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# Lessee Is under Implied Duty to Protect His Lessor from Field-Wide Drainage Caused by Lessee.

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is fair to surface and mineral owner alike.

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## OIL AND GAS—Implied Covenants—Lessee is Under Implied Duty to Protect His Lessor From Field-wide Drainage Caused by Lessee.

*Amoco Production Co. v. Alexander,*
594 S.W.2d 467 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ granted).

The Alexanders, lessors, are the royalty owners of three oil and gas leases executed to Amoco Production Co., lessee, in the Hastings West Field in Brazoria County. Amoco is the leasehold owner of eighty percent of the entire field, which is an active water-drive field.[1] The Alexander's leases are down-dip[2] from Amoco's remaining leases. Exxon Corporation, Amoco's chief competitor in the field, holds leases up-dip[3] from the Alexanders, but down-dip from Amoco's remaining leases. The Alexanders sued Amoco for breach of contract for failure to protect the Alexander leases from drainage[4] which resulted after Amoco initiated a plug-back program[5] in an effort to improve its competitive position in the field.[6] The result of this program was to greatly accelerate the up-dip drainage of oil not only from Exxon's leases, but also from the Alexander's leases

1. In an active water-drive field, water below the oil drives oil forward as the oil is pumped out of the reservoir. Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 470 (Tex. Civ. App.—Houston [1st Dist] 1979, writ granted).

2. A down-dip well is located low on the producing structure "where the oil is furthest from the surface of the field." H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 161 (4th ed. 1976).

3. An up-dip well is "located high on the structure where the oil is nearest" to the surface of the field. *Id.* at 629.

4. There are two principle types of drainage, local and field-wide. *See id.* at 163. Local drainage is the movement of oil to the well bore of a producing well, resulting "from the unequal removal of oil from one well as compared to surrounding wells." *Id.* at 163, 217. Field-wide drainage is the regional migration of oil, resulting from the "removal of petroleum from any point in the reservoir." *Id.* at 217.

5. A plugged well is one that is sealed off, preventing the migration of oil to either the surface or another stratum. *See id.* at 436.

6. The standard practice in a water-drive field is to begin production in the lowest portion of the lease and plug-back to increasingly high points on the oil formation. *See* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 472 (Tex. Civ. App.—Houston [1st Dist] 1979, writ granted). Amoco, however, began plugging-back all of its wells to the highest points of the structure, thereby increasing the drainage of oil up-dip. *See id.* at 472.

since they were even further down-dip.[7] Alexander notified Amoco of the drainage, but Amoco refused to perform any corrective work on the Alexander leases to offset the drainage. At trial, Amoco contended it had no duty to protect the Alexander leases from drainage, since the drainage was field-wide. Amoco further denied any duty on its part based on the existing spacing requirements of the Texas Railroad Commission, despite Amoco's failure to seek any exceptions to the regulation on behalf of the Alexanders.[8] The Alexanders, however, proved by expert testimony that substantial oil was being drained from their leases, that exception permits to drill wells to offset the drainage could have been obtained,[9] and that offset wells[10] would have been profitable.[11] The trial court entered judgment in favor of the plaintiffs, awarding the Alexanders $3,916,659.00 in actual and exemplary damages.[12] Amoco appealed to the Houston First District Court of Civil Appeals. Held—*Reformed and affirmed.*[13] Lessee, Amoco, was under an implied duty to protect its lessor, the Alexanders, from field-wide drainage caused by Amoco.[14]

In the absence of express provisions to the contrary, certain covenants by the lessee to an oil and gas lease are implied.[15] The parties to such a

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7. In a water-drive field the up-dip leases have a structural advantage over down-dip leases since there is a natural up-dip drainage of oil as more oil is removed from the formation. *See id.* at 471; H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 641-42 (4th ed. 1976).

8. *See* Tex. R.R. Comm'n, Rule 051.02.037 (1980) (Rule 37). Rule 37 regulates the spacing of wells and provides for exceptions to prevent waste or confiscation. *Id.* 051.02.037(a)(2); *see* Pan Am. Prod. Co. v. Hollandsworth, 294 S.W.2d 205, 206 (Tex. Civ. App.—Austin 1956, no writ). In order to obtain a Rule 37 exception on the basis of confiscation of property, there must be a local situation producing excess net drainage with reference to adjacent lands. Byrd v. Shell Oil Co., 178 S.W.2d 573, 575 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.). Under Texas law, adjacent leases are not necessarily contiguous. Arrington v. El Paso Natural Gas Co., 233 F. Supp. 522, 525 (W.D. Okla. 1964) (applying Texas law); *cf.* State *ex rel.* Pan Am Prod. Co. v. Texas City, 157 Tex. 450, 456, 303 S.W.2d 780, 784 (1957) (quo warranto proceeding challenging validity of annexation ordinance).

9. *See* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 476 (Tex. Civ. App.—Houston [1st Dist] 1979, writ granted).

10. An offset well is drilled to prevent drainage to an adjacent tract. *See* H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 383 (4th ed. 1976). Strictly speaking, Amoco should have drilled replacement wells. The effect of these wells, however, would be to offset drainage from the Alexander leases.

11. *See* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 479 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ granted).

12. *See id.* at 469.

13. *Id.* at 470. The damages were reformed to allow deduction of the Alexander's share of the occupation taxes from the actual damages. *See id.* at 481.

14. *Id.* at 474.

15. *See, e.g.,* Brewster v. Lanyon Zinc Co., 140 F. 801, 811 (8th Cir. 1905) (lease contains implied covenants to reasonably explore, develop, and produce); Harris v. Ohio Oil

lease can rarely reduce to writing all the lessee's duties, since variables such as geological and economic conditions, along with governmental regulation, inevitably affect the lessee's subsequent development and operation.[16] Since the right of the lessee to exploit the mineral estate is usually exclusive,[17] mutuality requires diligent operation of the lease to accomplish the primary purpose of the agreement—discovery, production, and sale of the mineral resource for the benefit of both parties.[18] The lessee, therefore, is under several implied obligations,[19] including the duty to protect against drainage.[20]

Under the implied covenant to protect the lease, the lessee must drill an offset well to prevent drainage of his lessor's oil to adjacent wells when a reasonable prudent operator would do so.[21] The test is whether the off-

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Co., 48 N.E. 502, 505 (Ohio 1897) (implied covenant to reasonably develop and protect); Klepper v. Lemon, 35 A. 109, 109 (Pa. 1896) (whatever ordinary care and knowledge dictate is required). *See generally* 5 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 54.2, at 1-4 (1978); M. MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES 21-22 (2d ed. 1940); 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 802, at 3-8 (1977). Implied and express covenants may not be construed to conflict with each other, although they may coexist. *See* Hartman Ranch Co. v. Associated Oil Co., 73 P.2d 1163, 1167 (Cal. 1937).

16. *See* M. MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES 19-20 (2d ed. 1940); 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 802.2, at 11 (1977).

17. *See* 5 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 56.2, at 37 (1978).

18. *See* M. MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES 21-22 (2d ed. 1940); 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 802.1, at 10 (1977).

19. *See, e.g.*, Empire Oil & Ref. Co. v. Hoyt, 112 F.2d 356, 360 (6th Cir. 1940) (diligent operation) (applying Michigan law); Harding v. Cameron, 220 F. Supp. 466, 470 (W. D. Okla. 1963) (reasonably diligent marketing); Mansfield Gas Co. v. Alexander, 133 S.W. 837, 838 (Ark. 1911) (initial exploration); Neff v. Jones, 288 P.2d 712, 716 (Okla. 1954) (further exploration); Waggoner Estate v. Siggler Oil Co., 118 Tex. 509, 511, 19 S.W.2d 27, 29 (1929) (reasonable development); United N. & S. Oil Co. v. Meredith, 258 S.W. 550, 555 (Tex. Civ. App.—Austin 1923) (protection), *aff'd*, 272 S.W. 124 (Tex. Comm'n App. 1925, judgmt adopted). More recently, an implied duty to seek favorable administrative action has found both judicial and academic support. *See* Baldwin v. Kubetz, 307 P.2d 1005, 1009 (Cal. Dist. Ct. App. 1957) (duty to seek variance to zoning law); U.V. Indus., Inc. v. Danielson, 602 P.2d 571, 581 (Mont. 1979) (duty to seek exception to well spacing regulation); Merrill, *Fulfilling Implied Covenant Obligations Administratively*, 9 OKLA. L. REV. 125, 140 (1956); Merrill, *Current Problems in the Law of Implied Covenants in Oil and Gas Leases*, *23* TEXAS L. REV. 137, 140 (1945). *But cf.* Eberhart, *Effect of Conservation Laws, Rules and Regulations on Rights of Lessors, Lessees and Owners of Unleased Mineral Interests*, PROCEEDINGS OF THE FIFTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 125, 152-54 (1954) (covenant should not be categorized but recognized as part of prudent operation in general).

20. *See* United N. & S. Oil Co. v. Meredith, 258 S.W. 550, 555 (Tex. Civ. App.—Austin 1923), *aff'd*, 272 S.W. 124 (Tex. Comm'n App. 1925, judgmt adopted).

21. *See* Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 431, 6 S.W.2d 1031, 1035 (1928); Magnolia Petroleum Co. v. Page, 141 S.W.2d 691, 693 (Tex. Civ. App.—San Antonio 1940, writ ref'd).

set well reasonably could be expected to return a profit.[22] When a third party operates the draining well, the economic interests of the lessor and lessee are united,[23] so long as the offset well is potentially profitable.[24] When the lessee is the draining operator, however, the problem becomes more complex since the lessee has no economic incentive to offset drainage.[25] For example, the lessee cannot rationally be expected to incur the cost of an offset well when he can recover the same amount of oil through his existing wells.[26] Similarly, the common-lessee[27] may owe a higher royalty to the lessor of the drained lease.[28] Some jurisdictions, therefore, imply a separate covenant by the common-lessee to refrain from depletory acts on adjacent lands.[29]

The depletion covenant, as applied in California and Mississippi, dispenses with the prudent operator standard, imposing a higher duty upon the lessee.[30] In *R.R. Bush Oil Co. v. Beverly-Lincoln Land Co.*[31] and *Phillips Petroleum Co. v. Millette*,[32] therefore, the prudent operator standard was found inapplicable when the draining well was operated by a common-lessee.[33] The higher duty rule, however, has been criticized by com-

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22. *See* Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 433, 6 S.W.2d 1031, 1036 (1928).

23. *See* Hardy, *Drainage Of Oil and Gas From Adjoining Tracts—A Further Development*, 6 NAT. RESOURCES J. 45, 51-52 (1966).

24. *See* Comment, *Liability of an Oil and Gas Lessee for Causing Drainage: A Standard For Texas*, 51 TEXAS L. REV. 546, 547 (1973).

25. *See* Hardy, *Drainage Of Oil and Gas From Adjoining Tracts—A Further Development*, 6 NAT. RESOURCES J. 45, 52 (1966); Comment, *Liability of an Oil and Gas Lessee for Causing Drainage: A Standard For Texas*, 51 TEXAS L. REV. 546, 548 (1973).

26. *See* M. MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES 18 (2d ed. 1940).

27. As used herein, "common-lessee" refers to a lessee who holds more than one lease from two or more lessors.

28. *See* Hardy, *Drainage of Oil and Gas From Adjoining Tracts—A Further Development*, 6 NAT. RESOURCES J. 45, 52 (1966).

29. *See* R.R. Bush Oil Co. v. Beverly-Lincoln Land Co., 158 P.2d 754, 758 (Cal. Dist. Ct. App. 1945); Phillips Petroleum Co. v. Millette, 72 So. 2d 176, 178-79 (Miss. 1954); Shell Oil Co. v. Stansbury, 410 S.W.2d 187, 188 (Tex. 1966). *See generally* Seed, *The Implied Covenant in Oil and Gas Leases to Refrain from Depletory Acts*, 3 U.C.L.A. L. REV. 508 (1956).

30. *See* R.R. Bush Oil Co. v. Beverly-Lincoln Land Co., 158 P.2d 754, 759 (Cal. Dist. Ct. App. 1945); Phillips Petroleum Co. v. Millette, 72 So. 2d 176, 178-79 (Miss. 1954).

31. 158 P.2d 754 (Cal. Dist. Ct. App. 1945).

32. 72 So. 2d 176 (Miss. 1954).

33. *See* R.R. Bush Oil Co. v. Beverly-Lincoln Land Co., 158 P.2d 754, 758 (Cal. Dist. Ct. App. 1945); Phillips Petroleum v. Millette, 72 So. 2d 176, 178-79 (Miss. 1954). The Mississippi Supreme Court apparently narrowed the applicablility of *Millette*, but the higher duty rule was later revived. *Compare* Monsanto Chem. Co. v. Sykes, 147 So. 2d 290, 297 (Miss. 1962) (*Millette* did not abolish prudent operator standard) *and* Monsanto Chem. Co. v. Andreae, 147 So. 2d 116, 118 (Miss. 1962) (*Millette* limited to facts so lessor must show bad faith of lessee) *with* Shell Oil Co. v. James, 257 So. 2d 488, 496 (Miss. 1972) (*Millette*

mentators as impractical and uneconomical since it inhibits the practice of blocking off large tracts by increasing the liability of the lessee.[34] Although Texas adopted the depletion covenant in *Shell Oil Co. v. Stansbury*,[35] the prudent operator standard was retained.[36] In a brief *per curiam* opinion refusing an application for a writ of error, the Texas Supreme Court held a lessee is under a duty to protect his lessor's minerals from depletion by the lessee's affirmative acts upon adjacent leases.[37]

Although the lessee's duty under the protection and depletion covenants is usually discharged by drilling offset wells, more may be required of the lessee.[38] In some jurisdictions the duty extends to seeking exceptions or variances to spacing or density regulations[39] when such rules facially prohibit the lessee from drilling offset wells.[40] In *Baldwin v. Kubetz*,[41] for example, the lessee was subject to an implied obligation to obtain the necessary drilling permit through a zoning variance.[42] The underlying principle was that the lessee's exclusive right to exploit the lease carried with it an implied obligation of good faith and fair dealing in the operation of the lease, including the performance of incidental or subsidi-

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not *Andreae* deemed controlling when lessee expended $1.5 million to protect and develop lease). Even when the prudent operator standard is applied, problems arise since profitability can be determined as to the offset well alone, or as to the field-wide operations of the lessee. *See* Comment, *Liability of an Oil and Gas Lessee for Causing Drainage: A Standard for Texas*, 51 TEXAS L. REV. 546, 556 (1973).

34. *See* 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 824.2, at 145-46 (1977).

35. 410 S.W.2d 187 (Tex. 1966).

36. *See id.* at 188.

37. *See id.* at 188 (express clause as to offset distances will not preclude action for breach of depletion covenant).

38. *See* 5 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 61.1, at 136 (1978). The covenant is often referred to as the offset well covenant. H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 384 (4th ed. 1976).

39. "Prior to spacing regulations, wells along a surface property were sometimes drilled in such profusion that they looked somewhat like fence posts." H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 383 (4th ed. 1976). As part of a program to prevent the waste of petroleum, and to protect correlative rights in oil and gas lands, the Texas Railroad Commission has restricted the number of wells that can be drilled in a certain area. *See* Tex. R.R. Comm'n, Rule 051.02.037 (1980) (commonly referred to as Rule 37). *See generally* Hardwicke, *Oil-Well Spacing Regulations and Protection of Property Rights In Texas*, 31 TEXAS L. REV. 99 (1952). Under Rule 37, no well may be drilled nearer than 1200 feet to any other well, and no well may be drilled nearer than 467 feet to any property, lease, or subdivision line. *See* Tex. R.R. Comm'n, Rule 051.02.037(a)(1) (1980). These distances provide for a maximum density of one well for every forty acres. *See id.* 051.02.037(b).

40. *See* Baldwin v. Kubetz, 307 P.2d 1005, 1009 (Cal. Dist. Ct. App. 1954) (zoning variance); U.V. Indus., Inc. v. Danielson, 602 P.2d 571, 581 (Mont. 1979) (well spacing exception).

41. 307 P.2d 1005 (Cal. Dist. Ct. App. 1945).

42. *See id.* at 1009.

ary acts reasonably necessary.[43]

More recently, the duty to protect the lease from drainage has been held to include the obligation to seek unitization of the lease.[44] In *Williams v. Humble Oil & Refining Co.*[45] the duty to seek unitization was recognized as the law of Louisiana.[46] Louisiana, however, has enacted compulsory unitization legislation.[47] Texas, by contrast, has no such law,[48] and one case suggests no duty to seek unitization exists.[49]

Prior to *Amoco Production Co. v. Alexander*,[50] the issue of a common-lessee's liability for drainage was presented in the context of local drainage.[51] Litigation involving field-wide drainage primarily involved the cancellation or denial of Rule 37 exceptions sought by down-dip operators in the water-driven East Texas Field near Kilgore.[52] Cases such as *Byrd v.*

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43. *See id.* at 1009.

44. *See* Williams v. Humble Oil & Ref. Co., 432 F.2d 165, 173-74 (5th Cir. 1970) (construing Louisiana law), *cert. denied*, 402 U.S. 934 (1971); Breaux v. Pan Am. Petroleum Corp., 163 So. 2d 406, 415-16 (La. App. 1964). A unitized lease is one in which separately owned tracts are included in a single lease. Skeeters v. Granger, 314 S.W.2d 364, 367 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.). *See generally* 1 C. MEYERS, THE LAW OF POOLING AND UNITIZATION IN OIL AND GAS LEASES 1 (1976). Unitization is a more efficient method of development and production because wells can be located so as to maximize the use of reservoir pressure without regard to surface property lines. *See* 6 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 901, at 3-4 (1977). The lessee, therefore, incurs no liability for drainage from one portion of the unit to another. *See id.* § 955.2, at 730.

45. 432 F.2d 165 (5th Cir. 1970), *cert. denied*, 402 U.S. 934 (1971).

46. *See id.* at 173-74.

47. *See* LA. REV. STAT. ANN. § 30.9 (West 1975).

48. *See* TEX. NAT. RESOURCES CODE ANN. § 101.012 (Vernon 1978) (no person required to enter unit agreement). *But cf. id.* § 101.011 (providing for voluntary unitization). The problem with voluntary unitization is that some lessors will decline to particpate, believing their tracts lie in the most favorable part of the reservoir. *See* 6 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 910, at 85 (1977). *See generally* Comment, *Prospects for Compulsory Unitization in Texas*, 44 TEXAS L. REV. 510 (1966).

49. *See* Waters v. Bruner, 355 S.W.2d 230, 235 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.).

50. 594 S.W.2d 467 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ granted).

51. *See, e.g.*, Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 424, 6 S.W.2d 1031, 1032 (1928) (gas drained to numerous wells near lessor's tract); Shell Oil Co. v. Stansbury, 401 S.W.2d 623, 628 (Tex. Civ. App.—Beaumont) (oil drained from lessor's tract to lessee's well on adjacent property), *writ ref'd n.r.e. per curiam*, 410 S.W.2d 187 (Tex. 1966); United N. & S. Oil Co. v. Meredith, 258 S.W. 550, 552 (Tex. Civ. App.—Austin 1923) (oil drained to wells on contiguous tracts 150 feet from boundary), *aff'd*, 272 S.W. 124 (Tex. Comm'n App. 1925, judgmt adopted).

52. *See, e.g.*, Woolley v. Railroad Comm'n, 242 S.W.2d 811, 812 (Tex. Civ. App.—Austin 1951, no writ) (denial of exception well permit by commission); Miller v. Railroad Comm'n, 185 S.W.2d 223, 224 (Tex. Civ. App.—Austin 1945, writ ref'd) (commission denied exception well permit); Byrd v. Shell Oil Co., 178 S.W.2d 573, 573 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.) (trial court cancelled exception well permit).

*Shell Oil Co.*,[53] *Miller v. Railroad Commission*,[54] and *Woolley v. Railroad Commission*[55] never reached the issue of a lessee's liability for accelerating field-wide drainage.[56] Representative of these cases is *Byrd*, in which a down-dip operator was not entitled to an exception on the grounds of confiscation because the drainage he complained of was not peculiar to his own tract, but common throughout the entire field.[57] The court observed that absent a local situation, other operators would be equally entitled to exceptions.[58] Byrd's claim, therefore, amounted to a collateral attack upon the spacing regulations.[59] Instead, the court felt the problem of field-wide drainage required a field-wide solution promulgated by the Railroad Commission.[60]

In *Amoco Production Co. v. Alexander*[61] the Houston Court of Civil Appeals was confronted with two conflicting principles of law. First, an oil and gas lessee is under an implied duty to protect his lessor's minerals from depletion caused by the affirmative acts of the lessee upon adjacent lands.[62] Second, field-wide drainage is a general condition requiring a field-wide or general solution promulgated by the Texas Railroad Commission.[63] Rejecting Amoco's contention that it had no duty to protect the Alexander's leases,[64] the court relied upon *Stansbury* finding the duty to protect against drainage includes protecting the lease from field-wide drainage.[65] To implement its central holding that Amoco was obligated to protect the Alexander leases, however, the court was forced to recognize

53. 178 S.W.2d 573 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.).

54. 185 S.W.2d 223 (Tex. Civ. App.—Austin 1945, writ ref'd).

55. 242 S.W.2d 811 (Tex. Civ. App.—Austin 1951, no writ).

56. *Cf.* Woolley v. Railroad Comm'n, 242 S.W.2d 811, 812 (Tex. Civ. App.—Austin 1951, no writ) (appeal by operator from denial of exception); Miller v. Railroad Comm'n, 185 S.W.2d 223, 224 (Tex. Civ. App.—Austin 1945, writ ref'd) (operator appealed denial of exception); Byrd v. Shell Oil Co., 178 S.W.2d 573, 573 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.) (appeal by operator from cancellation of exception).

57. *See* Byrd v. Shell Oil Co., 178 S.W.2d 573, 575 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.).

58. *See id.* at 574.

59. *See id.* at 576.

60. *See id.* at 576. One such field-wide solution would be compulsory unitization of the field. *See* H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 276 (4th ed. 1976); 30 TEXAS L. REV. 786, 788 (1952).

61. 594 S.W.2d 467 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ granted).

62. *See* Shell Oil Co. v. Stansbury, 410 S.W.2d 187, 188 (Tex. 1966).

63. *See* Woolley v. Railroad Comm'n, 242 S.W.2d 811, 813 (Tex. Civ. App.—Austin 1952, no writ); Miller v. Railroad Comm'n, 185 S.W.2d 223, 226 (Tex. Civ. App.—Austin 1945, writ ref'd); Byrd v. Shell Oil Co., 178 S.W.2d 573, 576 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.).

64. *See* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 470 (Tex. Civ. App.—Houston [1st Dist] 1979, writ granted).

65. *See id.* at 473-74.

an implied duty on Amoco's part to seek favorable administrative action,[66] since the Texas Railroad Commission's spacing regulations prohibited Amoco from fulfilling its obligation without first obtaining a Rule 37 exception.[67]

Although the solution to the problem of field-wide drainage lies in a field-wide solution promulgated by the Railroad Commission,[68] cases so holding are not dispositive as to the lessee's duty to protect his lessor from field-wide drainage.[69] In *Byrd, Miller,* and *Woolley* the issue was whether an operator complaining of field-wide drainage was entitled to an exception well permit.[70] The decisions in these cases logically concluded a field-wide solution was required because the drainage would only be worsened by the proliferation of down-structure wells equally entitled to exceptions.[71] In contrast to these cases, *Amoco Production Co. v. Alexander* presents the more limited issue of a common-lessee's duty to protect his down-dip lessor from field-wide drainage caused by the lessee's operations on his up-dip leases.[72] In such a situation, the lessee is not *per se*

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66. *See id.* at 475. Specifically, Amoco's duty was to initiate the proper steps to obtain a Rule 37 exception. *See id.* at 475.

67. *See id.* at 475; Tex. R.R. Comm'n, Rule 51.02.037(a)(1) (1980) (Rule 37).

68. *See, e.g.,* Woolley v. Railroad Comm'n, 242 S.W.2d 811, 813 (Tex. Civ. App.—Austin 1951, no writ) (remedy to field-wide drainage is promulgation of general rule by railroad commission); Miller v. Railroad Comm'n, 185 S.W.2d 223, 226 (Tex. Civ. App.—Austin 1945, writ ref'd) (condition not to be solved by exceptions for individual tracts); Byrd v. Shell Oil Co., 178 S.W.2d 573, 576 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.) (exception absent local condition is collateral attack on spacing regulation).

69. *Cf.* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 469-70 (Tex. Civ. App.— Houston [1st Dist] 1979, writ granted) (suit by lessor for lessee's breach of protection covenant); Woolley v. Railroad Comm'n, 242 S.W.2d 811, 812 (Tex. Civ. App.—Austin 1951, no writ) (appeal by operator from denial of exception); Miller v. Railroad Comm'n, 185 S.W.2d 223, 224 (Tex. Civ. App.—Austin 1945, writ ref'd) (operator appealed denial of exception); Byrd v. Shell Oil Co., 178 S.W.2d 573, 573 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.) (appeal by operator from cancellation of exception).

70. *See* Woolley v. Railroad Comm'n, 242 S.W.2d 811, 812 (Tex. Civ. App.—Austin 1951, no writ); Miller v. Railroad Comm'n, 185 S.W.2d 223, 226 (Tex. Civ. App.—Austin 1945, writ ref'd); Byrd v. Shell Oil Co., 178 S.W.2d 573, 573 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.).

71. *See* Woolley v. Railroad Comm'n, 242 S.W.2d 811, 813-14, (Tex. Civ. App.—Austin 1945, no writ); Miller v. Railroad Comm'n, 185 S.W.2d 223, 226 (Tex. Civ. App.—Austin 1945, writ ref'd); Byrd v. Miller, 178 S.W.2d 573, 574 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.). *See generally* 30 TEXAS L. REV. 786, 788 (1952).

72. *Compare* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 471-72 (Tex. Civ. App.— Houston [1st Dist.] 1979, writ granted) (suit by lessor for lessee accelerated field-wide drainage) *with* Woolley v. Railroad Comm'n, 242 S.W.2d 811, 812 (Tex. Civ. App.—Austin 1951, no writ) (suit by operator to obtain exception well permit on basis of field-wide drainage) *and* Miller v. Railroad Comm'n, 185 S.W.2d 223, 226 (Tex. Civ. App.—Austin 1945, writ ref'd) (operator sued commission to obtain exception well permit on basis of field-wide drainage) *and* Byrd v. Shell Oil Co., 178 S.W.2d 573, 573 (Tex. Civ. App.—San Antonio

bound to obtain an exception well permit and then drill.[73] Instead, he may either surrender the down-dip lease,[74] or seek unitization as an alternative means of fulfilling his implied obligation.[75]

Although there is a natural up-dip drainage of oil in a water-drive field,[76] Amoco's policy of plugging-back to the highest points on the Hastings West structure greatly accelerated the natural process.[77] Amoco, by its affirmative acts upon its up-dip leases, was depleting the Alexander's minerals.[78] The court, therefore, correctly applied *Stansbury* in reaching its conclusion that Amoco was obligated to protect the Alexander leases.[79]

The court's recognition of an implied duty on Amoco's part to seek favorable administrative action on behalf of the Alexanders, however, fails to consider the conflicting interests of a common-lessee such as Amoco.[80] While prudent operation of the Alexander leases required Amoco to seek exceptions,[81] it is not inconceivable that prudent operation of its up-dip leases would have required Amoco to challenge any application for an exception well.[82] The court's reliance on *Baldwin v. Kubetz* as authority for the imposition of the implied duty,[83] therefore, is unpersuasive since the lessee in *Baldwin* was not faced with any possible conflict of interest.[84] Nevertheless, it does not follow Amoco can establish the "im-

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1944, writ ref'd w.o.m.) (suit by other operator challenging validity of exception permit granted on basis of field-wide drainage).

73. *See* 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 825.4, at 171-72 (1977) (lessee can surrender lease).

74. *See id.*

75. *See* Williams v. Humble Oil & Ref. Co., 432 F.2d 165, 173 (5th Cir. 1970) (construing Louisiana compulsory unitization statute), *cert. denied*, 402 U.S. 934 (1971). In Texas the lessee could only attempt to negotiate a voluntary unitization plan. *See* TEX. NAT. RESOURCES CODE ANN. § 101.012 (Vernon 1978).

76. *See* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 471 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ granted); H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 641-42 (4th ed. 1976).

77. *See* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 472-73 (Tex. Civ. App.— Houston [1st Dist.] 1979, writ granted).

78. *See id.* at 472.

79. *Cf.* Shell Oil Co. v. Stansbury, 410 S.W.2d 187, 188 (Tex. 1966) (lessee under duty to refrain from depletory acts on adjacent lands); Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 472 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ granted) (lessee's plug-back policy on up-dip leases greatly accelerated natural up-dip drainage of oil from lessor's down-dip lease).

80. *See* 5 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 59.1, at 106-07 (1978).

81. *See* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 475 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ granted).

82. *See* 5 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 59.1, at 107-08 (1978).

83. *See* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 476 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ granted).

84. *Compare id.* at 469-70 (suit by lessor against common-lessee for breach of implied

pregnable defense" that existing spacing regulations preclude performance of its implied obligation to protect the Alexander leases.[85] Amoco, having breached its implied duty, should not remain immune from liability solely because of the spacing rules promulgated by the Railroad Commission,[86] particularly since Amoco was able to obtain Rule 37 exceptions for its up-dip leases.[87]

Ultimately Amoco's basic contention that field-wide drainage requires a field-wide solution is correct.[88] If the duty to protect is limited simply to offsetting drainage on individual tracts,[89] field-wide drainage will be accelerated even further since field-wide drainage, by definition, results from the removal of oil from any point in the reservoir.[90] A preferable solution to the problem of field-wide drainage in a water-drive field is compulsory unitization of the field,[91] whereby the field is developed in the most efficient manner,[92] irrespective of surface boundaries and the competing economic interests of various lessors.[93] The duty to seek unitization, moreover, is consistent with the prudent operator standard.[94] A prudent operator would not drill an unprofitable offset well, but he might seek unitization for the protection of his own interest as well as his lessor's.[95]

An effective unitization plan requires participation by all affected les-

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covenant of protection) *with* Baldwin v. Kubetz, 307 P.2d 1005, 1009 (Cal. Dist. Ct. App. 1957) (suit by lessor against lessee for breach of express drilling obligation).

85. *Cf.* Merrill, *Current Problems In The Law of Implied Covenants In Oil and Gas Leases*, 23 TEXAS L. REV. 137, 141 (1945) (generally lessee cannot excuse nonperformance of implied duties solely on basis of administrative regulations).

86. *See* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 474 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ granted).

87. *Cf.* Baldwin v. Kubetz, 307 P.2d 1005, 1009 (Cal. Dist. Ct. App. 1957) (implied covenant of good faith and fair dealing in all contracts not to injure rights of other party).

88. *See* Byrd & Shell Oil Co., 178 S.W.2d 573, 576 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.) (relief for field-wide drainage requires general solution by Railroad Commission).

89. *See* Amoco Prod. Co. v. Alexander, 594 S.W.2d 467, 475 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ granted) (Amoco under duty to protect by drilling).

90. *See* H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 217 (4th ed. 1976).

91. *See id.* at 217; 30 TEXAS LAW REV. 786, 788 (1952).

92. *See* C. MEYERS, THE LAW OF POOLING AND UNITIZATION IN OIL AND GAS LEASES § 8.02(1), at 285 (1976); Comment, *Prospects for Compulsory Unitization in Texas*, 44 TEXAS L. REV. 510, 531 (1966).

93. *See* H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 100 (4th ed. 1976); Comment, *Prospects for Compulsory Unitization in Texas*, 44 TEXAS L. REV. 510, 528 (1966).

94. *See* Hardy, *Drainage of Oil and Gas From Adjacent Tracts—A Further Development*, 6 NAT. RESOURCES J. 46, 48 (1966); Comment, *Liability of an Oil and Gas Lessee for Causing Drainage: A Standard for Texas*, 51 TEXAS L. REV. 546, 574 (1973).

95. *See* Hardy, *Drainage of Oil and Gas From Adjacent Tracts—A Further Development*, 6 NAT. RESOURCES J. 46, 48 (1966).

sors.[96] Lessors of tracts higher on the structure of a producing formation in a water-drive field, however, will be reluctant to participate in a voluntary plan because of their structural advantage.[97] The Texas Legislature, therefore, should enact compulsory unitization legislation.[98] The Texas Supreme Court, having granted the writ of error in *Amoco Production Co. v. Alexander,* should affirm the decision of the court of civil appeals. With compulsory unitization currently prohibited by Texas law,[99] the lower courts had no choice but to hold Amoco liable for its failure to protect the Alexander leases from drainage.[100] In upholding the judgment, however, the court should give thoughtful consideration to the potential for conflict of interest inherent in the imposition of a *per se* duty to seek favorable administrative action.[101] Finally, the court must clearly impress upon the legislature the need for compulsory unitization, the most feasible solution to the problem of field-wide drainage.

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96. *See* 6 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 910, at 85 (1977).

97. *See id.*; 30 TEXAS L. REV. 786, 788 (1952).

98. *See* Comment, *Prospects for Compulsory Unitization in Texas,* 44 TEXAS L. REV. 510, 530-32 (1966); 30 TEXAS L. REV. 786, 788 (1952).

99. *See* TEX. NAT. RESOURCES CODE ANN. § 101.012 (Vernon 1978).

100. *Cf.* Williams v. Humble Oil & Ref. Co., 432 F.2d 165, 173 (5th Cir. 1970) (under Louisiana law lessee may fulfill protection duty by seeking compulsory unitization), *cert. denied,* 402 U.S. 934 (1971).

101. *See* 5 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 59.1, at 197-208 (1978).