PROSPECTING FOR OIL AT THE COURTHOUSE[1]: RECOVERY FOR DRAINAGE CAUSED BY SECONDARY RECOVERY OPERATIONS

I. INTRODUCTION

For the latter part of the nineteenth century and the majority of the twentieth century, the United States watched expectantly the birth and surge of the oil and gas industry.[2] By the 1980s, the reservoirs that once produced these resources in enormous quantities were seemingly depleted.[3] The industry, as well as its accompanying body of law, seemed at a standstill.[4] However, with the emergence of technological advances, such as secondary recovery operations, the industry has proved itself far from exhausted.[5] Likewise, this resurgence demands that oil and gas jurisprudence keeps pace with the industry's changes. The danger to the oil and gas industry at this point lies not in an inability to produce the minerals, but in the judicial system's allowance of recovery on the part of adjacent landowners for drainage caused by secondary recovery operations.

While there are numerous implications for courts facing the various issues brought on by these new technologies, this Article assesses only those implications brought on by the advent of secondary recovery operations—more specifically, the issue of an operator's liability for reducing the amount of oil or gas ultimately recoverable by another mineral owner from a common source of supply. While this assessment considers the rights and liabilities of a producer utilizing secondary recovery methods to

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1. Brief of Sonat Exploration Co., Taurus Exploration, Inc., Smackco Ltd., and Longleaf Energy Group Inc. as Amici Curiae at 9, Phillips Petroleum Co. v. Stryker, No. 1951920, 1998 WL 258185 (Ala. May 22, 1998) ("[P]rospecting for oil at the courthouse can be far more profitable than drilling for oil on the land.").

2. *See* Laura H. Burney, *A Pragmatic Approach to Decision Making in the Next Era of Oil and Gas Jurisprudence*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 1, 4-5 (1996).

3. *Id.* at 6.

4. *See id.* at 7.

5. *See id.* at 7-8.

persons having interests in adjacent land, no effort is made to cover the liabilities of a mineral lessee to a lessor under a lease. Also outside the scope of this Article are the consequences and damages arising from the migration of material injected into disposal or storage wells.

This assessment argues the necessity of jurisprudence that considers the nature of the subject matter, the future of the oil and gas industry, and the need for certainty and efficiency in the industry. Its focus should be the desirability of disallowance of recovery by adjacent landowners for drainage caused by secondary operations where measures exist to protect the rights of those adjacent landowners.[6] The issue, as applied in the State of Alabama, is examined in the conclusion.

II. BACKGROUND

A. The Rule of Capture

Historically, the determinative tenet of ownership of oil and gas has been the rule of capture. During the early stages of oil and gas jurisprudence, courts, unaided by the background of research and study available today, were uncertain of the physical nature of the minerals, and therefore made analogies to matters of which they were certain.[7] The rule of capture thus developed out of courts' determinations of the rights to oil and gas by analogy to the common law rule describing the ownership of wild animals, or *ferae naturae*, because of the fugitive nature of both the minerals and wild animals.[8] Thus, the landowner

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6. While the term "landowner" is employed for simplicity's sake, it should be recognized that often the complaining party is a holder of an interest in the mineral estate rather than, or in addition to, being the surface owner. Here, the term "landowner" is used loosely.

7. RAYMOND M. MYERS, LAW OF POOLING AND UNITIZATION § 1.03 (1957).

8. *See* 1 WILLIAMS & MEYERS, OIL AND GAS LAW § 203 (Patrick Martin & Bruce Kramer eds. 1997); *see also* Westmoreland & Cambria Natural Gas Co. v. DeWitt, 18 A. 724 (Pa. 1889). The court noted that:

> [Oil and gas] may be classed . . . as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. . . . They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under

was said to own the oil and gas existing in a common source of supply only when the minerals had been captured, or reduced to possession.[9] The rule of capture is most succinctly stated as follows: "The owner of a tract of land acquires title to the oil or gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands."[10] The adjacent landowner's remedy is to "go and do likewise."[11]

B. Limitations on the Rule of Capture

Even in those early years, courts recognized that "[the rule of capture] may not be the best rule; but neither the Legislature nor our highest court has given us any better."[12] Certainly, the rule of capture in its "pure" form is not the best rule, and it has come to be, of necessity, qualified.[13] The rule in its "pure" form encourages a race among landowners to drain as much oil as quickly as possible, resulting in physical waste of the resource, a risk of damage to the environment, and economic waste on the part of landowners.[14] Obviously, for public policy reasons, such a result is unacceptable. The rule has thus been qualified by both state conservation statutes and the doctrine of correlative rights.[15]

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another's control, the title of the former owner is gone.
Id. at 725.

9. 1 WILLIAMS & MEYERS, *supra* note 8, § 203.

10. Robert E. Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391, 393 (1935).

11. Barnard v. Monongahela Natural Gas Co., 65 A. 801, 802 (Pa. 1907); *see also* BRUCE KRAMER & PATRICK MARTIN, THE LAW OF POOLING AND UNITIZATION § 2.01 (3d ed. 1989) (stating that the interest holder's protection "is the right to drill offset wells that would intercept the hydrocarbons otherwise being drawn to the neighboring wells").

12. *Barnard*, 65 A. at 802.

13. *See* Vitauts M. Gulbis, Annotation, *Rights and Obligations, with Respect to Adjoining Landowners, Arising out of Secondary Recovery of Gas, Oil, and Other Fluid Minerals*, 19 A.L.R. 4TH 1182 (1983).

14. Alabama v. United States Dep't of the Interior, 84 F.3d 410, 413 (11th Cir. 1996).

15. *See* Gulbis, *supra* note 13.

1. Conservation Statutes.—The production of oil and gas, because of the irreplaceable nature of the minerals and their importance to society, is regarded by the states as being imperative to the public interest.[16] Each producing state has passed laws to promote and oversee the conservation of the minerals and to prevent the waste thereof.[17] State regulatory boards oversee the enforcement of such statutes, performing the task by regulating factors such as the issuance of drilling permits, well spacing, and production rates.[18] The purpose of these boards is to protect correlative rights and to prevent waste.[19] These regulatory boards both approve and encourage the use of secondary operations to increase the efficiency with which oil and gas is produced and to increase the amount ultimately recoverable.[20]

2. Correlative Rights.—Courts have clarified that "[t]he common law rule of capture is not a license to plunder. Rather, it has an important corollary in the doctrine of 'correlative rights.'"[21] The doctrine of correlative rights modifies the rule of capture as it allows owners to produce oil and gas from a common source of supply, but it carries with it the duty not to injure the source and not to commit waste from the source.[22] An operator has the right to produce what he can from the common source of supply, but he must exercise this right with regard to the rights of the adjoining landowner to do the same.[23] Thus, an operator has a duty to protect against spoilage of the common source of supply and a right to a "fair share" of the oil or gas.[24]

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16. *See* MYERS, *supra* note 7, § 1.01.

17. *Id.* According to Myers, the authority of the states to issue such legislation is derived from their police power as such power has been affirmed by the United States Supreme Court in cases such as *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 210 (1900). Waste is defined in conservation statutes not only as the escape of oil or gas occurring in its production, but also as operating a well with an inefficient gas-to-oil ratio and the operation of wells in excess of their maximum efficient rate. MYERS, *supra* note 7, § 1.01(5).

18. *See id.* § 2.06.

19. *See id.*

20. *See id.*

21. Young v. Ethyl Corp., 521 F.2d 771, 774 (8th Cir. 1975).

22. 1 W.L. SUMMERS, THE LAW OF OIL AND GAS § 63 (2d ed. 1954).

23. 1 EUGENE KUNTZ, OIL AND GAS: A REVISION OF THORNTON §§ 4.1., 4.2, 4.3, 4.7 (1987).

24. *Id.* §§ 4.1, 4.3.

It is important to note that the right to a fair share "does not assure a proportionate share of the minerals; it simply means that he has a right to a fair opportunity to extract oil and gas."[25]

C. Secondary Recovery Operations and the Negative Rule of Capture

Secondary recovery methods are employed to increase recovery and prevent waste.[26] After a point, primary operations cease to be effective because of the loss of pressure in the reservoir.[27] Secondary recovery techniques are utilized to repressurize the reservoir to increase the amount and rate of recovery of oil and gas.[28] This is accomplished by the injection of gases or liquids into the reservoir after the reservoir's natural energy has been depleted and usually after the primary recovery period has been completed.[29] For instance, the method of water flooding entails the injection of water under pressure through input wells, creating a water drive and pushing residual oil forward so that the oil is eventually extracted through output wells.[30] The same concept is in play with the method of gas cycling, in which the liquids are removed from the gas produced, and the residue is returned to the reservoir, thereby providing

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25. Thomas M. Golden, *Secondary Recovery Operations— Protection of Correlative Rights*, 2 LAND & WATER L. REV. 129, 141 (1967) (citing KUNTZ, *supra* note 23, §§ 4.1, 4.2, 4.7).

26. Railroad Comm'n of Tex. v. Manziel, 361 S.W.2d 560, 568 (Tex. 1962) (noting that secondary recovery operations increase the ultimate recovery of oil and gas, resulting in more recovery than that obtained by primary methods).

27. *See* Golden, *supra* note 25, at 130. Primary recovery is "the recovery of oil, gas, or oil and gas by any method, including natural flow or artificial lift, that may be employed to produce these substances through a single well bore, with the fluid entering the well bore by the action of the natural reservoir energy or gravity." 38 AM. JUR. 2D *Gas & Oil* § 163 (1968).

28. *See* Golden, *supra* note 25, at 130. Primary recovery methods usually recover between fifteen and twenty-five percent of the oil and gas found in a reservoir, while secondary recovery techniques generally increase primary recovery by thirty to sixty percent. Robert G. Rogers & E. Spivey Gault, *Mississippi Compulsory Field-Wide Unitization*, 44 MISS. L.J. 185, 195-96 (1973).

29. Golden, *supra* note 25, at 130.

30. James L. Cunningham, *Oil and Gas: Rights and Liabilities Incident to Water Flood Operations*, 17 OKLA. L. REV. 457, 457 (1964).

pressure and preventing condensation.[31]

In utilizing secondary recovery methods, it is impossible to prevent the movement of injected materials across property lines. Injected fluids or gases may migrate to that area of a reservoir underlying the land of an adjacent landowner and thus displace the substances in that portion of the reservoir.[32] Secondary recovery operations thus have tremendous implications for courts deciding cases under the modified rule of capture because secondary methods may result in the migration of oil and gas, possibly displacing the oil or gas under the land of an adjacent landowner, and thereby reducing the neighbor's amount of recovery.

Courts vary as to whether a landowner whose enhanced recovery methods cause the displacement of valuable substances beneath a neighbor's land is liable for damages. Williams and Meyers have here proposed a rule of non-liability, which they term the "negative rule of capture."[33] They explain the rule as follows:

> Just as under the rule of capture a landowner may capture such oil or gas as will migrate from adjoining premises to a well bottomed on his own land, so also may [he] inject into a formation substances which may migrate through the structure to the land of others, even if this results in the displacement under such land of more valuable with less valuable substances.[34]

III. FUTURE DETERMINATION OF RIGHTS UNDER THE NEGATIVE RULE OF CAPTURE

The question remains as to how and on what basis operators should determine prior to utilizing secondary recovery operations their risk of liability to adjacent landowners for drainage. As Williams and Meyers note, "[t]he law on this subject has not been fully developed."[35] While many courts have already addressed the question, the issue still seems to fluctuate in light of

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31. *See, e.g.*, MYERS, *supra* note 7, § 2.04.
32. 1 WILLIAMS & MEYERS, *supra* note 8, § 204.5.
33. *Id.*
34. *Id.*
35. *Id.*

policy considerations and ownership issues. What operators need now is a clarification. Why the problem? Laura Burney, one commentator on the subject, posits that the "quilt of oil and gas jurisprudence was formed through a patchwork of both pragmatic and formalistic case decisions."[36] By analogizing to the common law doctrine *ferae naturae*, "[e]arly judges myopically adhered to common-law rules rather than venturing to fashion a unique jurisprudence for oil and gas law."[37] An example, writes Burney, is the judicial system's fascination with the misleading wild animal analogy, a comparison which, even the United States Supreme Court has noted, consists of an analogy but lack of identity between the two.[38] "[C]ourts seem to have been more interested in selecting high sounding labels, which they assumed almost automatically settled the law questions, than in working out fundamental principles . . . ."[39]

Even the reasoning behind the adoption of the rule of capture has been admitted by at least one state supreme court to have been adopted *not* for its true depiction of the nature of oil and gas and a landowner's rights to that oil and gas, but for the "impracticality of tracing ownership of a transient substance which migrated from lands of one owner to lands of someone else."[40] Throwing enhanced recovery operations into the equation has certainly not helped matters. The courts' insistence on clinging to early theories has left jurisprudence confused. To add to the confusion, oftentimes involved are the very state regulatory agencies upon whose blessing and upon whose orders the operators are acting. Burney urges a "forward-looking stance . . . [to facilitate] the goal of promoting efficient production . . . ."[41]

The various states and federal circuits which have encountered questions involving recovery by adjacent landowners for "injuries" caused by secondary recovery operations, in their own respective efforts to make some sense out of the confusion, have

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36. Burney, *supra* note 2, at 19.

37. *Id.* at 11.

38. *Id.* at 21 (citing Ohio Oil Co. v. Indiana, 177 U.S. 190, 209 (1900) ("not identity between them")); *see also* SUMMERS, *supra* note 22, § 62 (stating that analogies to wild animals must be false because the physical and economic characteristics of animals and oil and gas are far from similar).

39. Hardwicke, *supra* note 10, at 399.

40. Jameson v. Ethyl Corp., 609 S.W.2d 346, 350 (Ark. 1980).

41. Burney, *supra* note 2, at 23.

come up with, of course, different answers. Some jurisdictions have found that an adjoining landowner is entitled to damages for the loss of minerals where secondary recovery methods cause drainage of minerals from neighboring lands overlying a common pool.[42] Recovery here is granted most often on theories of trespass and nuisance.[43] Still other jurisdictions have held that an adjoining landowner is not entitled to damages for drainage when an operator utilizes secondary recovery methods which have been approved by a state agency.[44] These cases are battlegrounds of property rights versus public policy considerations. It is the position of this Article that through the adequate protection of correlative rights and the goal of certainty and efficiency in oil and gas production, liability for drainage of an adjacent landowner should not be allowed.

IV. PROTECTION OF CORRELATIVE RIGHTS AS OPPOSED TO PROPERTY RIGHTS

Both implicit and explicit in cases allowing recovery for injury to the adjacent landowner is an emphasis on the injured property rights of the landowner. These cases frequently note the principle that "no man's property can be taken, directly or indirectly, without compensation."[45] The issue of eminent domain and takings in this context is outside the scope of this Article, but is mentioned here because it necessarily implies that an interest holder has been deprived of a property right. The question arises, then, as to *whose* property has been taken.

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42. *E.g.*, Greyhound Leasing & Fin. Corp. v. Joiner City Unit, 444 F.2d 439, 443 (10th Cir. 1971); Tidewater Oil Co. v. Jackson 320 F.2d 157, 164-65 (10th Cir. 1963), *overruled in part by* Fransen v. Conoco, Inc. 64 F.3d 1481 (10th Cir. 1995); Boyce v. Dundee Healdton Sand Unit, 560 P.2d 234, 237 (Okla. Ct. App. 1975).

43. *E.g.*, *Greyhound Leasing*, 444 F.2d at 443 (granting recovery on theory of private nuisance in action for damage caused by encroachment of salt water resulting from secondary recovery operations); *Tidewater*, 320 F.2d at 162-63 (granting recovery on theories of trespass and nuisance in action for damage caused by water flooding operations); *Boyce*, 560 P.2d at 236-37 (granting recovery on theory of nuisance for damages sustained from water flooding).

44. *E.g.*, California Co. v. Britt, 154 So. 2d 144, 147-48 (Miss. 1963); Baumgartner v. Gulf Oil Corp., 168 N.W.2d 510, 516 (Neb. 1969); Railroad Comm'n of Tex. v. Manziel, 361 S.W.2d 560, 565 (Tex. 1962).

45. *Tidewater*, 320 F.2d at 163 (citing Hauck v. Tidewater Pipeline Co., 26 A. 644 (Pa. 1893)).

According to the rule of capture, even as modified, minerals are not owned per se until they are produced and possessed, that is, captured. States historically are distinguished as abiding by either an ownership theory or non-ownership theory in an attempt to classify the ownership of minerals beneath the ground.[46] The nonownership theory posits that because the oil and gas in the ground are fugitive, no person owns the minerals until they are produced.[47] An interest holder has the right to drill upon his land to capture the minerals.[48] Under the ownership theory, an interest holder owns the minerals in place in the ground.[49] Nevertheless, "[t]he liability *vel non* of the injector to the adjoining landowner does not appear to turn upon the view held in the state as to the nature of the landowner's interest in oil and gas."[50] Rather, "it appears that the view held in the state has [no] significance in determining whether one landowner is liable to others overlying the common reservoir for conduct resulting in the permanent loss of otherwise recoverable hydrocarbons . . . ."[51]

More important to the courts than the question of *whose* property is lying in the common pool is the protection of the correlative rights of the interest holders involved. Accordingly, "the law of capture as modified by the doctrine of correlative rights is the hub of the wheel around which secondary recovery projects turn."[52] In *Tidewater Oil Co. v. Jackson*,[53] the Tenth Circuit found Tidewater liable for damages to Jackson's oil wells

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46. *See* 1 WILLIAMS & MEYERS, *supra* note 8, § 203.1.

47. *Id.*

48. *Id.*

49. *See id.* § 203.3

50. *Id.* § 204.5; *see, e.g.*, Tidewater Associated Oil Co. v. Stott, 159 F.2d 174, 178 (5th Cir. 1946) (denying recovery for displacement of wet gas caused by a gas recycling program, even though Texas adopts the ownership theory); West Edmond Salt Water Disposal Ass'n v. Lillard, 265 P.2d 730, 732 (Okla. 1954) (permitting recovery by plaintiff on trespass theory even though Oklahoma adheres to the non-ownership theory).

51. Golden, *supra* note 25, at 133 (citation omitted).

52. *Id.* Golden explains that in cases claiming liability on the grounds of trespass, negligence, nuisance, or absolute liability, "true liability attaches because of the injury to the correlative rights of the adjacent, non-unitized landowner." *Id.* at 136.

53. 320 F.2d 157 (10th Cir. 1963), *overruled in part by* Fransen v. Conoco, Inc., 64 F.3d 1481 (10th Cir. 1995).

as a result of its waterflood operations on adjoining property.[54] According to the court:

> "[T]he peg on which the court hangs its hat is not one of the traditional theories of tort liability, *e.g.*, trespass, negligence, or nuisance. . . . [T]he decision seems to rest on a well-known principle, *viz.*, if an operator effectuates such a program and in so doing injures his neighbor, *the protection of correlative rights* demands that the non-unitized landowner be indemnified for his loss."[55]

Therefore, if the ownership of the oil and gas is not at issue, but rather the protection of the correlative rights of the adjacent landowners is at issue, then, provided the correlative rights of that landowner are protected, he or she should be precluded from asserting a claim. The correlative rights of adjacent landowners are protected by state regulatory boards and oftentimes by the ability of the owner to join in the secondary recovery project through unitization.

A. State Regulatory Boards

State regulatory boards oversee the protection of correlative rights.[56] As discussed previously, under the doctrine of correlative rights, a mineral interest holder has the right to his "fair share" (that is, opportunity to produce) of the minerals from the common source of supply, his remedy for the production of his neighbor being to "go and do likewise."[57] Granted, if an operator, in his utilization of secondary recovery methods, prevents his neighbor from doing likewise, he has violated the neighbor's correlative rights and recovery is due. However, provided the appropriate regulatory authority has determined that an adjacent landowner's correlative rights will *not* be harmed by a secondary recovery project and provided the board's orders are carried out by the operator legally and with due care, liability

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54. *Tidewater*, 320 F.2d at 158-65.

55. Golden, *supra* note 25, at 141.

56. *See supra* notes 18-20 and accompanying text; *see, e.g.*, Railroad Comm'n of Texas v. Manziel, 361 S.W.2d 560, 572 (noting that the two primary duties of the Railroad Commission are to prevent waste and to allow each operator to recover his fair share).

57. *See supra* note 11 and accompanying text.

should be precluded.

Because secondary operations are regulated and approved by the state regulatory board, it is often suggested that an operator's compliance with an approved plan should immunize him from liability.[58] That protection is provided by compliance with orders of the regulatory board is often referred to as the "cloak of protection theory."[59] Such a theory is based on the idea that the state's police power "extends to the area of conservation of natural resources and that, therefore, the execution of a state approved plan to accomplish this socially desirable end should not result in liability to the operator."[60]

In *Railroad Commission of Texas v. Manziel*,[61] the Manziels attacked the order of the Railroad Commission which permitted the Whelans to conduct a water flooding project.[62] The Manziels argued that the order should be set aside on the grounds that it would cause waste, that it would result in the confiscation of property, and that it was not necessary to protect the Whelans' correlative rights.[63] The court faced squarely the issue of whether a trespass occurs when waters from a secondary recovery project authorized by the appropriate regulatory commission cross lease lines. The court stated:

> The orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions as arise out of the secondary recovery of natural resources. . . . The technical rules of trespass have no place in the consideration of the validity of the orders of the Commission.[64]

The court noted that in carrying out its duties, the Commission has the power, pursuant to the state's police power, to promulgate orders and regulations to control the production of oil and

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58. The argument is often based on *Corzelius v. Railroad Comm'n*, 182 S.W.2d 412, 417 (Tex. Civ. App. 1944) (upholding an order of the Railroad Commission that authorized a subsurface invasion where necessary to prevent waste). The court explained that "being authorized by law such entry did not constitute a trespass." *Corzelius*, 182 S.W.2d at 417.

59. Golden, *supra* note 25, at 135.

60. Cunningham, *supra* note 30, at 460.

61. 361 S.W.2d 560 (Tex. 1962).

62. *Manziel*, 361 S.W.2d at 561.

63. *Id.* at 561-62.

64. *Id.* at 568-69.

gas in the state, and "that power may invade the right of the owner of the land to the oil in place under his land as long as it is based on some justifying occasion, and is not exercised in an unreasonable or arbitrary manner."[65]

Other courts have handed down similar rulings. In *Texaco, Inc. v. Railroad Commission*,[66] the Texas Supreme Court noted that "the right to be protected against confiscation under the Commission's oil and gas rules is not unconditional or unlimited."[67] The Mississippi Supreme Court in *California Co. v. Britt*[68] held that where an operator acts in accordance with orders of the state regulatory board, the operator is not liable under the rule of capture for drainage.[69] Also, in *Mize v. Exxon Corp.*,[70] the Fifth Circuit held that the plaintiffs' contention that their leases lay inside the productive limits of the unit area was contrary to the regulatory board's finding otherwise, and thus constituted an impermissible collateral attack on the board's order.[71]

Even courts that have allowed recovery for damage caused by water flooding operations under an action for trespass have given deference to the orders of regulatory authorities. The Tenth Circuit has retreated from its strong statement against the conclusive adjudication by regulatory authorities made in *Tidewater Oil Co. v. Jackson*.[72] In *Tidewater*, the court stated:

> It is wholly . . . incompatible with fundamental principles of due process to hold that a tribunal, possessing no power to adjudge tort liability, may nevertheless deprive a tort claimant of his day in court on that issue, by conclusive adjudication of the operative facts upon which his claim must rest.[73]

The Tenth Circuit backed away from this position in *Fransen v.*

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65. *Id.* at 572 (citing Brown v. Humble Oil and Refining Co., 83 S.W.2d 935 (Tex. 1935)).

66. 583 S.W.2d 307 (Tex. 1979).

67. *Texaco*, 583 S.W.2d at 310.

68. 154 So. 2d 144 (Miss. 1963).

69. *Britt*, 154 So. 2d at 145-46, 150.

70. 640 F.2d 637 (5th Cir. 1981).

71. *Mize*, 640 F.2d at 639-40.

72. 320 F.2d 157 (10th Cir. 1963), *overruled in part by* Fransen v. Conoco, Inc., 64 F.3d 1481 (10th Cir. 1995).

73. *Tidewater*, 320 F.2d at 162.

Conoco, Inc.,[74] stating, "[w]e believe this . . . statement goes too far. It is now well settled that facts found administratively can have a preclusive effect in later legal proceedings."[75]

Great effort is made under the conservation statutes to protect the rights of adjacent landowners as affected by orders of the regulatory board. Under the negative rule of capture, an aggrieved landowner's only remedy is to conduct his own secondary operations. Still, conservation statutes supply yet another remedy by permitting the landowner to bring his grievance before the regulatory board. Interested parties, and more specifically adjacent landowners fearing drainage from beneath their lands by secondary recovery projects, may bring their complaints before the appropriate regulatory agency.[76] Notice is given to adjacent landowners prior to hearings before the board regarding plans proposing the adoption of secondary recovery operations.[77] Also at an aggrieved party's disposal are statutory provisions providing for judicial review through a suit for injunction by persons who have exhausted administrative remedies with the regulatory board.[78]

B. Unitization

Oftentimes secondary recovery operations are conducted only within a pooled unit, for the reason that it is to the benefit of the secondary operations as a matter of efficiency to unitize

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74. 64 F.3d 1481, 1493 (10th Cir. 1995) (abrogating *Tidewater* to the extent that *Tidewater* "suggests that ultimate facts found in administrative proceedings can never be binding in a subsequent tort action").

75. *Fransen*, 64 F.3d at 1493.

76. *See, e.g.*, ALA. CODE § 9-17-13 (Supp. 1998) ("All orders requiring . . . secondary recovery operations shall be made after notice and hearing . . . ."); LA. REV. STAT. ANN. § 30:6 (West 1989 & Supp. 1999) ("No rule, regulation, order, or change, renewal, or extension thereof, shall . . . be made . . . except after a public hearing . . . . Any person having an interest in the subject matter of the hearing shall be entitled to be heard.").

77. *See, e.g.*, LA. REV. STAT. ANN. § 30:6 (West 1989 & Supp. 1999) ("Whenever any application shall be made . . . for creation, revision, or modification of any unit . . . , or for adoption of any plan . . . of secondary recovery, . . . at least thirty days' notice shall be given of the hearings to be held thereon . . . .").

78. *Id.* § 30:12 (West 1989); *see also* TEX. NAT. RES. CODE ANN. § 85.241 (West 1993) (providing persons dissatisfied with conservation laws or orders the right to file suit to challenge their validity).

the entire reservoir in question.[79] An operator lying outside the unit may endanger pressure maintenance operations of the unit.[80] Depending on state statutes, units may be formed by the voluntary execution of an agreement of unitization, by order of a regulatory board under a compulsory unitization statute, by execution of a community lease, or by the exercise of a power granted by a pooling clause in a lease.[81] In some instances, unitization is achieved by order of a regulatory board sustained only by authority granted by conservation laws.[82]

Unitization plans are subject to regulation by the appropriate regulatory authority.[83] Because it is established without question that secondary operations are conservation measures, a plan for operation of a pool presented to the board, after notice and hearing, will be approved provided the board finds that the plan prevents waste.[84] It must be established that the plan is in the public interest, that it protects correlative rights, and that it is necessary to prevent the waste of oil and gas.[85]

In many cases denying recovery to complaining mineral interest holders, courts often emphasized the fact that the complainants refused to join in the unitization, and hence the secondary recovery operations. For instance, in *Tide Water Associated Oil Co. v. Stott*,[86] the Fifth Circuit denied recovery for drainage to plaintiffs who had refused to join in a voluntary unitization plan.[87] The court stated that while the plaintiffs had the right to refuse to join in the plan, the plaintiffs may not refuse to join in the plan offered for the mutual protection of all involved and still demand damages.[88] Likewise, in *Baumgartner v. Gulf Oil Corp.*,[89] the operators of a unit en-

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79. MYERS, *supra* note 7, § 5.16.
80. *Id.*
81. *Id.* at 45.
82. *Id.*
83. *Id.* § 6.01.
84. *See* MYERS, *supra* note 7, § 6.01.
85. *Id.; see, e.g.*, TEX. NAT. RES. CODE ANN. § 101.013 (West 1993); UTAH CODE ANN. § 40-6-7(2) (1993).
86. 159 F.2d 174 (5th Cir. 1946).
87. *Tide Water*, 159 F.2d at 178.
88. *Id.* at 179; *see also* California Co. v. Britt, 154 So. 2d 144, 150 (Miss. 1963) (stating that plaintiffs refused to participate in agency-approved repressuring unit).
89. 168 N.W.2d 510 (Neb. 1969).

gaged in secondary recovery did not incur liability for trespass where the unit and its secondary recovery methods were approved by the state regulatory commission and the unitization agreement was signed by all interest holders except the plaintiff, who refused to join.[90] The court stated that an interested party who refuses to join in a unitization project to recover secondary oil "should not be permitted to capitalize on that refusal."[91]

V. FURTHERANCE OF PUBLIC POLICY

In addition to debate over property rights and correlative rights in secondary recovery cases are extensive policy discussions. The clash between property rights and public policy is inevitable in these cases. The line must be drawn in favor of public policy. The Texas Supreme Court stated this best in *Manziel*:

> Certainly, it is relevant to consider and weigh the interests of society and the oil and gas industry as a whole against the interests of the individual operator who is damaged; and if the authorized activities in an adjoining secondary recovery unit are found to be based on some substantial, justifying occasion, then this court should sustain their validity.[92]

Relevant (and interrelated) policy issues are: (i) The public's interest in increasing the ultimate recovery of oil and gas, and (ii) The incentive for investment in the production of oil and gas provided by certainty, predictability, and stability in the industry.

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90. *Baumgartner*, 168 N.W.2d at 515.

91. *Id.* at 516.

92. Railroad Comm'n of Tex. v. Manziel, 361 S.W.2d 560, 568 (Tex. 1962). The Texas Supreme Court has further stated in *Texaco, Inc. v. Railroad Comm'n*, 583 S.W.2d 307, 310 (Tex. 1979), that as between protecting the public interest of preserving natural resources and protecting correlative rights, the dominant purpose is held to be the prevention of waste. In discussing the court's decision in *Manziel*, Richard Hemingway agrees that there should be no liability under such circumstances, but states that "it would be more desirable to classify the intrusion into the adjoining subsurface as a trespass that was not actionable due to overriding public policy." RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 4.2 (3d ed. 1991).

A. Increasing Ultimate Recovery

Secondary recovery programs result in more recovery than that obtained by primary methods.[93] As noted in *Manziel*, secondary recovery operations would not and could not be conducted if adjoining landowners were permitted to halt projects on grounds such as trespass.[94] Had the court granted the injunction sought in *Manziel*, the policy of increased recovery would have been frustrated "by empowering 'holdout' owners who refuse to join voluntary-unitization agreements unless their unreasonable demands are met."[95] An Illinois court further explained the problem:

> If a minority of one or more persons affected by the operation could prevent it by refusing to join in the agreement, they could then force the others to choose between leaving a large part of the oil underground, or consent to granting the dissidents an unreasonably large percentage of the oil. In other words, the power to block a repressure program by refusing to sign the unitization agreement, would be the power to insist upon unjust enrichment.[96]

To block secondary operations is to waste minerals both irreplaceable and vital. The economic benefit of those producing the oil is at stake as well as, and most importantly, the lifeblood of an industry that provides an important source of revenue for many states, an industry that, without the development of secondary recovery methods, would be at a standstill.

B. Incentive for Investment—Certainty, Predictability, and Stability

The exploration for and production of oil and gas are both expensive and risky. Who would commit to such an investment where the regulatory scheme under which the industry operates

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93. *See* discussion *supra* note 28.
94. *Manziel*, 361 S.W.2d at 568.
95. Burney, *supra* note 2, at 28.
96. Reed v. Texas Co., 159 N.E.2d 641, 644 (Ill. App. Ct. 1959).

affords no protection even when complied with and even when failure to comply is illegal? Such a system would be chaotic. Board orders would provide no guidance for operators of secondary recovery units. As a result, uncertain as to their liability in conducting secondary operations, producers would lack the incentive to develop the operations, transaction costs would increase, and the number of costly lawsuits would skyrocket.[97]

Also implicated in the recovery movement is the incentive for adjacent landowners to "go and do likewise." If recovery is allowed in these cases, owners will be encouraged, not to drill, but to sit back and sue their neighbors for drainage.[98] Landowners should not be able to reap the profits of production without incurring any of its attendant risks.[99] To allow them to do so would promote waste by discouraging the development of secondary recovery units.[100] Based on the number of lawsuits brought by these adjoining landowners, word seems to have spread quickly that "prospecting for oil at the courthouse can be far more profitable than drilling for oil on the land."[101]

V. ALABAMA

The issue of recovery by adjacent landowners for drainage caused by secondary recovery operations was recently addressed by the Alabama Supreme Court in *Phillips Petroleum Co. v. Stryker*.[102] The plaintiffs in *Stryker* owned interests in properties lying outside a parcel of land known as the Chatom Unit, on which Phillips conducted secondary recovery operations.[103] The Chatom Unit was created by the Alabama Oil and Gas Board

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97. *See* Burney, *supra* note 2, at 40.

98. *See* discussion *infra* text accompanying note 101.

99. Budd v. Ethyl Corp. 474 S.W.2d 411, 413 (Ark. 1971) (noting that the complainant's standing is weak in that he "seeks to reap the profits of the recycling venture without having volunteered to incur any of its risks").

100. Baumgartner v. Gulf Oil Corp., 168 N.W.2d 510, 518 (Neb. 1969).

101. Brief of Sonat Exploration Co., Taurus Exploration, Inc., Smackco Ltd., and Longleaf Energy Group Inc. as Amici Curiae at 9, Phillips Petroleum Co. v. Stryker, No. 1951920, 1998 WL 258185 (Ala. May 22, 1998).

102. No. 1951920, 1998 WL 258185 (Ala. May 22, 1998).

103. *Stryker*, 1998 WL 258185, at *1. The secondary recovery in this case consisted of Phillips injecting dry gas into the ground to stimulate an increase in underground pressure. *Id.*

upon petition by Phillips.[104] Prior to issuing its order establishing the unit, the Board found that unitization for recycling operations was necessary to prevent waste of the resources.[105] The Board determined the geographic limitations of the unit,[106] and found that the lands on which the plaintiffs based their suit were *not* included in the productive limits of the unit.[107] The plaintiffs alleged that Phillips had improperly drained the oil and gas lying beneath their tracts.[108] They also alleged that Phillips had fraudulently failed to disclose that the plaintiffs' properties were being drained by withholding data from the State Oil and Gas Board that the plaintiffs' tracts were part of the common pool underlying the Unit.[109] The jury returned four verdicts of $4,197,439.07 each on the fraud, nuisance, conversion, and negligence claims, as well as $8,755,420.54 on the trespass claim and $16,519,661.40 in punitive damages.[110] The jury found in favor of Phillips on the wantonness and breach of implied lease covenants claims.[111] Upon the plaintiffs' request that the court reduce the amount of compensatory damages as duplicative, the court entered a judgment of $26,852,223.94.[112]

Phillips appealed to the Alabama Supreme Court, which reversed the judgment of the circuit court.[113] The court held that the judgment constituted an impermissible collateral attack on the Board's order creating the unit and that the plaintiffs failed to exhaust their administrative remedies under the applicable statutes.[114]

The court explained that under Alabama Code section 9-17-15, the plaintiffs had the right, within thirty days of the date of the Board's order creating the unit, to file a complaint in the county circuit court requesting that the court review the Board's

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104. *Id.*
105. Record at 1186, 1772-73, 1803, *Stryker*, 1998 WL 258185 [hereinafter Record].
106. Record, *supra* note 105, at 1776-77.
107. *Id.* at 1291-95.
108. *Stryker*, 1998 WL 258185, at *2.
109. *Id.*
110. *Id.* at *1.
111. *Id.*
112. *Id.*
113. *Stryker*, 1998 WL 258185, at *8.
114. *Id.*

order.[115] The plaintiffs failed to do so. Furthermore, under section 9-17-85, the plaintiffs had (and have) the right to petition the Board to hold another hearing and to amend its order, adding the plaintiffs' tracts to the unit.[116] The plaintiffs failed to do so. The facts of the case indicated that the plaintiffs believed that the operations were draining their properties as early as 1975.[117] Instead of pursuing at that time the remedies provided by the statutes, they waited sixteen years to file an action in court. The court stated:

> Clearly, the plaintiffs had the opportunity to seek review of the Chatom Unit order, or to petition for inclusion in the Chatom Unit, but failed to do so. To hold Phillips liable for drainage of [the plaintiffs' tracts] in these circumstances would run counter to this State's policy regarding secondary recovery unitization. An owner of interests outside a unit should not be entitled to damages from the operator of the unit if the circumstances are such that he can protect himself by engaging in an independent operation, or if he has been extended a fair opportunity to participate in the Unit.[118]

The court also expressed the importance of the Board's freedom to use its discretion in determining the unitization of areas in need of secondary recovery operations.[119] Such discretionary power is necessary for the Board to prevent the waste of oil and gas and to secure the greatest ultimate recovery of the minerals.[120] The court stated that actions such as that brought by the plaintiffs "substantially impede secondary recovery operations in this State."[121]

VI. CONCLUSION

Recovery for drainage caused by secondary recovery operations should not be allowed where the correlative rights of adjacent landowners are adequately protected by state regulatory

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115. *Id.* at *6.
116. *Id.* at *7.
117. *Id.*
118. *Stryker*, 1998 WL 258185, at *7 (citing KUNTZ, *supra* note 23, § 4.8(c)).
119. *Id.* at *4.
120. *Id.*
121. *Id.*

boards. The rights of adjacent landowners to oil in a common source of supply should give way to policy considerations of certainty and efficiency in oil and gas production. The avenue of relief for landowners who feel that their rights to extract oil and gas have been infringed upon should be through the regulatory agencies themselves and judicial review of those agency decisions, not through recovery from operators of secondary recovery operations acting under orders of the appropriate regulatory board. The lifeblood of the oil and gas industry in the United States depends on the ability of operators to continue extraction through secondary recovery operations of oil and gas that would otherwise remain beneath the surface.

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