

Opinion No. 85.**Oil Conservation Board—Powers—
Personal Liability of Members
of the Board.**

HELD: 1. The production of crude oil in the state of Montana need not be limited to the amount allocated to the state by the Secretary of the Interior.

2. The Oil Conservation Board has power to prorate production in any oil field where waste is occurring.

3. The Board, being vested with a certain amount of discretion, the members of the Board, acting in the performance of a public duty which involves the use of discretion, are not personally liable in a civil action for damages arising out of their acts, where an error of judgment has been made, unless such acts were done corruptly or maliciously.

April 19, 1935.

Hon. E. B. Coolidge
Chairman, Oil Conservation Board
Great Falls, Montana

Your letter to us of March 25, is in part as follows:

"Some of the members of the Oil Conservation Board wish to know how far the Board can go in the proration of oil; first, whether the power to prorate is limited by the amount of allowable production allocated to Montana by the Federal Administrator; second, whether the Board has the power to prorate any particular field or fields individually or collectively or whether we would be required to prorate the whole State of Montana on a certain fixed basis; and third, whether or not the fact that some producers have contracts for all their crude production would exempt them from proration orders of the Board. These are the three questions I would like to submit to you for your opinion.

"It is my belief that we have the power to prorate and that we may or may not stay within the allowable fixed by the Government but if we do not want to be penalized by embargoes on interstate shipments of crude oil in excess of the fixed allowable we must stay within that

amount and that in prorating we may exercise our best judgment in determining what fields shall be prorated and how much based on consideration of markets, the nature of the fields and all other conditions which would affect the matter. This expression is not made with the intention of influencing your opinion in any way but I thought the expression may invite you to analyze the various angles as to what you think we are legally entitled to do.

"Some members also thought that there perhaps might be personal liability for any rulings of the Board which could be shown by any producer affected to have damaged him in any way. It is assumed that all members of the Board will act honestly and fairly with a view of doing justice between the various fields and producers. Assuming that the latter statement is a fact, what would be your opinion with reference to this personal liability?"

We will first deal briefly with the federal side of the question. Section 9(c), Title I, of the National Industrial Recovery Act of June 16, 1933, is as follows:

"The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed \$1,000, or imprisonment for not to exceed six months, or both."

In the case of *Panama Refining Co. v. Ryan*, 79 Law. Ed. 223, 293 U. S. 388, the supreme court invalidated this provision of the law as an unconstitutional delegation of legislative power, and at the same time invalidated certain pertinent Executive Orders and certain Regulations issued thereunder by the Secretary of the Interior. The court declined, however, to pass on the constitutionality of

some provisions of the Code of Fair Competition for the Petroleum Industry, including section 4 of Article III, as amended by Executive Order made on September 25, 1934, on the ground that the matter was not properly before it.

Sections 1, 2 and 9 of Chapter 18, Laws of Extraordinary Session 1933-34, provide:

"Section 1. The production of crude petroleum in the State of Montana in such manner, under such conditions and in such amounts as to constitute or result in waste is hereby declared to be opposed to the public interest and is hereby prohibited."

"Section 2. There is hereby created and established an Oil Conservation Board of the State of Montana to be known as 'Oil Conservation Board of the State of Montana', said Board shall consist of five (5) members to be appointed by the Governor, but may be removed by him at any time. They shall serve for two (2) years and until their successors are appointed and qualified, provided, however, that said Board shall be in existence only during such period as the Code of Fair Competition for the Petroleum Industry (approved by the President of the United States, August 19, 1933, or any amendments thereto, or revisions thereof) shall be in effect, it being the intention that the life of said Board shall be coterminous with that of the Code of Fair Competition of the Petroleum Industry, or amendments thereto or revisions thereof."

"Section 9. The Conservation Board shall have general power and it shall be its duty:

1. To have general control, regulation and supervision of the production, transportation and storage of crude petroleum within the State of Montana.

2. To make and prescribe rules and regulations, not inconsistent with the Constitution and Laws of the State of Montana, which shall govern the operation of wells for the production of crude petroleum and the conservation thereof and the transportation and storage of crude petroleum within the State of Mon-

tana for the effectual carrying out of any and all laws, regulations and orders with regard to crude petroleum production, transportation and storage made by the United States Government, or by the Department of the Interior of the United States of America, by the National Recovery Administration of the United States Government, or by the authorities administering the Code of Fair Competition for the Petroleum Industry and/or any amendments thereof or any revision or modification thereof.

3. To determine and prescribe what producing wells shall be defined as 'stripper wells', and to make such orders as in its judgment shall be required to protect said wells, and to provide that such wells may be produced to capacity if it is deemed necessary in the interest of conservation so to do, notwithstanding allocation or restriction of production of other wells. * * *

5. To act as a regulatory board or agency for any allocation and regulation of crude petroleum production and/or storage within the State of Montana under and in accordance with the terms and provisions of the Code of Fair Competition for the Petroleum Industry or any amendments or revision thereof, and to have full power and authority to carry out the provisions of said Code and to provide for the conforming thereto of all producers, transporters, dealers in and/or storers of crude petroleum within the State of Montana."

In Montana the rule is that petroleum and gas, so long as they remain in the ground, are a part of the realty. They belong to the owner of the land, and are a part of it, so long as they are on it or in it or subject to his control. When taken to the surface they become personal property and belong to the owner of the well. (*Gas Products Co. v. Rankin*, 63 Mont. 372; *Williard v. Federal Surety Co.*, 91 Mont. 465).

Accordingly, in the *Gas Products Company Case* the court held that Chapter 125, Laws of 1921 (secs. 3550-3552, Rev. Codes 1921), prohibiting the use or consumption of gas from a natural gas well in such man-

ner as to prevent the heat therein contained from being utilized for other manufacturing purposes or domestic purposes, was unconstitutional as depriving the owner of his property without due process of law. But the court significantly remarked: "We do not intend hereby to indicate as our opinion that the state government may not with propriety prevent the waste of natural resources, even though the lands on which they are produced are privately owned."

It is well settled that a state may, in the interest of the conservation of its natural resources and as a proper exercise of its police power, provide by legislation for the regulation of the production of crude oil in order to prevent waste as the term is commonly understood in that industry, and this is so whether the doctrine of qualified ownership or the doctrine of absolute ownership of the mineral in place prevails. (*Champlin Rfg. Co. v. Commission*, 286 U. S. 210; *Danciger Oil & Refining Co. v. Railroad Commission*, 49 S. W. 837; *Sterling Refining Co. v. Walker*, 25 Pac. (2d) 312; *People v. Associated Oil Co.*, 294 Pac. 717, 297 Pac. 536; *F. C. Henderson, Inc. v. Railroad Commission*, 56 Fed. (2) 218; *People's Petroleum Producers v. Sterling*, 60 Fed. (2) 1041; *Canadian River Gas Co. v. Terrell*, 4 Fed. Supp. 222; *Amazon Petroleum Corp. v. Railroad Commission*, 5 Fed. Supp. 633; 40 C. J. 1140.)

This brings us to the concrete questions involved herein. It is our view that the production of crude oil in the state of Montana need not be limited to the amount allocated to the state by the Secretary of the Interior, but it may not be prudent or business-like to exceed it, particularly when the power of congress over interstate commerce is considered. We believe the Board has power to pro rate production in any oil field where waste is occurring. Otherwise, its value as a conserving force would be much diminished. Great care must be exercised, however, to avoid discrimination against particular fields or against individual operators. The Board should not by order or regulation interfere with or prevent the full performance of any contract existing between a producer of crude oil as such and a purchaser or refiner at the

time that Chapter 18 became effective. Subsequent contracts of that kind would, no doubt, be affected by the provisions of the Act, for a law in force when a contract is made is a part thereof. (*State v. City Council of Great Falls*, 19 Mont. 518; 9 Montana and Pacific Digest, sec. 167 of "Contracts"; 6 Page on Contracts, sec. 3676.)

In the exercise of its powers the Board is of necessity vested with a certain amount of discretion. (*School Dist. No. 2 v. Richards*, 62 Mont. 141; 46 C. J. 1036.) The general rule is that members of a public board or commission, acting in the performance of a public duty which involves the use of discretion, are not personally liable in a civil action for damages arising out of their acts, where an error of judgment has been made, unless such acts were done corruptly or maliciously. (*Wilbrecht v. Babcock*, 228 N. W. 916; 46 C. J. 1043.)