperscript{17} A legal subdivision comprises a 40-acre tract or equivalent lot. Within each legal subdivision, only one well is permitted.

\begin{footnotesize}
\begin{itemize}
\item[12.] \textsc{Trelease, Bloomental & Geraud at 1074. See, e.g., Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 365, 65 A. 801, 802 (1907).}
\item[13.] \textsc{Trelease, Bloomental & Geraud at 1060-61. See Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 A. 801 (1907).}
\item[14.] \textsc{Trelease, Bloomental & Geraud at 1074.}
\item[15.] \textsc{Id. at 778.}
\item[16.] Hardwicke, \textit{The Rule of Capture and Its Implications as Applied to Oil and Gas}, 13 \textit{Texas L. Rev.} 391, 410 (1935). See \textsc{Trelease, Bloomental & Geraud at 778.}
\item[17.] \textsc{Williams & Meyers — Terms at 245-46.}
\end{itemize}
\end{footnotesize}
which must be located approximately in the center of the subdivision.

The second method, commonly termed "well spacing," combines adjacent mineral interests within a specific reservoir to obtain the most effective capture. This is accomplished by establishing spacing units. Spacing units are created individually, whether a well exists or not, defining the boundaries in respect to particular reservoirs. Within each spacing unit, only one well may be drilled, located approximately in the center of the unit. Spacing units may vary in size and shape.

The differences between legal subdivisions and spacing units should be kept in mind. Legal subdivisions (established by well location regulations) are 40-acre tracts or equivalent lots created to promote statewide drilling regulation. Spacing units (established by well spacing regulations) are tracts which may vary in size and shape, created over a specific reservoir for the dual purpose of regulating drilling and protecting the correlative rights of the adjacent mineral owners.

POOLING AND RETROACTIVE POOLING

Once the land over an oil or gas reservoir is included within a spacing unit, the mineral interest holders can be afforded an equitable share of unit production. This share is that percentage of production equaling the percentage which the owners' land constitutes of the entire unit. This process of equitable apportionment of mineral production is called pooling. For instance, A, B, and C each own five acres of land. All these properties are contained within a 20-acre spacing unit. A has the only well existing within the spacing unit. Pooling of the mineral interests within the spacing unit would allow A, B, and C each 1/4 of the unit production, because each five-acre tract is 1/4 of the 20-acre total.

So long as the spacing unit exists at the time oil or gas is initially produced from the unit well, pooling affords all owners complete protection of their correlative right. A problem arises when the well is drilled prior to the establishment of a spacing unit. To fully protect correlative rights to a share of all the oil drained from below the nondrilling properties, pooling should apply retroactively to the date of initial production. However, if only mineral interests con-

18. Id. at 506-07.
19. Meyers & Williams, Petroleum Conservation in Ohio, 26 Ohio St. L.J. 591, 603 (1965).
20. Williams & Meyers — Terms at 336.
tained within a spacing unit can be pooled, as Nebraska's statute seems to indicate, is it possible to apply the pooling order retroactively to a date before a spacing unit existed?

For example, A, B, and C each own five acres of land. A drills a well which produces oil on June 1. A 20-acre spacing unit is established on July 1 including the land of A, B and C. During this one-month interval A continues to produce oil. Pooling of the interests contained within this spacing unit is now possible. B and C contend that pooling should apply retroactively to the date of initial drilling, as they want to share in all production. Naturally, A does not want to divide the first month's production with B and C, and contends that pooling should apply only to the date the spacing unit was established. This article will show that protection of the correlative rights of B and C requires retroactive pooling to the date of initial production. Also, this article will show that recent Nebraska supreme court cases favor retroactive pooling to the initial production date.

Now suppose A drilled his well within a 40-acre legal subdivision on June 1. The tracts of A, B and C are included within this legal subdivision. Only one well is allowed per 40-acre legal subdivision. A 40-acre spacing unit is established on July 1, including the lands of A, B and C. A pooling of interests contained within this spacing unit is now possible. Should pooling apply retroactively to the date of initial production or to the date the spacing unit was established? As in the previous example, retroactive pooling to the date of initial production is the answer favored by both the Nebraska supreme court and this author.

The creation of a spacing unit, combined with a pooling agreement, is an efficient method of both regulating oil and gas production and protecting correlative rights. But when only a legal subdivision (and not a spacing unit) exists at the time of drilling, retroactive pooling is necessary to fully protect the correlative rights of adjoining mineral owners. If retroactive pooling is not permitted, then the drilling mineral owner will be the only person allowed to enjoy all of the production. The adjoining mineral owners should be entitled to their proportionate share of the production, since they own portions of the reservoir, but are precluded from drilling a second well within the legal subdivision.

22. In this hypothetical nothing has prevented B and C from protecting their own interests to a share in the oil below their land. Until the spacing unit was created each could have drilled and produced oil from his land. However, this would not have been true had a legal subdivision existed at the date of initial production.
23. In this second example, B and C are not able to protect their own interests by drilling additional wells, as the only well permitted already exists within the legal subdivision.
This problem of allowing pooling retroactive to the establishment of a spacing unit is often specifically covered in state oil and gas conservation statutes. In Nebraska it is not. Although the Nebraska Legislature enacted full protection of correlative rights, specific regulations appear to obstruct this protection.

NEBRASKA OIL AND GAS REGULATION

The Nebraska Legislature provided in the Oil and Gas Conservation Act (Act) for the establishment of the Oil and Gas Conservation Commission (Commission) to carry out the policies inherent in the Act. Section 57-901 of the Nebraska statutes delineates these policies:

It is hereby declared to be in the public interest to foster, to encourage and to promote the development, production and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of the oil and gas properties in such a manner that the greatest ultimate recovery of oil and gas be had; and that the correlative rights of all owners be fully protected... (Emphasis added).

Waste is prohibited under section 57-902 and is defined in section 57-903(1). Correlative rights are defined in section 57-903(10). The Commission has been delegated the power to enforce the regulatory provisions of the Act (for purposes of this article, "provisions" shall refer to regulations of the Act) and to promulgate rules where necessary to supplement the policies and provisions of the Act.

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28. Neb. Rev. Stat. § 57-903(10) (Reissue 1968): (10) Correlative rights shall mean the opportunity afforded to the owner of each property in a pool to produce, so far as it is reasonably practicable to do so without waste, his just and equitable share of the oil or gas, or both, in the pool.
CASE NOTES

(for purposes of this article, "rules" shall refer to regulations passed by the Commission). The primary function of the Commission is the regulation of well drilling operations throughout the state pursuant to the Act.

The Act is primarily concerned with: (1) conservation of the state's natural resources, and (2) protection of the individual's correlative rights. Both provisions and rules implement these policies by limiting the number of wells, requiring permits to drill, and regulating pooling agreements. A provision (section 57-908(1)), dealing with well spacing, and a rule (Rule 313), dealing with well location, regulate the number and location of wells that may be drilled in a designated area.

Rule 338 provides for the establishment of a spacing unit upon the request of an interested party or upon the Commission's own motion. Rule 313 provides that the 40-acre legal subdivision or equivalent lots established thereunder shall exist wherever other regulatory units do not already exist.

   (1) When required to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights, the commission shall establish spacing units for a pool, except in those pools which, prior to September 28, 1959, have been developed to such an extent that it would be impracticable or unreasonable to establish spacing units at the existing state of development. Spacing units when established shall be of substantially uniform size and shape for the entire pool, except that when found to be necessary for any of the purposes above mentioned, the commission is authorized to divide any pool into zones and establish spacing units for each zone, which units may differ in size and shape from those established in any other zone.

32. Nebraska Oil and Gas Conservation Commission, Rules and Regulations of the Commission Rule 313 (1971) [hereinafter cited as Commission]:
   (a) No well drilled for oil or gas in or adjacent to presently producing pools shall be drilled at a location within a legal subdivision which varies substantially from the established locations within legal subdivisions of a majority of the wells in the pool or which will result in a spacing unit for such wells substantially different from that attributable to the established wells in the pool.
   (b) All wells drilled ... for which no spacing pattern has been established by existing wells shall be drilled on 40-acre legal subdivisions or equivalent lots and not less than 500 feet from the boundaries of said legal subdivisions.
   
33. Commission Rule 338:
   The Commission may upon its own motion or upon motion of any interested party and after notice and hearing establish spacing units of specified and approximate uniform size and shape for each pool within this state.

34. Commission Rule 313(b). See text of rule at note 32 supra.
Section 57-906 of the Act regulates the issuance of drilling permits by requiring that the operator obtain a permit from the Commission before drilling a well. This assures that only wells which satisfy either Rule 313 (legal subdivisions) or section 57-908(1) (spacing units) will receive Commission approval. This permit system eliminates uncontrolled drilling.

Pooling agreements are regulated by section 57-909(1) of the Act, providing that interested parties may voluntarily pool interests within the spacing unit. When an agreement cannot be achieved, the Commission, upon application by an interested party, may order compulsory pooling and dictate the apportionment of unit production. This section allows mineral owners a means to recover their equitable proportion of unit production, which they might otherwise be unable to achieve.

At first glance it appears that the policies of conservation and protection are fully satisfied by the above-mentioned provisions. However, the language of sections 57-909(1) states that pooling will be authorized only when a "spacing unit" exists.35 Does this mean that mineral interests contained within a legal subdivision, absent the existence of a spacing unit under section 57-908, cannot be pooled? Both spacing units created under section 57-908 and legal subdivisions created by Rule 313 prevent the drilling of wells except by compliance with these regulations. Mineral owners not owning a prescribed well are unable to protect their interests by drilling. They must protect their correlative interests by pooling. As suggested by previous hypotheticals,36 only by equating these two units can correlative rights be fully protected; for without the existence of a spacing unit, pooling would not appear to be permitted.37

It is this author's opinion that these two terms should be equated — that legal subdivisions be construed to constitute spacing units — in order to provide a basis for pooling the mineral interests contained within a legal subdivision. If only a legal subdivision exists when A drills his well on June 1, adjoining mineral owners will not be able to protect their correlative right to their share of the oil produced until

35. Neb. Rev. Stat. § 57-909(1) (Reissue 1968): When two or more separately-owned tracts are embraced within a spacing unit, or when there are separately-owned interests in all or part of the spacing unit, then the owners and royalty owners thereof may pool their interests for the development and operation of the spacing unit. . . . (Emphasis added).
36. See text at notes 22-23 supra.
the establishment of a spacing unit and a pooling agreement on July 1. But with the equation of the two terms, a court may treat the legal subdivision as a spacing unit, and thereby allow pooling retroactive to the date of initial production.

Concern was expressed in Nebraska at the hearing prior to Rule 313’s adoption that the legal subdivisions established under the rule might be confused with spacing units established under section 57-909. Conservation acts of other states expressly proscribe an equation of spacing units with legal subdivisions. In Nebraska there is nothing expressed in the Act or the rules that disallows such an equation, although section 57-909(1) appears to allow retroactive pooling only to the date the spacing unit was established (not to the earlier date the legal subdivision was established). If read literally, whenever a spacing unit is not present, retroactive pooling appears impermissible. If spacing units and legal subdivisions are equated, then full protection of the correlative right to a proportionate share of production — the statutory objective — would appear to be possible. A legal subdivision or spacing unit would exist at the date of initial production, and the section 57-909(1) requirement that a spacing unit exist prior to the issuance of a pooling order would be satisfied. Section 57-909(1) would suggest retroactive pooling could apply to this date, thereby granting the nonoperator his proportionate share of production from the date of initial unit production.

NEBRASKA CASE LAW

A, B and C each own five acres of land. A drills a well, located on a 40-acre tract of land designated by Rule 313 as a legal subdivision.

40. NEB. REV. STAT. § 57-909(1) (Reissue 1968): “Each such pooling order shall... afford to the owner of each tract or interest in the spacing unit... his just and equitable share...” (Emphasis added).
41. Without such an equation of terms, several options still remain for protecting the interests of the nondrilling mineral owner. First, mineral owners might seek a special order pursuant to Rule 313(d) permitting drilling elsewhere within the legal subdivision, Commission Rule 313(d). However, the Commission would probably balk since this would tend to defeat the purpose of Rule 313 to limit the number of wells in a designated area by well location. Second, the mineral owner could also apply to the Commission sometime after initial production for a spacing order and subsequently enter into a voluntary pooling agreement with others holding interests within the legal subdivision, NEB. REV. STAT. § 57-909(1) (Reissue 1968). Third, if a voluntary agreement could not be reached he could seek a compulsory pooling order from the Commission. Id. However, either a voluntary or compulsory agreement will fail to completely protect correlative rights unless the pooling agreement is made retroactive to the initial date of production. A literal reading of section 57-909(1) indicates that such retroactive pooling to the date of initial production will not be permitted, absent the existence of a spacing unit at the date of initial drilling.
B and C also own mineral interests included within this legal subdivision. One week after A drills and starts producing oil, B’s request for a permit to drill on his property within the legal subdivision is denied. B and C then seek a voluntary pooling agreement with A despite the lack of a spacing unit. A is not willing to agree on any terms. B and C then seek a compulsory pooling order. Are the interests contained within the legal subdivision subject to pooling despite the lack of a spacing unit? If they are, could the pooling order apply retroactively to the date of initial production to assure B and C their correlative right to a proportionate share of production taken from beneath their land?

In Farmers Irrigation District v. Schumacher (Schumacher)42 and Ohmart v. Dennis (Ohmart),43 pooling of mineral interests contained within a legal subdivision was allowed, though in neither case had a spacing unit existed prior to the pooling order. In each case, pooling was allowed to apply retroactively to the date of initial production.

FARMERS IRRIGATION DISTRICT v. SCHUMACHER

Schumacher and Farmers Irrigation had both purchased part of a government-owned parcel of land which constituted a 48-acre legal subdivision under Rule 313.44 Schumacher owned approximately forty-four acres of this lot which he leased to Whitefeather. Farmers Irrigation District owned a border strip of this lot, approximately four acres, which it leased to Sun Oil. Whitefeather drilled a producing well in the center of the legal subdivision on October 15, 1964. On or about December 22, 1964, Sun Oil gave notice to Whitefeather of its lease and claimed its correlative right to a proportionate share of the production from the well. Farmers Irrigation District applied to the Commission on January 16, 1967, for a compulsory pooling order as to oil production from the legal subdivision, and asked that the pooling order be made retroactive to October 15, 1964, the date of initial production. The Commission entered a pooling order making allocation effective as to all production and costs subsequent to October 15, 1964. The district court reversed the order of the Commission, stating that any minerals owned by

42. 187 Neb. 825, 194 N.W.2d 788 (1972).
43. 188 Neb. 261, 196 N.W.2d 181 (1972).
44. Rule 313 establishes legal subdivision where other regulatory units have not been previously established. Legal subdivisions constitute either 40-acre units or "equivalent lots" under Rule 313. Here, the government-owned property constituted an equivalent lot comprising 48 acres.
Farmers Irrigation District and its lessee could not be pooled. The decision of the district court was reversed by the Nebraska supreme court. At issue, of course, was whether the interests of the parties were subject to pooling, and whether the pooling order could be made retroactive to the date of initial production.

The supreme court held that the mineral interest was subject to pooling and that the pooling order was issued in conformity with sections 57-908 and 57-909. However, as we have seen, the language of section 57-909 implies that pooling orders must be preceded by the existence of a spacing unit. Since the court omits mentioning that Rule 313 creates legal subdivisions (not spacing units) and goes on to allow pooling as though spacing units existed, an inference may be drawn that the two terms have been equated by the court.

The court also allowed the pooling order to be made retroactive to the date of initial production. The court's basis for this ruling was as follows. First, mineral owners are dependent on pooling orders to allow them a fair share of production. Each mineral owner has a correlative right to a fair share of the gas and oil from beneath his land. Since it is the policy of the Act to fully protect this right, retroactive pooling to the date of initial production should be allowed. The court concluded:

(T)o permit an adjoining owner to obtain, recover, and receive his just and equitable share, the pooling order may be made retroactive to the time production started. . . . Unless the order may be made effective retroactively, it may on occasion verge on the confiscatory.

Second, the court found an equitable basis which required retroactive pooling. Here the drilling party had intentionally delayed the nondrilling party from establishing a spacing unit. The court felt that these circumstances required that the nondrilling party should be allocated a share of production from the initial date of production rather than from the date the spacing unit had been established. The court was careful to state that retroactive pooling of mineral interests to the date of initial production was not always proper. It was inferred that when the delay in seeking a pooling order was the result of speculation or inadvertance, this relief would not be proper.

46. 187 Neb. at 832, 194 N.W.2d at 791-92.
47. Id. at 832-33, 194 N.W.2d at 792.
48. Id. at 832, 194 N.W.2d at 792.
Judge Clinton wrote a strong dissent in which he attempted to distinguish well location (establishing legal subdivisions) from well spacing. He argued that the Commission had acted beyond its statutory authority in authorizing a pooling order prior to the establishment of a spacing unit. He felt that a strict reading of section 57-909(1) required the establishment of a spacing unit prior to pooling mineral interests, and that Rule 313 did not establish a spacing unit for several reasons.

First, Judge Clinton emphasized that legal subdivisions established under Rule 313 are nearly always of a uniform (40-acre) size, while spacing units vary in size and shape, depending upon the geophysical character of the land containing gas or oil pools. For this reason he argued that a spacing order must specify the size and shape of each unit and the location of the well. This argument does not appear to be sound. Although it is true that spacing unit size and shape may vary with the geophysical characteristics of the land, there appears to be no reason why a spacing unit could not constitute a 48-acre-square plot of land (the size of the legal subdivision in Schumacher) if that size and shape facilitates efficient reservoir drainage. Since the facts of Schumacher do not present evidence of inefficient drainage, it may be concluded that a unit of this size does effectively regulate the production of oil.

Second, Judge Clinton stated that equation of legal subdivisions with spacing units would deny due process requirements of notice and hearing. Even though the majority failed to address this issue, Judge Clinton's objections are answered by the fact that in the establishment of legal subdivisions proper filing with the Secretary of State is impelled by statute, and this filing provides constructive notice to the public. The hearing requirement is met by the mechanical application of Rule 313 (i.e., legal subdivisions are created uniformly throughout the state).

Third, Carter Oil Co. v. State was cited involving a rule identical to Rule 313 which was held not to create spacing units. But the Oklahoma ruling was based on section 86.4 of the Oklahoma Oil and Gas Act, which states that spacing units cannot be created under

49. For pertinent text, see note 35 supra.
50. Neb. Rev. Stat. § 84-906 (Reissue 1968), which provides that filing of agency rules with the Secretary of State gives sufficient notice to the public.
51. See Meyers & Williams, Petroleum Conservation in Ohio, 26 Ohio St. L.J. 591, 603 (1965). This article indicates that where unit designation is mechanical as it is under Commission Rule 313 and not variable, there is no need for a hearing.
52. 205 Okla. 541, 240 P.2d 787 (1951).
any provision of the Oklahoma Act or rules promulgated by the 
Oklahoma Gas and Oil Corporation, except as provided in section 
87.1 of the Act.* This provision clearly indicates the intention of the 
Oklahoma Legislature not to equate spacing units created under 
section 87.1 with units created under Rule 202.* Such a provision 
is lacking in the Nebraska Oil and Gas Conservation Act. The Ne-
braska courts must determine whether legal subdivisions created 
der under Rule 313 should be equated with spacing units established 
der section 57-908 of the Act. Since legal subdivisions and spacing 
units produce the identical effect upon the mineral owner’s right 
to drill wells upon his land, this should be a primary consideration 
of the court.

Finally, assuming that Judge Clinton is correct that it is the man- 
date of section 57-909 that spacing units be issued for the purpose of 
pooling interests already contained within legal subdivisions, the 
establishment of such spacing units appears superfluous. So long 
as there exists a basis for allowing retroactive pooling to the initial 
date of unit production, there appears to be no need for spacing 
units when another unit already exists (i.e., a legal subdivision) 
which readily serves the purpose of a spacing unit.

Rejecting the possibility of an equation between legal subdivision 
and spacing unit, Judge Clinton stated that a spacing unit did not 
exist at the time the Commission ordered the pooling of mineral 
interests contained within the legal subdivision. For support of 
his contention that pooling could not apply retroactively (i.e., before 
a spacing unit was established), he cited Wood Oil Co. v. Corporation 
Commission.** However, this Oklahoma ruling was also based on 
Oklahoma section 86.4.* Since no similar provision negates an 
equation of these units in the Nebraska Act or the rules of the Ne-
braska Commission, the holding of the Oklahoma case should not 
govern this issue of retroactive pooling under Nebraska law.

Without an equation of the term “legal subdivision” to the term 
“spacing unit,” pooling could not be made retroactive. Section 
57-909(1) seemingly allows pooling to be made retroactive only when 
a spacing unit exists, and then only to the date the spacing unit is

55. The Oklahoma Corporation Commission, Rules and Regulations of the 
Corporation Rule 202 (Order 19334, 1946), as amended, The Oklahoma Corpora-
tit. 52, § 86.4 (1969).
established. If the court has equated legal subdivision with spacing unit as it appears, then a spacing unit, as required by section 57-909(1), will exist at the time of drilling whenever a well is drilled within a legal subdivision. It follows that a pooling order issued subsequent to the date of initial production should apply retroactively to that date when the interests pooled are contained within a legal subdivision. Otherwise, the nonoperator would be denied his share of production recovered prior to the statutory apportionment under sections 57-908(1) and 57-909(1). The court in Schumacher held that this is true, however, only when required by equitable considerations.

Whatever the basis for allowing such an order and however narrow the ruling, the result clearly satisfied the underlying policies of the Act. First, it is an inherent policy of the Nebraska Oil and Gas Conservation Act that the correlative rights of mineral interest holders be fully protected. Since pooling of mineral interests within the legal subdivision was not sought until after the date of initial production occurred, full protection of the correlative right to an equitable share of unit production would only be possible by retroactive pooling to the initial date of production. Second, it is also the policy of the Act to prevent waste, which exists when any party recovers a disproportionate amount of production as a result of any state regulation of its natural resources. The facts here indicate that had retroactive pooling not been ordered, the drilling party would have obtained full unit production from the initial date of drilling until the date of the pooling order. Much of this would have come from lands of nonoperating mineral owners proscribed by Rule 313 from drilling on their land. Such a disproportionate allocation of production to the well operator would clearly constitute waste as defined by the Act.

**Ohmart v. Dennis**

The Nebraska supreme court again dealt with these issues in Ohmart. Dennis owned a large part of a 40-acre tract of land referred to by the Commission as a "spacing unit designated by the Commission in 1959 for the location of wells." This tract was leased to Banner Oil Company. The United States owned approximately 7½ of this tract which it leased to Ohmart. A producing well was drilled by Banner on its leasehold June 5, 1963. On March 17, 1964, Ohmart

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60. 188 Neb. at 263, 196 N.W.2d at 184.
applied to the Commission to pool these interests. A compulsory pooling order was issued April 10, 1964. However, the United States moved subsequently to dismiss this order, holding that the Secretary of the Interior had failed to determine that such a pooling order would be in the public interest. The order was vacated. Several years later Ohmart reapplied for a pooling order to apply retroactively to the date of initial unit production. The court, finding that there was no preclusion by the earlier ruling vacating the original order, ordered the pooling as requested. It reserved for later hearing the issues concerning allocation of drilling and operating costs.

Once again the court authorized the order of the Commission allowing pooling retroactively to the date of initial unit production. As in Schumacher, neither the source nor the rationale of the Commission's authority to issue this order was included in the opinion. However, certain language of the opinion provided a subtle hint as to the rationale. The 40-acre "spacing unit" referred to by the court was established under Rule 313 and is synonymous with the legal subdivision considered in Schumacher.61 In Ohmart, however, the court referred to the legal subdivision as a "spacing unit" and not as a legal subdivision.62 This interchange of terminology appears to indicate an equation of "legal subdivision" with "spacing unit." Schumacher held that the pooling of mineral interests included within a legal subdivision was in accordance with sections 57-908 and 57-909. The absence of an established spacing unit under section 57-908 apparently was of no concern. Since it appears the two units were equated, and mineral interests included in either may be pooled under section 57-909, there was no need for a spacing unit under section 57-908.

In Ohmart, retroactive pooling to the date of initial unit production was again held to be within the power of the Commission. In this case, however, the circumstances were somewhat different than those in Schumacher, where the court found an equitable basis for the ruling: in Schumacher the operating party had prevented the nonoperating mineral interest holder from pooling interests contained within the legal subdivision. In Ohmart, it was not clear

61. The Nebraska Commission promulgated "well location" Rule 313 in 1959, which established 40-acre legal subdivisions throughout the state where other regulations did not exist. The unit in this case was "designated by the Commission in 1959 for the location of wells." Id. at 263, 196 N.W.2d at 184. It may therefore be concluded that this unit constitutes a 40-acre legal subdivision within the language of Rule 313 of the Commission.

62. 188 Neb. at 263, 196 N.W.2d at 184.
whether the court found an equitable issue to justify the retroactive pooling order. The nonoperating mineral interests holder was not prevented from pooling the interests contained within the legal subdivision by the operating party. Instead, he was prevented from pooling these interests by his lessor, the United States. The court indicated that the reason for the delay on the part of the government in seeking a pooling order was unknown. It appeared, however, that the interests of the lessee, Ohmart, and the government were in conflict with respect to the pooling order. It is quite possible that the court considered these facts as equitable grounds for such relief. The court also appeared to stress the prevention of waste. In Schumacher the equity factor was required. In Ohmart the Court seemed satisfied to base its holding on the underlying policy of preventing waste and remained silent about the additional equity factor. Ohmart appears to broaden the narrow ruling in Schumacher. If prevention of waste as defined within the Nebraska statute is the overriding basis for Ohmart, it appears that retroactive pooling could occur in situations other than those equitable situations defined in Schumacher. For instance, retroactive pooling might even be allowed under the Ohmart rationale when the delay in pooling interests contained within a legal subdivision is caused by inadvertence by the nondrilling party.

It is not contended that Ohmart goes so far as to hold that retroactive pooling will be allowed even when the delay is entirely the fault of the nonoperating party. Yet, this possibility is not negated by the provisions or rules. Some argument exists that this holding would allow the nonoperator to avoid the risk of drilling by waiting until the well proves productive before seeking a pooling order. Section 57-909(2) places the risk of loss entirely upon the drilling operator, regardless of whether a pooling order was established prior or subsequent to the drilling of the well. The risk upon the operating party is not increased by a delay in the pooling of mineral interests contained within the drilling unit. So long as a pro rata share of drilling costs, including compensation for services and interest for financing, are deducted from the nonoperating mineral owner's share of production, the efforts of the well operator are compensated. He will recapture the initial drilling expenses as provided in section 57-909(2) just as though well spacing and pooling had existed prior to initial production.

63. Again Judge Clinton dissented, for the same reasons as expressed in Schumacher. In addition, Judge Newton, who wrote the majority opinion in Schumacher, dissented on other grounds.
64. NEB. REV. STAT. § 57-909(2) (Reissue 1968).
65. Id.
CONCLUSION

Defining the characteristics of well location and well spacing regulation and their respective application to correlative mineral rights is indeed confusing. This confusion stems from the lack of clear definition of these terms in both the provisions of the Act and the rules of the Commission. As we have seen, the Nebraska supreme court has rendered two decisions that satisfy the underlying policies of the Act. In both cases the court is either vague or silent about its rationale. A literal reading of the Act and the rules would dictate a result violative of the underlying policies of the Act to protect the correlative rights of mineral owners. Nowhere in the Act or the rules does there exist the authority to equate legal subdivisions with spacing units. Yet, nowhere is it negated.

It is true that the function of the court does not include rewriting provisions of the Act or rules of the Commission. This is the responsibility of the Nebraska Legislature. However, legislative provisions are often capable of varied construction. A particular construction of a provision may better facilitate the underlying policies of an act rather than another construction. Unless such a construction is expressly negated by another provision of the act, the court may adopt this interpretation as the intended meaning of the legislation. In Schumacher and Ohmart it has done so. A legislative revision or clarification of these regulations in respect to the mineral owner’s correlative rights would ease the court’s future task.

In summary, the above analysis of Schumacher and Ohmart reveals the following trends in respect to providing full protection for a mineral owner’s correlative right to an equitable apportionment of production: first, it appears that the existence of legal subdivisions under Rule 313 at the date of initial production authorizes the Commission to order pooling of interests contained within these units under section 57-909, despite the lack of a spacing unit; second, it appears that retroactive pooling to the date of initial production will be allowed where equity requires or where such an order serves to prevent waste. Although the holding in Schumacher was limited specifically to those situations where an equitable basis exists, it appears that this narrow holding has been broadened by the ruling in Ohmart to extend to situations wherein waste occurs.

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