

DAVID E. PIERCE

35th Annual Rocky Mountain Mineral Law Institute



**Snowmass, Colorado
July 20, 21 & 22, 1989**

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RESOLVING DIVISION ORDER DISPUTES:
A CONCEPTUAL APPROACH

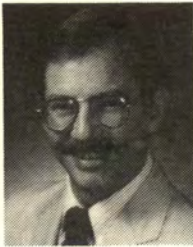
By

David E. Pierce

Washburn University School of Law

Topeka, Kansas

Paper 16



Biographical Sketch

DAVID E. PIERCE

David E. Pierce is an Associate Professor of Law at Washburn University School of Law in Topeka, Kansas. He is a graduate of Kansas State College of Pittsburg (B.A. 1974), Washburn University School of Law (J.D. 1977), and the University of Utah College of Law (Energy Law - LL.M. 1982). Prior to accepting his current position at Washburn, Professor Pierce was an Associate Professor of Law and Associate Director of the National Energy Law and Policy Institute at the University of Tulsa College of Law. He also served Of Counsel to the Tulsa-based law firm of Gable & Gotwals. Prior to entering law teaching, Professor Pierce was an oil and gas attorney for Shell Oil Company in Houston, Texas and a Research Fellow at the University of Utah's Energy Law Center in Salt Lake City, Utah. Prior to that he practiced law in Kansas.

RESOLVING DIVISION ORDER DISPUTES: A CONCEPTUAL APPROACH

David E. Pierce
Associate Professor
Washburn University School of Law

I. Law in search of a theory -- What is a division order?.

General agreement concerning the function served by the division order; very little agreement concerning the legal nature of a division order.

II. Ownership of production under the oil and gas lease.

A. Many lease forms provide for a royalty:

1. On oil, one-eighth of that produced and saved.
2. On gas, the market value of one-eighth of the gas sold or used off the leased land, or if sold on the leased land one-eighth of the amount realized from such sale.

B. Ownership of oil and gas.

1. Lessor has title to 1/8th of the oil.
2. Lessor has no title to the gas after it is produced; only entitled to a payment reflecting 1/8th of the value or proceeds.
3. Must acquire title to avoid conversion claims. See, e.g., Teel v. Public Service Co. of Oklahoma, 767 P.2d 391 (Okla. 1985, released for publication in 1989) (failure to obtain working interest owner's consent to lease operator's sale of gas constituted conversion).

C. Production of oil.

1. Lessee has an implied obligation to market lessor's oil. If lessor fails to take or market royalty oil, lessee has implied authority to sell lessor's oil. Wolfe v. Texas Co., 83 F.2d 425, 430, 432 (10th Cir. 1936).
2. Possible theories to support lessee's authority:
 - a. Lessee is the lessor's marketing "agent."
 - b. Lessee has the implied contractual right to sell and transfer title to lessor's oil.

3. In Hull v. Sun Refining and Marketing Co., No. 71179 (pending before Okla. Sup. Ct.), the parties to the litigation, and the district court, agreed the lessee was the lessor's marketing agent when the lessor failed to take or market its oil.
 - a. No lessee is a party to the Hull litigation. Query whether lessees would be so quick to embrace an agency theory which, by definition, imposes fiduciary obligations.
 - b. The agency theory creates other problems: defining the scope of the lessee/agent's authority and the lessor's ability to revoke the lessee's agency authority -- or giving notice to the purchaser that the lessee is acting beyond such authority.
4. A more workable theory would be implied contract. Under this theory, the lessee, by implication from the express terms of the oil and gas lease, has the right to transfer title by selling royalty oil at the posted price on customary industry terms.

D. Production of gas.

Usually the gas purchaser deals directly with the lessee and obtains a gas purchase contract and division order covering 100% of the gas produced by the lessee.

III. The Perrenial Problems - An Update

- A. Refusal to sign a division order. Consider H.B. 121, 1989 Gen. Sess. (Utah Code Ann. § 40-6-9(8)(d) (Supp. 1989) (refusal to sign division order).

1. Lessee demand for a division order - usually this occurs with a sale of gas. TXO Production Corp. v. Page Farms, Inc., 287 Ark. 304, 698 S.W.2d 791 (1985) (oil and gas lease does not require lessor to sign division order nor does lessor's refusal to sign render title to gas unmarketable).
2. Purchaser demand for a division order - usually this occurs with a sale of oil. Blausey v. Stein, 61 Ohio St.2d 264, 400 N.E.2d 408, 410 (1980) (lessor obligated to sign an "authorization to the purchaser of oil to distribute the purchase price in a specified manner" to "verify" their right to royalty payments); Hull v. Sun Refining and Marketing Co., No. 71179 (pending before Okla. Sup. Ct.) (district court held lessor obligated to sign a division order containing ten elements

PLUG IN
STATUTES

specified by the trial court before it would be "legally entitled" to payment).

B. Protection offered by a division order.

1. Errors in payment.

- a. General rule: division order, until revoked, binds underpaid royalty owners who signed division order. Exxon Corp. v. Middleton, 613 S.W.2d 240 (Tex. 1981).
- b. Exception: if the overpaid interest owner is the purchaser who prepared the division order, to the extent the purchaser will be unjustly enriched by the error at the expense of the underpaid interest owner, the division order will not bind the underpaid party. Gavenda v. Strata Energy, Inc., 705 S.W.2d 690 (Tex. 1986). See also Strata Energy, Inc. v. Gavenda, 753 S.W.2d 789 (Tex. App. 1988) (applying Supreme Court's rule).

2. Purchaser failure to pay.

What if the purchaser fails to pay for the oil it purchases from lessor through lessee?

- a. Lessee not liable. See Cook v. Tompkins, 713 S.W.2d 417 (Tex. App.--Eastland 1986) (lessee's obligation to lessor ended when it sold royalty oil to purchaser). *failure to provide address*
- b. Lessee liable. Williams v. Baker Exploration Co., 767 S.W.2d 193 (Tex.App.--Waco 1989) (division order from lessor to purchaser does not excuse the lessee for nonpayment of royalty).
- c. Consider: Okla. Stat. tit. 52, § 548 to 548.6 (Supp. 1988) (Oil and Gas Owners' Lien Act).

C. Effect of division order on lessor's lease rights.

1. Express lease covenants.

- a. General rule: Division order, while in effect, can alter express lease terms, such as the royalty clause. Sowell v. Natural Gas Pipeline Co., 789 F.2d 1151, 1157 (5th Cir. 1986) (division order expanded, to the lessor's benefit, how the market value of gas would be determined; division order

restricted, to lessor's detriment, the right to receive royalty on condensate after gas is metered).

- b. Limit on general rule: Even though division order is expressly made irrevocable, they are nevertheless revocable. Exxon Corp. v. Middleton, 613 S.W.2d 240, 250 (1981).
- c. Kansas rule: Neither the lessee nor a purchaser can unilaterally impose on lessor division order terms which reduce the lessor's rights under the oil and gas lease. Maddox v. Gulf Oil Corp., 222 Kan. 733, 567 P.2d 1326, 1328 (1977), cert. denied, 434 U.S. 1065 (1978) (waiver of interest); Holmes v. Kewanee Oil Co., 233 Kan. 544, 664 P.2d 1335, 1342 (1983) (change basis for paying royalty from market value to proceeds). Statutes in North Dakota, Oklahoma, and Wyoming also have this effect.

2. Implied lease covenants. Cabot Corp. v. Brown, 754 S.W.2d 104, 107-08 (Tex. 1987) (division order specifying method for calculating royalty negates, while the order is unrevoked, lessee's implied obligation to market and related duties).
3. Ratification and revivor.
- a. By signing a division order, an interest owner can become bound to an existing oil and gas lease through "ratification." Pope v. Pennzoil Producing Co., 288 Ark. 10, 701 S.W.2d 366, 368-69 (1986) (lease); Puckett v. First City Nat. Bank of Midland, 702 S.W.2d 232, 236 (Tex. App. 1985) (ratified pooling agreement).
- b. If lease terminates, signing a division order will not, absent detrimental reliance, revive the lease unless there is express language creating a new grant of a leasehold interest. Bradley v. Avery, 746 S.W.2d 341, 344 (Tex. App.--Austin 1988); but see De Benavides v. Warren, 674 S.W.2d 353, 361 (Tex. App. 4 Dist. 1984) (suggests reference to royalty interest in division order could revive a terminated defeasible term non-participating royalty interest).
4. Division order as a two-edged sword. Lessors can use division orders offensively against their

problems for 3d party purchaser

lessees and purchasers. See, e.g., Sowell v. Natural Gas Pipeline Co., 789 F.2d 1151, 1154-55 (5th Cir. 1986) (expanding basis for calculating market value under oil and gas lease); TXO Production Corp. v. Prickett, 653 S.W.2d 642, 645 (Tex. App. 1983) (confirmed right to share of production from date of first sales and established venue in county where the division order was signed by royalty owner).

See also Smith, "Royalty Issues: Take-Or-Pay Claims and Division Orders," 24 Tulsa L. J. 509 (1989).

take-or-pay

D. Legislative intervention.

- Problems for 3d party purchaser*
- costs that can be deducted*
1. North Dakota. N.D. Cent. Code § 47-16-39.3 (Supp. 1988), provides, in part:

"A division order is an instrument . . . directing the purchaser of oil or gas to pay for the products taken in the proportions set out in the instrument. Royalty payments may not be withheld because an interest owner has not executed a division order. A division order may not alter or amend the terms of the oil and gas lease. . . ."

2. Wyoming. S. 67, 50th Leg., Gen. Sess. (1989) (to be codified as Wyo. Stat. §§ 30-5-304 and 30-5-305 (Supp. 1989)).
3. Oklahoma. S. 107, 42nd Leg., 1st Reg.Sess. (1989).

IV. A division order analysis.

A. Traditional contract analysis.

1. Courts generally begin by stating that a division order is a "contract." E.g., Wagner v. Sunnray Mid-Continent Oil Company, 182 Kan. 81, 318 P.2d 1039, 1047 (1957). However, it is revocable -- even if the express terms of this "contract" make it irrevocable. Exxon Corp. v. Middleton, 613 S.W.2d 240, 250 (Tex. 1981). In some states, the contract cannot change rights the lessor has under the oil and gas lease. E.g. Maddox v. Gulf Oil Corp., 222 Kan. 733, 567 P.2d 1326, 1328 (1977), cert denied, 434 U.S. 1065 (1978).
2. The courts' inconsistent analysis is invited by the way the "contract" is negotiated and structured. Seldom is it negotiated; it is not signed by the purchaser.

3. Courts manipulate the consideration requirement to protect the lessor. *market value vs proceeds*

B. The division order as a sale of goods.

- see 1 Cur*
1. UCC Article 2 seems well-suited to situations where the lessor refuses to sell on the purchaser's terms and the purchaser refuses to buy on the lessor's terms -- yet the oil continues to flow from the lessor to the purchaser.
2. Consider UCC § 2-207(3): "Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any provisions of this Act."
3. § 2-204(1) provides: "A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."

V. New demands on the division order.

- A. The new gas market. Purchasers placing major reliance upon the 100% indemnifying division order and shifting the burden of proceeds distribution to lease operators.
- B. Gas balancing problems. The new gas market offers the prospect of perpetual gas imbalances.
1. This raises the issue of whether lessors will be paid royalty whenever any gas is removed from the lease or only when their lessee markets gas.
2. Lessees may respond by modifying division orders to provide for payment of royalty only when the lessee is marketing gas. This will be ineffective in many states.

VI. Addressing the conceptual problems.

- Dratton 14 lease* →
1. Eliminate the "division order" and negotiate a "production sales contract" that meets traditional contract formation requirements. *for lessee situation*
2. Eliminate the lessor by giving the lessee authority to convey title to oil and gas to a purchaser.

① judicial action
② Dratton leases
amended - take in kind

Order 509

John C. Lacy, Mining Program Chairman
DeConcini McDonald Brammer Yetwin & Lacy, P.C.
Tucson, Arizona

John C. Lacy practices law in Tucson, Arizona, with the firm of DeConcini McDonald Brammer Yetwin & Lacy. His practice is primarily devoted to representation of clients in matters related to the acquisition of mineral exploration and mining rights and other public land law matters. He has recently provided advice to the Republic of Bolivia on the formulation of a new mining code and teaches mining and public land law in both the College of Mines and College of Law at the University of Arizona. Mr. Lacy has written a wide range of professional articles on mineral law that includes five chapters on State Mineral Rights in the second edition of the American Law of Mining, articles for various institutes of the Rocky Mountain Mineral Law Foundation, and a number of historical articles on various aspects of mineral law policy and history. He has also served as the editor of Dips, Angles and Spurs, the newsletter of the Society of Mining Law Antiquarians, since 1981.



John C. Lacy

John S. Lowe, Oil and Gas Program Chairman
Southern Methodist University School of Law
Dallas, Texas

John S. Lowe is Professor of Law at Southern Methodist University in Dallas, Texas, where he teaches Oil and Gas Law, Oil and Gas Contracts, and Property Law. Professor Lowe is author of Oil and Gas Law in a Nutshell (2nd ed. West 1988) and one of the editors of Cases and Materials on Oil and Gas Law (West 1986), a book developed with the support of the Eastern and Rocky Mountain Mineral Law Foundations. Professor Lowe is a Trustee and former member of the Executive Committee of the Rocky Mountain Mineral Law Foundation. This year, he serves as Oil and Gas Section Chairman for the Annual Institute. He has also participated frequently in the programs of the Eastern Mineral Law Foundation, and was one of the speakers at its 10th Annual Institute in Hershey, Pennsylvania, this summer. Professor Lowe is also a member of Council of the ABA Section of Natural Resources, Energy, and Environmental Law, one of the editors of the Oil and Gas Reporter, and a frequent continuing education speaker, expert witness, arbitrator, and legal consultant.



John S. Lowe

Daniel P. Loughry, Landmen's Program Chairman
Texaco U.S.A.
New Orleans, Louisiana

Daniel P. Loughry is Regional Land Manager of Texaco U.S.A.'s newly established Exploration and Producing Region-East. He received a bachelor of arts degree in chemistry in 1968 and a master's in business administration in 1973, both from the University of Colorado. He joined Texaco as an Associate Landman in 1974, and was named District Land Representative in 1978, Advanced Exploration Land Representative in 1980, Senior Land Representative in 1981, and Division Land Manager in 1984.



Daniel P. Loughry

George Vranesh, Water Program Chairman
Attorney at Law
Boulder, Colorado

George Vranesh is the retired senior partner in the Boulder, Colorado, law firm of Vranesh & Raisch. He received his E.M. degree from the Colorado School of Mines in 1951 and his LL.B. degree from the University of Colorado School of Law in 1961. Mr. Vranesh has written numerous articles on water law, mining law, and the environmental aspects of natural resources law. He has served as a Water Referee, as Director of the Colorado Mining Association, and as President of the Boulder County Mining Association.



George Vranesh

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35th ANNUAL ROCKY MOUNTAIN MINERAL LAW INSTITUTE

The Trustees of the Rocky Mountain Mineral Law Foundation, along with Phillip Wm. Lear, Program Chairman, John C. Lacy, John S. Lowe, Alan J. Gilbert, Daniel P. Loughry, and George Vranesh, wish to thank the following individuals who, in total, contributed well over a thousand hours of committee time in their efforts to make the 35th Annual Institute one of the best natural resources legal education programs in 1989:

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PROGRAM

35th ANNUAL ROCKY MOUNTAIN MINERAL LAW INSTITUTE

All sessions will be held at the Snowmass Convention Center.

WEDNESDAY, JULY 19, 1989

9:00 A.M.-9:00 P.M. REGISTRATION
(Lobby—Snowmass Convention Center)

THURSDAY, JULY 20, 1989

7:30 A.M. REGISTRATION OPENS
(Lobby—Snowmass Convention Center)

GENERAL SESSION—
(Anderson/Hoaglund Rooms)

8:45-9:00 A.M. INTRODUCTIONS AND OPENING REMARKS
KENNETH D. HUBBARD, President, Rocky Mountain Mineral Law Foundation; Managing Partner, Holland & Hart, Washington, D.C.
PHILLIP WM. LEAR, Program Chairman; Attorney, Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah

9:00-9:50 A.M. ① NATURAL RESOURCES FEDERALISM
Federalism issues pervade natural resources law. The laws of mining, water, public lands, energy, and environmental preservation are filled with the potential for conflict among local, state, and federal government authorities. This paper examines the legacy of the last two decades of federalism on natural resources issues. Among topics considered are the federal power over public lands, the dormant commerce clause, federal supremacy and preemption, and the Tenth Amendment. While primary focus will be given to United States Supreme Court cases (over 40 cases during the Reagan era examine natural resources federalism questions), the paper also will consider legislative and administrative actions.

DONALD N. ZILLMAN, Professor of Law and Director of Graduate Studies, University of Utah College of Law, Salt Lake City, Utah

9:50-10:20 A.M. Break

10:20-11:10 A.M. ② CROSSING THE BORDER: ISSUES IN THE MULTISTATE PRACTICE OF LAW

After gaining substantial experience with a company's needs and procedures, a natural resources lawyer licensed to practice law in one jurisdiction is frequently asked to perform the same services in another jurisdiction in which he is not entitled to practice. While the lawyer must make a business decision in determining

THURSDAY, JULY 20, 1989 GENERAL SESSION (Continued)

whether it is economically feasible to learn the relevant law of the new jurisdiction, he also faces the threshold question as to whether he is even legally entitled to perform requested services. This paper assumes that a company and its counsel wish to continue working together in a new jurisdiction, focusing on the ethical and legal constraints that may prohibit this from occurring.

DAVID G. EBNER, Attorney, Lohf, Shaiman and Ross, P.C., Denver, Colorado

11:10-Noon

**③ ADMINISTERING STATE MINERAL LANDS:
WHAT IS THE STATE'S TRUST
RESPONSIBILITY?**

State institutional or trust lands were granted to the states by their respective enabling acts. This paper will examine the duties of the state as trustee of state lands, and will attempt to define the fiduciary standard to which states should adhere in administering the mineral resources in state school lands. The paper will focus on problems presented in *Kadish v. Arizona State Land Department* and evaluate whether the state's trust responsibility is different for mineral and non-mineral lands. These enabling acts prescribed restrictions on the use of lands and/or revenues derived from those lands. Leasing policies may violate those restrictions and deprive the state schools and citizens of the benefits to which they were entitled. This paper will review state leasing policies and discuss whether applicable restrictions have been ignored.

DALLIN W. JENSEN, Attorney, Parsons, Behle & Latimer, Salt Lake City, Utah

Noon-2:00 P.M.

Lunch—On Your Own

**THURSDAY, JULY 20, 1989 ENVIRONMENTAL SESSION—
(Anderson/Hoaglund Rooms)**

ALAN J. GILBERT, Chairman; Attorney, Sherman & Howard, Denver, Colorado

2:00-2:50 P.M.

**④ MINERAL TRANSACTIONS,
ENVIRONMENTAL PERMITS AND
THE SHIFTING OF LIABILITY FOR
ENVIRONMENTAL PROBLEMS UPON
TRANSFER OF PROPERTY INTERESTS**

The last few years have seen a major shift in the bases of environmental liability from "occurrence" theories (examination of who undertook a particular activity creating pollution) to current, broader strict liability which attaches through bare ownership, operation, or other control of property. This paper will focus upon the consideration of environmental liabilities in property transactions in both the mining and oil and gas industries. The paper will address difficulties and make recommendations concerning the private apportionment of liability among appropriate parties and will examine the transfer of permits, realistic valuation of environmental liabilities in a transactional context, cleanup prior to or after transfer (and associated liabilities),

THURSDAY, JULY 20, 1989

ENVIRONMENTAL SESSION (Continued)

disclosure requirements, parent-subsidiary liability, common law liabilities, bonding or insurance, and the use of alternative dispute resolution.

JAMES A. HOLTKAMP, Attorney, Davis, Graham & Stubbs, Salt Lake City, Utah; until recently with Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah

2:50-3:10 P.M.

Break

3:10-4:00 P.M.

5 A PRACTICAL GUIDE TO ECONOMIC VALUATION OF THE ENVIRONMENT

During the last two decades, there have been significant conceptual and empirical advances in scientific methods to value non-market commodities, particularly attributes of the environment. Some of these methods have been identified in recent federal regulations identifying procedures for valuing natural resource damages. This paper will extensively review these advances and examine how useful and accurate they are for valuing the environment. Valuation techniques including the contingent valuation method, revealed preference methods, opportunity cost methods, and physical damage methods are reviewed and criticized. The focus of the paper is whether such techniques can be implemented to yield reliable, accurate, and replicative values for various characteristics of the natural environment.

RALPH C. d'ARGE, John S. Bugas Distinguished Professor of Economics, University of Wyoming, Laramie, Wyoming

4:00-4:50 P.M.

6 MULTI-PARTY ISSUES AT CERCLA MINING AND ENERGY SITES

Mining and energy sites typically present an array of unusual substantive and procedural problems both for governmental entities seeking to force a CERCLA cleanup and for the defendants or potentially responsible parties (PRPs) to whom those entities are looking for cleanup financing and implementation. This paper will examine these issues in terms of both litigation strategy and settlement options. The focus will be on the practical realities and constraints these multi-party sites present for both plaintiffs and defendants relative to site and case management, including multi-party practice. Specific issues to be addressed include, among others, liability apportionment, PRP group organization, negotiating with the government on multi-party sites, and private party cost recovery and contribution actions.

ELIZABETH H. TEMKIN and **KRISTIN TITA**, Attorneys, Davis, Graham & Stubbs, Denver, Colorado

4:50 P.M.

Adjournment

6:00-8:00 P.M.

RECEPTION AND COCKTAIL PARTY

Hosted by the Foundation for Speakers, Registrants, and Guests—Roof Garden; concurrent with Pre-Teen Party—Kearns Room (ages 4-12)

FRIDAY, JULY 21, 1989

MINING SECTION—
(Hoaglund/Erickson Rooms)

JOHN C. LACY, Chairman; Attorney, DeConcini McDonald Brammer Yetwin & Lacy, P.C., Tucson, Arizona

9:00-
9:50 A.M.

**7 CONFIDENTIALITY AGREEMENTS
IN THE MINING INDUSTRY**

This paper will discuss the scope of confidentiality agreements, their enforceability, exceptions to the confidentiality requirement, limitations on acquisition of other properties, what information must be disclosed, and what must be returned or delivered to the property owner upon conclusion of a property examination.

FRED E. FERGUSON, JR., Attorney, Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona

9:50
10:10 A.M.

Break

10:10-
11:00 A.M.

**8 LEGAL CONSIDERATIONS IN MINE
CONSTRUCTION CONTRACTS—
GREAT EXPECTATIONS AND
PITFALLS**

This paper will cover certain types of contracts and pricing methods together with a discussion of key contract provisions including scope of work, differing site conditions, changes, bonds, payments, liens, delays, correction of work, insurance, limitation of liability, consequential damages, warranties, and dispute resolution. Certain problems will be reviewed regarding use of "standard form" contract provisions including General Conditions in the 1987 edition of the A.I.A. Document A-201.

PHILIP E. RIEDESEL, Attorney, Gorsuch, Kirgis, Campbell, Walker and Grover, Denver, Colorado

OIL AND GAS SECTION—
(Anderson Room)

JOHN S. LOWE, Chairman; Professor of Law, Southern Methodist University School of Law, Dallas, Texas

**13 GAS BALANCING RIGHTS AND
REMEDIES IN THE ABSENCE OF A
BALANCING AGREEMENT**

The production of natural gas and the causes of the imbalance in its marketing are modern developments. People of good will seeking a fair solution to the problems incident to an imbalance are justifiably in doubt as to their fundamental rights and remedies in balancing. Those fundamental rights are, however, of ancient origin. They were recognized and rudimentary balancing remedies were provided by statute in England as early as the thirteenth century. This paper will examine the old concepts, trace their development to modern times, and apply such concepts and other remedies to the balancing of natural gas in absence of an agreement.

EUGENE KUNTZ, Dean Emeritus, University of Oklahoma Law Center, Norman, Oklahoma

Break

**14 THE CHANGING FRAMEWORK OF
NATURAL GAS BUSINESS AND LAW**

An overview and analysis of natural gas law and markets will be the focus of this paper. Such topics as decontrol and price issues, preemption, the Federal Energy Regulatory Commission's (FERC) continuing open access initiatives, the legal pitfalls and the business opportunities presented by open access, gas inventory charges, marketing affiliates, the impact of the new certificate and abandonment process at the FERC, including the use of optional expedited certificates and the "open season" concept for new pipelines in California, the Northeast and offshore Mobile Bay, capacity brokering, Order No. 500, LDC bypass, rate reforms, and other major policy issues will be discussed.

SHEILA S. HOLLIS, Attorney, Vinson & Elkins, Washington, D.C.

MINING SECTION (Continued)

11:00-
11:50 A.M.

**9 MINE AND MINERAL PROCESS
WASTE FROM AGRICOLA TO
CERCLA AND BEYOND**

This paper traces the legal constraints on handling mine and mineral process wastes. Legal approaches to treatment of mine waste will be placed in historical perspective beginning with English common law, tracing early American legislation in which mine waste was indirectly addressed, and ending with contemporary statutory schemes intended to comprehensively regulate solid and hazardous wastes. The paper will consider future directions in legal approaches to mine and mineral process waste, addressing the U.S. Bureau of Mines' proposal for a new RCRA subpart for mining and beneficiation wastes, the California Mining Waste Study, EPA's "Strawman" proposal, and recent judicial and administrative decisions.

JOHN R. JACUS and **THOMAS E. ROOT**, Attorneys, Bradley, Campbell & Carney, Golden, Colorado

11:50 A.M.-
2:00 P.M.

Lunch—On Your Own

2:00-
2:50 P.M.

10 PRECIOUS METALS ROYALTIES

This paper will examine the effects of modern mineral financing and sales schemes (including forward sales and commodity trading) and changing technology on traditional mineral royalty provisions. The recent *Candelaria* cases will be discussed along with the problems associated with royalty calculation where the lessee engages in price hedging or speculative activities.

PAUL J. SCHLAUCH, Attorney, Sherman & Howard, Denver, Colorado, and **RALPH W. GODELL**, Senior Attorney, Cyprus Minerals Company, Englewood, Colorado

2:50-
3:10 P.M.

Break

OIL AND GAS SECTION (Continued)

**15 PRODUCTION VALUATION ISSUES
FOR ROYALTY PURPOSES ON
FEDERAL, INDIAN AND STATE
LEASES**

This paper will consider a variety of issues relating to how production is to be valued for royalty purposes. An update will be provided on the new federal royalty valuation regulations with an emphasis on recent revisions and proposals to make further modifications. The paper will also address major royalty issues associated with take-or-pay settlements, the deductibility of gathering, processing, and transportation costs, and the valuation of gas liquids and other gas by-products. Coverage will also include royalty accounting issues related to audits and refunds.

SALVATORE J. CASAMASSIMA, Counsel, Exxon Company, U.S.A., Houston, Texas

Lunch—On Your Own

**16 RESOLVING DIVISION ORDER
DISPUTES: A CONCEPTUAL
APPROACH**

Division order disputes continue to mount with little consensus regarding a conceptual basis for resolving such disputes. State legislatures are starting to react to division order disputes while courts attempt to define a coherent division order jurisprudence. This presentation examines traditional division order problems while predicting how the division order will function in an age of open access, gas marketers, and spot sales. Alternative theories are discussed that might be employed to predict the enforceability of division orders. Alternatives to the division order are suggested as well as lease language and contracting procedures to more effectively deal with the marketing and sale of oil and gas.

DAVID E. PIERCE, Associate Professor of Law, Washburn University School of Law, Topeka, Kansas

Break

MINING SECTION (Continued)

**3:10-
4:00 P.M.**

**⑪ THE CALIFORNIA MINING
EXPERIENCE: DEMYSTIFYING THE
PROCESS**

Mining operators often perceive that California is a tougher, more highly-regulated state in which to operate than other western states. The paper will address some of the typical legal problems that are encountered in siting and operating mining projects in California, dispel myths where appropriate, and provide practical suggestions and solutions to what might otherwise appear to be insurmountable obstacles. A brief history of mining in California will be presented along with a discussion of such topics as the no-mining initiatives, the nature of water rights as they affect mining in California, and the ability to verify title to California mining properties. The paper will also provide a guide to the state environmental laws and regulations that affect mining, such as air and water quality, hazardous wastes, and Proposition 65 statutes.

MARGARET G. LEAVITT and REED SATO,
Attorneys, Downey, Brand, Seymour & Rohwer,
Sacramento, California

**4:00-
4:50 P.M.**

**⑫ EXTRALATERAL MINING
RIGHTS AND SUB-SURFACE
CONFLICTS: A LAST HURRAH?**

Discounted for decades as an anachronism from another age, the extralateral right has nonetheless survived into our time and is a well-known though little-used feature of the General Mining Law. Remembered now more for its intricacies and for famous apex disputes which arose under it than for its purpose, it fell into disuse when mining companies turned to bulk-mining methods. As the number of individual mines declined, and the number of mining claims located and acquired in groups increased, the law of the apex seemed for the most part irrelevant. In the modern geological setting, however, in which the search for precious metals must sooner or later pursue epithermal deposits and other vein systems to depth, the extralateral right, which is the fundamental distinction of the lode mining law, may well resume something of its original importance. Furthermore, even if the General Mining Law should be repealed, the extralateral right is an appurtenance to tens of thousands of patented lode mining claims lurking in old mining districts of renewed interest, and the law of the apex just might become the last survivor of the mining law itself. Or would it?

DON H. SHERWOOD, Attorney, Sherman &
Howard, Denver, Colorado

4:50 P.M.

Adjournment—Mining Section

**6:00-
11:00 P.M.**

BARBECUE AT RODEO GROUNDS—See Order Form for Tickets

OIL AND GAS SECTION (Continued)

**⑬ LIMITED ASSIGNMENTS—WHO
GETS WHAT?**

Limitations to particular depths, formations, or boreholes have become an increasingly common attribute of oil and gas farmouts and sales, and even leases. This paper will consider who gets what in such assignments and transactions. The rights of the parties will be discussed in various problem-filled contexts, including liens, subsequent leases, secondary recovery, and water well conversion, along with the application of Pugh, continuous development, and other lease clauses. The paper also will explore the effect of conservation laws on these types of assignments and identify specific drafting pitfalls.

LAWRENCE P. TERRELL, Attorney, Ireland,
Stapleton, Pryor & Pascoe, P.C., Denver, Colo-
rado

**⑭ CONSERVATION ACTS AND
CORRELATIVE RIGHTS—HAS THE
PENDULUM SWUNG TOO FAR?**

Oil and gas conservation acts historically were intended to prevent waste and protect correlative rights. This paper will explore whether waste prevention has begun to take a back seat in importance to concern for ownership interests, and whether "maximum share" economic concerns have replaced the traditional "fair share" goal in the protection of correlative rights.

KEMP WILSON, Attorney, Crowley, Haughey,
Hanson, Toole & Dietrich, Billings, Montana

Adjournment—Oil and Gas Section

SATURDAY, JULY 22, 1989

LANDMEN'S SECTION—
(Anderson Room)

DANIEL P. LOUGHRY, Chairman; Regional Land Manager, Exploration and Producing Region—East, Texaco USA, New Orleans, Louisiana

8:30-
9:00 A.M.

**LEGISLATIVE, JUDICIAL, AND
REGULATORY UPDATE**

This presentation will be dedicated to a brief update of significant legislative, judicial, and regulatory developments affecting mineral law issues during the past year.

MARTHA BROWN WYRSCH, Attorney, Davis, Graham & Stubbs, Denver, Colorado

9:00-
9:50 A.M.

**19 EMPLOYEE V. INDEPENDENT
CONTRACTOR: THE DISTINCTIONS
AND RAMIFICATIONS TO THE
NATURAL RESOURCES INDUSTRY**

This paper will review the distinctions between employees and independent contractors generally, with specific emphasis on the distinctions as they relate to the natural resources industry. Although this paper primarily will concentrate on the consequences of such distinctions to landmen, it also will discuss the consequences in connection with other natural resources industry workers, such as pumpers, well service operators, geologists, title searchers, accountants, and secretarial and clerical staff. The consequences of being classified as either an employee or an independent contractor will be reviewed in connection with such matters as employment taxes, liability, duties owed to the employer, employee benefits, and labor and employment laws. This paper also will provide a practical approach to establishing an independent contractor relationship, along with various drafting guidelines and sample contractual provisions for service contracts.

WILLIAM G. LAUGHLIN, Vice President, General Counsel and Secretary, Ladd Petroleum Corporation, Denver, Colorado, and **LYNN P. HENDRIX**, Attorney, Holme Roberts & Owen, Denver, Colorado

9:50-
10:10 A.M.

Break

WATER SECTION—
(Hoaglund Room)

GEORGE VRANESH, Chairman; Attorney, Boulder, Colorado

**RECENT JUDICIAL AND
LEGISLATIVE WATER RIGHTS
DEVELOPMENTS**

This presentation will focus on very recent water rights cases and legislation, including "beneficial use" interpretations, in-stream flows, and *in situ* appropriations.

MAX MAIN, Attorney, Bennett & Main, Belle Fourche, South Dakota

**22 REWEAVE THE GORDIAN KNOT:
WATER FUTURES, WATER
MARKETING AND WESTERN
WATER MYTHOLOGY**

Using the Colorado River Basin as a model, this paper will explore the myth and reality of western water law. The vehicle of this inquiry will be the "law of the Colorado River"; that Gordian knot of case decisions, statutes, treaties, and gentlemen's agreements which govern the use of water in the river. The current reality of water marketing and possible future commercial instruments of water marketing, such as water futures, will be described. The result of this process will be to reweave the Gordian knot to protect established interests and accommodate new forces in water use. By this reweaving, the evils of the past, chronicled in the movie *Chinatown*, will not be replaced with the evils of the present, glorified in the movie *Wall Street*.

JOHN D. MUSICK, JR., Attorney, Musick and Cope, Boulder, Colorado

Break

LANDMEN'S SECTION (Continued)

10:10-
11:00 A.M.

(20) RAILROAD GRANT LANDS AND RIGHTS-OF-WAY: TITLE TO THE MINERALS

This paper will address the statutory grants in aid of construction made to various railroads, the land available and unavailable to fulfill the grants, and the patents issued to the railroads. It will discuss the reservations of minerals by the railroads in their sales of these lands and will analyze judicial decisions construing these grants, patents, and reservations. It will examine such issues as whether title to the minerals under these lands passed from the United States to the railroads and what minerals were subsequently reserved by them. The types of rights-of-way acquired by the railroads and the title to minerals under existing and abandoned rights-of-way also will be reviewed.

DAVID S. DALE, Senior Attorney, Meridian Oil Inc., Englewood, Colorado

11:00-
11:50 A.M.

(21) AREA OF INTEREST PROVISIONS—TWO EDGED SWORDS

This paper will review current "Area of Interest" provisions and will address such issues as the intent and purpose of area of interest clauses; when they should be used; selected provisions presently in use both in the mining and oil and gas industries; the legal ramifications and common pitfalls of their use, including the rights of the parties and their remedies; antitrust implications; recommendations for avoiding problems both from a legal and business perspective; and conflict resolution—"How do you get out of the clutches of an unwanted area of interest provision?"

MARK T. NESBITT, Attorney, Littleton, Colorado

11:50 A.M.

Adjournment—Landmen's Section and 35th Annual Institute

WATER SECTION (Continued)

(23) LOSS OF WATER RIGHTS: OLD WAYS AND NEW

Water rights may be terminated or reduced in their nature and scope by various means. This presentation will update various historic means for losing water rights, such as abandonment, forfeiture, and prescription. In addition, attention will be given to such new legislative and court-made bases for loss such as common law modification, statutory "registration" acts, and the public trust doctrine.

CHARLES B. ROE, JR., Assistant Attorney General, Olympia, Washington

(24) WHAT IN THE WORLD IS KESTERSON: AGRICULTURAL RETURN FLOWS DEGRADING WATER QUALITY

This paper will discuss the problems of pollution from selenium and other heavy metals in the San Joaquin Valley of California, and in particular at Kesterson Reservoir. Proposed solutions will be discussed, focusing on the legal issues raised by their implementation. Finally, anticipated water pollution legal issues arising from return flow from irrigation projects will be examined.

CHARLES T. DUMARS, Professor of Law, University of New Mexico School of Law, Albuquerque, New Mexico

Adjournment—Water Section and 35th Annual Institute

Title: RESOLVING DIVISION ORDER DISPUTES

Date: July 21, 1989

Location: Snowmass, Colorado

**Program: 35th Annual Rocky Mountain Mineral Law
Institute**

Sponsor: Rocky Mountain Mineral Law Foundation

Duration: One Hour