

## BOOKS

OIL AND GAS LAW CASES AND MATERIALS by Eugene O. Kuntz, John S. Lowe, Owen L. Anderson and Ernest E. Smith. West Publishing Co., 1986. 857 pages.

Reviewed by *William A. Mogel\**

Why should a practitioner read a casebook designed for law students? He probably shouldn't read this casebook, but he should use it as a reference because of the insights and wisdom of the four authors who collectively have 75 years of experience in the field.

*Oil and Gas Law* is divided into seven major chapters. Chapter 1, "Accumulation, Ownership, and Conservation of Oil and Gas," begins with a description of the origins of petroleum and lays the foundation for an analysis of the rule of capture. It also describes the different kinds of oil and gas interests—fee interest, mineral interest, leasehold interest, surface interest, royalty interest, etc. Chapter 1 provides some basic oil and gas history, geology, and engineering as a background for an understanding of conservation statutes, drilling, well-spacing and well-spacing exceptions. It also analyzes regulatory restrictions on production and marketing, prorationing, limiting gas/oil and oil/water ratios, unitization and gas flaring regulations. Finally, a section on the economics of conservation regulation is provided which discusses some of the unique problems in promoting that elusive concept of "efficiency" in oil and gas development.

Chapter 2, "The Oil and Gas Lease," provides an analysis of the various clauses found in the typical oil and gas lease. For example, the granting clause, *habendum* clause, and royalty clause, are presented in a manner designed to give a clear understanding of the specialized nature of the oil and gas lease. Chapter 2 also includes a discussion of oil and gas leasing on public lands, a brief overview of oil and gas taxation, and the treatment of oil and gas leases as securities.

In Chapter 3, "Covenants Implied in the Oil and Gas Lease," the authors present a classification of the various obligations implied in leases. Covenants implied in the lease include the covenant to develop the tract expeditiously, the covenant to protect against drainage, the covenant of diligent and proper operation, and the covenant to market the product. Extensive coverage is given to the prudent operator rule.

Chapter 4, "The Nature and Protection of Interests in Oil and Gas," describes characteristics of the various kinds of oil and gas interests: mineral in-

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terests, shared interests (concurrent and successive), and royalty interests. It also discusses the remedies for trespass or other interference with oil and gas interests. Termination of oil and gas interests by operation of law is described in the context of adverse possession, liberative prescription, abandonment, forfeiture, and mineral interest acts.

Chapter 5, "Titles and Conveyances," focuses on the special problems encountered in construing oil and gas conveyances. The authors survey how various jurisdictions distinguish between mineral interests and royalty interests. They pose questions concerning drafting to avoid problems of construction. Interpretive problems arising out of the reference to "other minerals" in mineral grants are reviewed. Chapter 5 also addresses title problems arising from the conveyance or reservation of fractional mineral and royalty interests, emphasizing the importance of the size of the interest reserved or conveyed, the effect of overconveyance, and proportionate reduction. The difficulties involved in conveyances of interests in leased land are discussed emphasizing conveyances "subject to" an existing lease, the non apportionment rule, and top leasing.

Chapter 6, "Contracts and Transfers by the Lessee," discusses and analyzes the most frequently encountered types of transfers by the lessee: letter agreements, farmout agreements, lease assignments and operating agreements. Chapter 6 provides background material to explain why parties enter into such agreements and how to guard against the most typically encountered difficulties arising from these agreements. The notes in Chapter 6 are particularly useful because the authors provide numerous examples of various clauses and sample problems.

Chapter 7, "Pooling and Unitization," begins by addressing the problem of small tract owners in the absence of a compulsory pooling statute. The unique regulatory developments in Texas are used for illustration. Several doctrines which preclude owners from invoking the exception to the statewide well-spacing are discussed. The authors discuss the conflict between the prevention of economic waste through policy agreements and the difficulty in ensuring that small tract owners receive their share of recoverable reserves. Chapter 7 describes how pooling is accomplished (community leases, pooling clauses, judicial pooling of spacing units and compulsory pooling acts). It also explains the conflicts that arise between voluntary pooling agreements and conservation commission spacing and pooling orders. A section in Chapter 7 on unitization of field-wide operations focuses on additional problems which, although relevant to pooling, are more serious in unitization. The text includes explanations of how enhanced recovery is performed, its usefulness in conservation, and how units are established by state commissions under compulsory unitization acts. Chapter 7 points out the unavailability of remedies to owners who refuse to participate in the formation of field-wide units.

*Oil and Gas Law* appears to accomplish its objective of being both a comprehensive and a new look at an important subject. If there is any shortfall, it may be that this casebook does not include any material on federal or state regulatory problems. In any event, law students and practitioners who study *Oil and Gas Law* acquire a valuable asset which will benefit them in the practice of energy law.

ANTITRUST & REGULATED INDUSTRIES, by David C. Hjelmfelt, New York, John Wiley & Sons, 1985. 417 pages

Reviewed by *James A. Calderwood\**

The energy industry has been subject to considerable deregulation in recent years. Even more deregulation may be on the horizon. Of course, all commercial activity is subject to some sort of government regulation, be it from the Occupational Safety and Health Administration or simply local zoning laws. However, energy, like transportation, communications and banking has long been subject to varying degrees of price and entry controls. price and entry controls delineate the traditional concept of "regulated industries" which are the subject of this book.

"Deregulation," while the popular term to use these days, may be an inappropriate noun for what is really meant. Energy, and other regulated industries, have not been totally deregulated. Some regulatory constraints have been removed, but many still remain. Certainly the gas and electric industries, as well as oil pipelines, have gone from being highly regulated, with the Federal Energy Regulatory Commission (FERC) responsible for approving or disapproving practically every major business decision, to having become industries with important aspects still subject to FERC review, but with major areas also not subject to FERC control.

In some respects this has actually increased the possible legal confusion surrounding energy decision making. With the decline of regulatory sanction for much business conduct has come the requirement that such conduct not violate the antitrust laws. In the days when the FERC would consider and rule upon practically all important business conduct in the energy area, antitrust actions were rarely instituted. Now, those feeling harmed by certain business decisions by energy companies who, in the past, may have asked the FERC for relief or who now do ask the FERC for relief and are rebuffed, are increasingly initiating private antitrust actions over the questioned practices.

A problem faced by many energy attorneys is that they feel insecure in the antitrust field of law and, while comfortable in advising clients on the FERC considerations of particular matters, are uncertain as to whether there also may be antitrust aspects to the particular situations that also need to be considered. Additionally, if there are antitrust issues, the energy attorney has to decide how those issues should be approached. For these attorneys, David Hjelmfelt's book will prove very helpful.

Antitrust law is particularly confusing in the energy area. Unlike certain other regulated industries, there is in energy no statutory grant of antitrust immunity except for the limited purpose of complying with presidential emer-

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agency gas allocation orders<sup>1</sup> and international crude oil agreements in case of another boycott.<sup>2</sup> The energy statutes do not grant antitrust immunity to industry action simply because the FERC has approved the activity or may have jurisdiction over it.

Once past the area of statutory antitrust immunity (generally referred to as "express immunity"), consideration must be given to "implied" antitrust immunity. Generally, implied immunity will be found to exempt particular activity from the antitrust laws if it can be shown that the regulatory scheme in question is pervasive and that the application of the antitrust laws would seriously disrupt the ability of a regulatory agency to perform its statutory function.<sup>3</sup> However, it is an often repeated axiom of antitrust law that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."<sup>4</sup>

This book provides an excellent survey of the express/implied immunity issue as well as most of the other key antitrust problem areas normally arising in regulated industry settings. Of particular help to energy lawyers is Mr. Hjelmfelt's rather lengthy review of the antitrust exemptions contained in various regulatory statutes as well as brief overviews of the legislative framework of regulatory structures ranging from agriculture to steamships. The court decisions concerning the application of the antitrust laws to particular regulated industries, including energy, borrow from rulings in a variety of regulated settings, each with its different standards and nuances. Consequently, some familiarity with the precise issue in a decision and the statutory scheme with which the decision is concerned is important in evaluating the applicability of non-energy regulated industries decisions to an energy problem. Here, Mr. Hjelmfelt's work can be very useful.

Among the antitrust/regulatory issues covered are the *Noerr-Pennington* decisions and their progeny and the ability of courts to consider a regulatory environment as part of a "reasonableness" argument within a particular industry. The "*Noerr-Pennington*"<sup>5</sup> issue concerns the ability of industry members to take group action to influence governmental policy such as lobbying or joint action before a regulatory body. "Regulatory defense" is concerned not with an antitrust exemption because of a regulatory system, but with whether in a business context particular action being attacked under the antitrust laws was reasonable business conduct (and therefore not a violation of the Sherman Act), because of the defendants' response to a regulatory environment.

A problem inherent in such a work as this is the constantly changing case law. Mr. Hjelmfelt's rather lengthy review of the state action antitrust exemption was considerably modified (and clarified) by the Supreme Court's decision in *United States v. Southern Motor Carrier Rate Conference*.<sup>6</sup> which was ren-

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1. 5 U.S.C. § 3301 (1982).

2. 42 *id.* § 6272 (1982).

3. *Keogh v. Chicago & N.W. R.R. Co.*, 260 U.S. 156 (1922).

4. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963).

5. *Eastern R.R. Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

6. 105 S. Ct. 1721 (1985).

dered too late for this book. Hence, this section of the work is already seriously dated.

While this text serves as a good survey for the field it probably seeks to accomplish too much. Approximately a third of the book is devoted to explaining the antitrust laws in general with the remainder delving into the principal subject of the application of the antitrust laws to regulated industries. In fact, we are even informed of Emperor Zeno's decrees concerning competition in 483 A.D. Perhaps a survey of the antitrust laws should have been left to another volume with this work devoted entirely to the regulatory/antitrust mesh.

In all, most lawyers who practice regularly in the energy area should find this book very helpful in approaching antitrust issues and identifying the key problems and analytical approaches that can be taken with respect to antitrust problems.



MANAGING NATURAL RESOURCES IN A FEDERAL STATE, Essays from the Second Banff Conference on Natural Resources Law, edited by J. Owen Sanders.

Reviewed by *Charles M. Darling, IV\**

The tension in a federal system between the federal and state governments over the proper management of natural resources is a constant one in the United States. One need only look to the history of natural gas regulation to see the various attempts to deal meaningfully with this problem, the effects, and the side effects that those attempts to manage the interaction and the conflicts have created. All too often, however, we forget that other nations have this problem, too, and within their own structure have had to attempt to reconcile the conflicts.

*Managing Natural Resources in a Federal State* presents a multi-faceted look at conflict resolution in the natural resource area of the federal-state relationship. It is the collection of essays presented at the Second Banff Conference on Natural Resources Law in April of 1985. Not surprisingly, the majority of the participants are from Western Canada. However, there are also participants from Eastern Colorado, and from Australia, where another federal-state relationship exists.

By virtue of this participation, there is, over the entirety of the book, a range of presentations on the various ways and contexts in which conflicts over resource management have arisen in the federal-state relationship. At the same time, there is a review of various means that have been or might be utilized in an attempt to work out these conflicts. Some of these solutions have worked; some of them have not.

More important than the issue whether a particular solution has worked or might work, is simply the process of exploring the means, thought processes and underlying frameworks in which someone has sought to work out the problem of resource management in a different political environment. Because this is a Canadian book, with essentially a Canadian outlook, it can be provocative to see solutions attempted in another environment and to question the applications that those solutions, or some variations thereof, can have in the American environment.

But the book does not stop there. In many important areas, the American experience and the Canadian experience are put into contraposition. Thus, there is the opportunity to analyze the different approaches taken in the two countries and to evaluate the results of each. It is this evaluative opportunity that perhaps gives the book an attraction for the reader. Although one may not necessarily agree with the evaluation of the experience, nevertheless the experience, and its results, are set forth and analyzed in its own environment. From this, the reader has the opportunity to reflect upon the potential lessons that may be contained in the particular approach and its results.

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Further, this is not a book limited to the problems of struggling to allocate rights and responsibilities solely over oil and gas. Rather, the title is reflective of the areas covered—management of natural resources, whether that resource be water resources, the environment, or the management of park lands and pristine areas in an age where development is often required to realize resource potential.

Two truisms seem to pervade the book, however. The first is that the management of natural resources is an inherently political endeavor, with parties, power and the timing of elections critical to understanding particular decisions reached and the course of administration that follows.

The second truism that is reinforced is that the state which struggles against the federal authority generally has wound up with a better deal from the federal government than have those which have not, at least from the point of view of those making the presentations. This seems to be the case whether the situation is the Coastal Zone Management Act in the United States or the various other altercations between state and federal authorities in Canada discussed in the book.

As might be expected, this is not a spell-binder that you would want to read on your next airplane trip. Further, as might be expected, this is a book with a definitely academic orientation. But if you are struggling with the policy issues involved in the federal-state dichotomy in the resource management area, this book offers insights into alternatives attempted and the perceived results. In that, it is constructive.