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Corporation Commission Jurisdiction: The Oklahoma Supreme Court's about Face in Tenneco Oil Co. v. El Paso Natural Gas Co.

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RECENT DEVELOPMENT

CORPORATION COMMISSION JURISDICTION: THE OKLAHOMA SUPREME COURT'S "ABOUT FACE" IN *TENNECO OIL CO. v. EL PASO NATURAL GAS CO.*

I. INTRODUCTION

Recently, the Oklahoma Supreme Court readdressed the issue of the jurisdictional boundaries between the district courts of Oklahoma and the Oklahoma Corporation Commission ("Commission") in a rehearing of *Tenneco Oil Co. v. El Paso Natural Gas Co.*[1] Two years ago in its first hearing of this case, the court recognized that "[t]he zones of authority over matters saved to the special jurisdiction of the Commission and those which are within the general powers of the district court have become increasingly blurred as the Legislature and the administrative agency developed new patterns of regulation which were unknown at common law."[2] The court noted that as a direct consequence of this overlap of power, even the most sophisticated litigants are confused by the duality of jurisdiction.[3] In attempting to eliminate some of this confusion, the *Tenneco I* court held that "[i]n matters *created* by the Legislature and assigned to the Commission's adjudicative authority, the lines of demarcation between the district court and the Commission must be drawn along the public-law/private-law borderline."[4] The court found

1. Tenneco Oil Co. v. El Paso Natural Gas Co., 687 P.2d 1049 (Okla. 1984) [*Tenneco II*].

2. Tenneco Oil Co. v. El Paso Natural Gas Co., 53 OKLA. B.J. 2476, 2482 (Oct. 19, 1982) [*Tenneco I*].

3. *Id.*

4. *Id.* The public right/private right dichotomy evolved from an 1855 decision in which the Supreme Court recognized that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States." Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855); *see also* Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 204-214 (discussing problems with the public rights/private rights dichotomy); Note, *Subject Matter Jurisdiction of the Oklahoma Corporation Commission:* Tenneco Oil Co. v. El Paso Natural Gas Co., 19 TULSA L.J. 465, 468-74 (1983) (discussing the history and development of the public rights/private rights doctrine).

that the dispute over election under a pooling order involved public law and was therefore within the jurisdiction of the Commission.[5]

In July, 1984, the court vacated its 1982 decision in *Tenneco I*, replacing the holding in that case with one which creates a new "borderline" within the public law/private law dichotomy.[6] The following Recent Development will review the court's former ruling; comparing that decision with the one handed down in July, 1984. In addition, it will comment on the law as it now stands and the impact the change in the law will have on the oil and gas industry in Oklahoma.

II. *TENNECO I*

The basis of the lawsuit in *Tenneco* evolved from an Oklahoma Corporation Commission forced pooling order of oil and gas interests which granted Tenneco operator status providing it commenced operations within ninety days.[7] If Tenneco failed to begin operations within that period, El Paso would become the unit operator and Tenneco would have fifteen days within which it could elect to participate in the drilling of the well or, in lieu of participating, take a royalty interest with cash bonus.[8]

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5. *Tenneco I*, 53 OKLA. B.J. at 2482-83.

6. *Tenneco II*, 687 P.2d at 1054-55.

7. *Tenneco I*, 53 OKLA. B.J. at 2476. The Commission had established the 640 acre drilling and spacing unit for gas and gas condensate from common sources of supply in Roger Mills County. *Tenneco II*, 687 P.2d at 1051. The Commission then force-pooled the interests of Tenneco and El Paso by order dated May 9, 1977. *Id.* Forced pooling or compulsory pooling involves the bringing together of separately owned small tracts (or interests) in the same mineral supply under a valid regulation or order for the purpose of granting a well permit under applicable spacing rules. *See* 8 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW—MANUAL OF TERMS 149 (1984). Forced pooling is important to prevent the drilling of unnecessary or uneconomic wells which would result in physical and economic waste. *Id.*

Oklahoma law allows the Commission to issue forced pooling orders "to avoid the drilling of unnecessary wells, or to protect correlative rights" when owners of land or mineral interests within a spacing unit fail to "validly pool their interests and develop their land as a unit." OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1984).

8. *Tenneco II*,-687 P.2d at 1049; *Tenneco I*, 53 OKLA. B.J. at 2476. "Election to participate" is a means of choosing between options open to owners of pooled oil and gas interests by the terms of a forced pooling or unitization statute. *See* 8 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW—MANUAL OF TERMS 33 (Supp. 1983).

> Reduced to its simplest terms, the pooling order offers the non-consenting owner of oil and gas rights a choice: either (1) to pay his proportionate share of the cost of the well and receive the same share of the working interest; or (2) to receive a bonus in lieu of the right to participate in the working interest in the well.
>
> In order to make an intelligent election between these alternatives, the non-consenting owner is entitled to know how much it will cost for him to participate in the well and what he will receive as bonus if he chooses to forego participation.

Nesbitt, *A Primer on Forced Pooling of Oil and Gas Interests in Oklahoma*, 50 OKLA. B.J. 648, 649 (1979). The cost of drilling completion and equipping under the forced pooling order in *Tenneco* was estimated at $2,389,200.00. *Tenneco II*, 687 P.2d at 1051 n.4. "The forced-pooling order fur-

The pooling order did not specify how the election was to be communicated to El Paso and a controversy ensued.[9] Tenneco sued in the District Court of Roger Mills County to quiet its title to the working interest in the oil-and-gas leasehold estate.[10] Tenneco argued that it had communicated to El Paso its intention to participate in the well.[11] In response, El Paso claimed that Tenneco had failed to make a timely election to participate.[12]

An alternative theory of recovery focused on a joint operating agreement which Tenneco contended was binding on the parties.[13] The operating agreement was executed between Tenneco and El Paso subsequent to the issuance of the forced pooling order.[14] Tenneco proposed that the agreement allowed it to participate in the well regardless of whether or not there had been a valid election.[15] The district court ruled in Tenneco's favor, finding both a properly communicated election and a valid operating agreement which modified the Commission's forced pooling

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ther provided for payment of a cash bonus of $175.00 per acre plus an overriding royalty of 1/16 of 7/8 on oil and 7/8 on gas if a party did not participate." *Id.*

9. *Tenneco I*, 53 OKLA. B.J. at 2476-77. Paragraphs eight and nine of the pooling order discussed the election terms, but did not detail any method of election. *Tenneco II*, 687 P.2d at 1051 & n.4. An owner who failed to make an election was assumed to have chosen to accept the cash bonus and overriding royalty interests in lieu of participation. *Id.* At least one commentator has noted that an election should be in writing and directed to the unit operator. Nesbitt, *supra* note 8, at 652. The majority in *Tenneco II*, however, disputed any general rule and stated that "[a]n election can be written, oral, by estoppel, or according to statute, rule, or regulation." *Tenneco II*, 687 P.2d at 1055. The court further noted that "hundreds of the owners of mineral estates or interests who are subject to pooling or spacing orders are relatively unsophisticated and may not possess knowledge, experience, or expertise enough to make a formal election." *Id.*

10. *Tenneco I*, 53 OKLA. B.J. at 2476.

11. *Id.* On about July 21 or 22, 1977, Tenneco notified El Paso that it was unable to meet the drilling commencement deadline, thus informing El Paso that it would become unit operator. *Tenneco II*, 687 P.2d at 1051; *Tenneco I*, 53 OKLA. B.J. at 2476. In this same conversation between production managers, Tenneco allegedly communicated to El Paso its intention to participate in the well. *Tenneco II*, 687 P.2d at 1051; *Tenneco I*, 53 OKLA. B.J. at 2476. The election was later confirmed by a letter dated July 27, 1977. *Tenneco II*, 687 P.2d at 1051.

12. *Tenneco I*, 53 OKLA. B.J. at 2476 ("El Paso argued there was a failure to elect with the result that Tenneco's working interest in the well became 'vested' in El Paso on the date of expiration of the election period.").

13. *Id.* An operating agreement is an agreement among the working interest owners of properties within a pooling order which specifies the rights and duties of the unit operator and the other parties. *See* 8 H. WILLIAMS & C. MEYERS, *supra* note 7, at 592. "It is common practice for the operator to accept the written election to participate followed by execution of an operating agreement as satisfactory security, especially where the parties have engaged in joint operations before, or the pooled owner is a substantial operator of established reputation." Nesbitt, *supra* note 8, at 652. "However, the non-operating participant has no legal obligation to execute an operating agreement." *Id.* at 654. For examples of operating agreements, see 7 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §§ 920.2-.6 (1981).

14. *Tenneco I*, 53 OKLA. B.J. at 2481. The agreement was prepared by El Paso and sent to Tenneco on August 11, 1977. *Tenneco II*, 687 P.2d at 1052.

15. *Tenneco I*, 53 OKLA. B.J. at 2476.

order.[16]

It was not until El Paso appealed the district court decision that the issue of subject matter jurisdiction was raised. The Oklahoma Supreme Court raised this problem itself and framed the issue on appeal as "whether the district court had subject matter cognizance over the dispute about an operating agreement and over the contested validity of an election to participate in a gas well."[17]

On October 19, 1982, the court in *Tenneco I* held that the Commission had original jurisdiction over controversies involving the construction or declaration of rights set forth by the Commission's administrative decisions.[18] In holding that the district court did not have jurisdiction to decide the dispute which followed from a Commission-based order, the court grounded its decision on the Commission's constitutionally granted power[19] and its "exclusive statutory responsibility over oil-and-gas conservation and over the drilling and operation of oil-and-gas wells."[20] The court reasoned that the "[a]djudicative process of the Corporation Commission . . . is protected from judicial invasion"[21] and that this protection

> extends to (a) public rights that stand adjudicated by Commission orders as well as to (b) any private arrangements that attempt to change the terms of resolved public-law issues or to alter the legal effect of adjudicated rights. Some Commission-fashioned terms stand shielded not only from judicial invasion but also from inconsistent private contracts by which public rights are sought to be altered . . . . A barrier to district court cognizance appears to be absent only when private

16. *Id.* at 2481; *Tenneco II*, 687 P.2d at 1052.

17. *Tenneco I*, 53 OKLA. B.J. at 2476. The court in *Tenneco II* justified its initial raising of the jurisdiction issue by stating that "the Supreme Court of Oklahoma must inquire into its own jurisdiction *as well as the jurisdiction* of the trial court, whether or not raised by a party." *Tenneco II*, 687 P.2d at 1052 (citing Hawkins v. Hurst, 467 P.2d 159 (Okla. 1970)).

18. *Tenneco I*, 53 OKLA. B.J. at 2482. For a comprehensive overview of the 1982 decision, along with a criticism of the court's holding, see generally Note, *supra* note 4.

19. *Tenneco I, 53* OKLA. B.J. at 2481. The Oklahoma Corporation Commission has been granted authority to administer rules and regulations concerning oil and gas interests, along with other areas of state concern such as ratemaking. *See* OKLA. CONST. art. IX, § 18. The Commission was created under the authority of the Oklahoma Constitution and is an agency which has legislative, executive and judicial powers as both an administrative board and a judicial tribunal. *Id.* §§ 15-19. The Oklahoma Constitution has given the Commission the same authority as a court of record within its own jurisdiction and the power to enforce compliance with any order which it sees fit to issue. *Id.* § 19.

20. *Tenneco I*, 53 OKLA. B.J. at 2481 (citing OKLA. STAT. tit. 17, § 51 (1981)). The Commission's authority with respect to forced pooling orders is set forth in title 52, section 87.1 of the Oklahoma Statutes.

21. *Tenneco I*, 53 OKLA. B.J. at 2484 n.27. The court stated that such protection was derived from "those provisions of our fundamental law which proscribe collateral attacks on Commission orders in the district courts" and from statutory implementation of constitutional mandates. *Id.*

arrangements neither affect nor alter the terms of extant Commission orders.[22]

The court, therefore, delineated the jurisdictional dispute along a public law/private law dichotomy.[23] The court opined that the Commission had no jurisdiction to adjudicate differences between private individuals in litigation involving "purely" private interests.[24] On the other hand, when the core of the dispute was a claim fashioned by the state in furtherance of the public interest, the disposition of the issues belonged exclusively to the Commission.[25] Thus, if two private parties were disputing the construction or interpretation of an operating agreement arising from a forced pooling order handed down by the Commission, as in the *Tenneco* case,[26] those parties would have to argue their case to the Commission and not the court.[27] If, however, those same parties had the same type of dispute on a contract which was not the result of a forced pooling order, they would be within the exclusive jurisdiction of the courts.[28]

The rationale for the public law/private law approach was that forced pooling orders, being statutory creatures unknown at common law, were created in the public interest.[29] Any disputes arising over the terms of the pooling order were, therefore, within the exclusive domain of the administrative agency which initially created the order—in this case, the Corporation Commission.[30] Inasmuch as the operating agreement election "terms were *incidental* to the election provisions fashioned by the Commission [pooling] order," the election dispute was also an

22. *Id.* (citing Crest Resources & Exploration Corp. v. Corporation Comm'n, 617 P.2d 215 (Okla. 1980)).

23. *Tenneco I*, 53 OKLA. B.J. at 2482.

24. *Id.* (citing Burmah Oil & Gas Co. v. Corporation Comm'n, 541 P.2d 834 (Okla. 1975)).

25. *Tenneco I*, 53 OKLA. B.J. at 2482.

26. Tenneco's alternative theory of recovery was that a valid operating agreement entered between Tenneco and El Paso allowed Tenneco to participate in the well regardless of whether or not an election had occurred. *Id.* at 2476.

27. *Id.* at 2482.

28. The court cites *Crest Resources & Exploration Corp. v. Corporation Comm'n*, 617 P.2d 215 (Okla. 1980), for the proposition that parties whose interests are pooled are free to enter into private agreements to govern their relationship so long as they do not "transfer the operator's public-law-delegated primary responsibility." *Id.* at 2484 n.23.

29. *Tenneco I*, 53 OKLA. B.J. at 2481.

30. *Id.* at 2481-82. The court noted that the district court has "unlimited original jurisdiction of all justiciable matters . . . except . . . such powers of review of *administrative action as may be provided by statute.*" *Id.* (quoting OKLA. CONST. art. VII, § 7). Furthermore, only the Oklahoma Supreme Court has the statutory power to review Commission orders made pursuant to the oil-and-gas conservation statutes. *Id.* at 2482 (citing OKLA. STAT. tit. 52, § 111 (1981)). Thus, Commission pooling orders may not be reviewed by the district courts. *Id.*

issue of public interest.[31] The question left open by *Tenneco I* was whether the court intended for all private contracts which altered, modified, or specified the terms of an effective forced pooling order, to require notice to interested parties, a hearing before the Commission and ultimate approval by the Commission.[32]

III. THE HOLDING IN *TENNECO II*

A. *Jurisdiction*

On July 17, 1984, in a 7-2 decision, the court vacated its opinion in *Tenneco I* and thereby affirmed the trial court's original holding.[33] In *Tenneco II*, the court stated that "the enactments [of the Commission] for the conservation of oil and gas are public in nature and that the spacing order, the pooling order, and the order fixing allowables, to name but a few of its functions, are within the realm of the public rights to be protected."[34] The purpose of the Commission is to "look after the rights of the body politic."[35] By law, the Commission must protect this "body politic" to achieve its purpose.[36] This is not to say that all controversies involving Commission orders are within the exclusive domain of the Commission.[37] Thus, the liability of one individual to another under a

31. *Tenneco I*, 53 OKLA. B.J. at 2482. In the first part of its opinion the court argued that the election is an offspring of the pooling order which is under the charge of the Commission. *Id.* at 2481. The court contended that since pooling disputes are within the adjudicative purview of the Commission, disputes as to election should be similarly governed. *Id.* at 2482. In the second part of its opinion the court discussed elections as handled in the operating agreement and stated that "[t]he error in labeling such a matter as a private claim ignores the public-interest core from whence the 'contract' evolved." *Id.*

32. The court did not directly address this issue in *Tenneco I*. The court did note the requirements of notice and hearing prior to the issuance of a pooling order. *Tenneco I*, 53 OKLA. B.J. at 2481 (citing OKLA. STAT. tit. 52, § 87.1 (1981)). For a further discussion of the notice and hearing requirements of forced pooling orders, see generally Kramer, *Pooling and Unitization Orders—Application of Administrative Law Principles*, 34 INST. ON OIL & GAS L. & TAX'N 259, 284-87 (1983); Nesbitt, *supra* note 8, at 655-56. In *Tenneco II*, Justice Opala directly addressed the issues of notice and hearing in his dissenting opinion by stating that:

> Although by contract the parties may vary a pooling order's election provision, they must do so on due notice to all other interested parties and upon a hearing before, and approval of, the Corporation Commission. A contrary rule would enable the operator to discriminate in favor of or against some bearers of the Commission-conferred election rights.

Tenneco II, 687 P.2d at 1060 (Opala, J., dissenting) (footnote omitted).

33. *Tenneco II*, 687 P.2d at 1056.

34. *Id.* at 1052.

35. *Id.*

36. *Id.*

37. *Id.* at 1054-55; *see, e.g.*, Stipe v. Theus, 603 P.2d 347 (Okla. 1979) (money judgments based on the Commission's final adjudication are private law matters and thus within the jurisdiction of the district court); Shell Oil Co. v. Keen, 355 P.2d 997 (Okla. 1960) (sanctioning private action for an accounting which was based upon a final order of the Commission).

contract, including an operating agreement, is a matter of private rights, and private-right disputes have historically been a matter for judicial interpretation.[38] Inasmuch as the parties in the *Tenneco* action were not attempting to "change or challenge the public issue of conservation of oil and gas," the dispute over election, whether or not the operating agreement was given effect, was a private dispute and properly within the jurisdiction of the district court.[39]

Nonetheless, the court did set forth a guideline as to when a private contract will become a "public issue" under the new public right/private right boundary when it noted that: "The limitation being *always omnipresent* is that no private contract or operating agreement may cause or grant a license to commit waste, or diminish correlative rights, control of which is exclusively within power of Corporation Commission."[40]

B. *Burden of Proof and Standard of Review*

After establishing the district court's jurisdiction over the contracting parties' rights and duties, the court acted on El Paso's request for the court to rule on the burden of proof Tenneco would have to maintain in order to establish an election under the Commission's forced pooling order and on what would constitute the appropriate standard of review.[41] El Paso contended that the appropriate burden of proof in this case was "clear and convincing" evidence of an election.[42]

The court declined to assign such a high standard and instead announced that the appropriate burden of proof would be the same as that which the district court had applied—a "mere preponderance of the evidence."[43] The court relied on the reasoning of the Supreme Court of Idaho which had observed that: "The rationale for a 'clear and convincing' evidentary [sic] standard rests in the value the law places on the integrity of a formal writing."[44] While noting that in Oklahoma the "clear and convincing" standard must be applied to establish adverse

38. *Tenneco II*, 687 P.2d at 1053-54.
39. *Id.*
40. *Id.* at 1053 (footnotes omitted).
41. *Id.* at 1055.
42. *Id.* El Paso pointed out to the court that the exact nature of the burden of proof which Tenneco and others similarly situated had to bear had never been defined by the court. *Id.*
43. *Id.*
44. *Id.* (quoting Lynch v. Cheney, 98 Idaho 238, __, 561 P.2d 380, 385 (1977)). *Lynch* concerned an allegation that an ex-wife had orally agreed to cancel arrearages on a written judgment. *Lynch*, 98 Idaho at __, 561 P.2d at 382. The court ruled that in order to prove an oral agreement to cancel a judgment debt, the defendant must meet the clear and convincing standard of proof. *Id.* at __, 561 P.2d at 385.

possession[45] and to reform oil and gas leases,[46] the court held that it was not necessary to apply this strict a test to the facts presented in *Tenneco*. "Tenneco . . . does *not* challenge the sanctity or integrity of a written judgment, order or instrument. At issue is the meaning of provisions in the forced-pooling order dealing with election"[47] and whether Tenneco made a timely election under those provisions. The court held that "[a]n election can be written, oral, by estoppel, or according to statute, rule, or regulation, to name but a few methods."[48] Thus, the election must be proved only by a preponderance of the evidence.[49]

The court had little difficulty in determining the proper standard of review. The court noted that in reviewing matters of equity, the appellate court should affirm the lower court if the judgment is not clearly against the weight of the evidence.[50] Since the district court's ruling was not against the weight of the evidence, nor was there a finding contrary to law or principles of equity, nor did grounds for reversal exist merely because it was possible to draw a different conclusion, the court allowed the district court's ruling to stand and vacated its own decision in *Tenneco I*.[51]

C. *The Dissent*

Justice Opala maintained that disputed claims to participation rights based on a Commission's forced pooling order were exclusively within the jurisdiction of the Corporation Commission.[52] Moreover, Opala's dissent in *Tenneco II* does more than reiterate the arguments presented in *Tenneco I*; it expands upon them and offers additional support for the position.[53]

45. *See* Pavlovitch v. Wommack, 206 Okla. 158, 161, 241 P.2d 1119, 1122 (1952); Rodgers v. International Land Co., 111 Okla. 98, 100, 238 P. 407, 408 (1924).

46. *See* Davis v. Keeche Oil & Gas Co., 89 Okla. 226, 230, 214 P. 711, 714 (1923).

47. *Tenneco II*, 687 P.2d at 1055 (citing parts of the agreement at issue to demonstrate the problem was indeed one of interpretation and not reformation).

48. *Id.*

49. *Id.*

50. *Id.* (citing Caywood v. January, 455 P.2d 49 (Okla. 1969); Tenneco Oil Co. v. Humble Oil & Ref. Co., 449 P.2d 264 (Okla. 1969); Moree v. Moree, 371 P.2d 719 (Okla. 1962); Priddy v. Shires, 204 Okla. 664, 233 P.2d 298 (1951)).

51. *Tenneco II*, 687 P.2d at 1055-56.

52. *Id.* at 1056-61 (Opala, J., dissenting).

53. Justice Opala began his dissent in *Tenneco II* by refuting the argument that primary jurisdiction would be a preferable means of settling jurisdiction disputes between the district court and the Commission. *Id.* at 1056. Opala argued that application of the doctrine of primary jurisdiction "would not *dispense* with having to draw a line of demarcation between district court 'issues' and those lying within the exclusive cognizance of the Commission." *Id.* at 1057. Opala next discussed the relationship of the election issue to the pooling order, noting that the trial court was erroneous in

Justice Opala argued that article 9 of the Oklahoma Constitution prohibits any court except the state supreme court from reviewing a Commission order,[54] and concluded that this prohibits a district court from supplying missing terms to an order or determining the compliance or noncompliance with an order.[55] Furthermore, an election right "cannot be transformed into a private contract interest by the magic of a subsequent operating agreement"[56]—it is a Commission-conferred right and, therefore, a public right.[57] In addition, Opala noted that operating agreements "do not embody purely private arrangements but are mere extensions of the statutorily created and regulated interest."[58]

In conclusion, Opala stated that although "Oklahoma is long overdue for a bright and consistent boundary line"[59] separating the district court's powers from that of the Commission's, the public interest is not furthered "when the line drawn places beyond the Commission's reach those post-pooling-order claims which are vital to the enforcement scheme of its regulatory power."[60]

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assuming "that an election right may be altered by *less than all* of its holders acting without approval of the Commission." *Id.* at 1059. To allow otherwise would be tantamount to allowing the state to "surrender or share its police power" with a private party. *Id.* Thus, Opala contended that:

> [T]he question whether an option holder did timely and effectively exercise his right of election under a pooling order is to be gauged not by the familiar offer-and-acceptance test of the contract law but rather by the holder's compliance with the terms provided in the source by which the right was conferred [i.e., the pooling order].

Id. at 1059-60.

54. *Id.* at 1058.

55. *Id.* at 1058-59.

> The conclusion to be drawn from case law is that when a pooling order is *facially void* for want of notice, a district court may declare it ineffective, *but* if the working interest owner, deprived of participation option by want of notice, seeks an opportunity to elect, the Commission constitutes the *sole tribunal* with power to grant relief. Because El Paso sought to invalidate Tenneco's election not on the basis of facial invalidity but because of Tenneco's alleged noncompliance with the terms of the Commission's pooling order, subject-matter cognizance of the dispute resided *solely* in the Commission.

Id. (footnotes omitted).

56. *Id.* at 1060.

57. *Id.* Justice Opala noted the risk of allowing parties to contract privately on issues such as election and stated that "the Commission-imposed result of an election or non-election under the pooling order may not be negated, modified or abridged by the district court's unwarranted assumption of adjudicative authority over a disguised private contract issue." *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1061.

IV. ANALYSIS

A. *Limited Jurisdiction of the Corporation Commission*

Stressing that the Commission is a tribunal of limited jurisdiction,[61] the *Tenneco II* court approvingly cited *Burmah Oil & Gas Co. v. Corporation Commission*[62] and *Kingwood Oil Co. v. Hall-Jones Oil Corp.*[63] In *Burmah*, the court relied extensively on precedent[64] to determine that the Commission had no jurisdiction over a controversy between two private concerns.[65] *Burmah* involved a dispute concerning an Oklahoma statute providing for the connection of a landowner's premises with a corporation's gas pipeline whenever the corporation places its pipeline across the land or premises of one outside of a municipality.[66] Burmah Oil & Gas Company brought the action to prohibit the Commission from ordering it to furnish gas to Putman, an individual.[67] Burmah argued that the Commission had no jurisdiction to enforce the statute in question.[68] In holding for Burmah, the court emphasized that the Commission "has such jurisdiction and authority only as is expressly or by necessary implication conferred upon it by the [Oklahoma] Constitution and the statutes."[69] Since the statute at issue did not confer jurisdiction upon the Commission and since the Commission was unable to cite any applicable constitutional provisions from which Commission power could be in-

61. *Id.* at 1053.

62. 541 P.2d 834 (Okla. 1975).

63. 396 P.2d 510 (Okla. 1964).

64. *Burmah*, 541 P.2d at 836 (citing, respectively, Smith v. Corporation Comm'n, 101 Okla. 254, 225 P. 708 (1924); Chicago, R.I. & P. Ry. v. State, 158 Okla. 57, 12 P.2d 494 (1932); Gibson v. Elmore City Tel. Co., 411 P.2d 551 (Okla. 1966); Southern Union Prod. Co. v. Corporation Comm'n, 465 P.2d 454 (Okla. 1970)).

65. *Burmah*, 541 P.2d at 836.

66. *See* OKLA. STAT. tit. 52, § 10 (1981). Section 10 provides that:

> Every gas pipeline corporation or individual in this state is hereby given authority to build, construct and maintain gas pipelines, over, under, across or through all highways, bridges, streets, or alleys in this state, or any public place therein, under the supervision of the inspector of oil and gas as to where and how in said highways, bridges, streets, alleys and public places said pipelines shall be laid, subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted, and subject to responsibility as otherwise provided by law; provided, however, that whenever any gas pipeline crosses the land or premises of anyone outside of a municipality, said corporation shall, by request of the owner of said premises, connect said premises with a pipeline and furnish gas to said consumer at the same rate as charged in the nearest city or town.

Id.

67. *Burmah*, 541 P.2d at 834-35.

68. *Id.* Burmah argued application of the statute to them would be unconstitutional and that, further, the Commission had no authority, express or implied, to enforce the statute. *Id.* The court did not consider the constitutionality of the act, but instead based its ruling upon the jurisdictional issue. *Id.* at 835-36.

69. *Id.* (quoting Oklahoma City v. Corporation Comm'n, 80 Okla. 194, 195 P. 498 (1921)).

ferred, the court was unable to find any grounds for granting the Commission jurisdiction over a dispute between two private parties.[70]

In *Kingwood*, the court was faced with whether the Commission had jurisdiction over a suit for "depreciation of the reasonable value of plaintiff's oil and gas leasehold estate."[71] The plaintiff claimed the loss was caused by the defendant's publication of a report stating that the defendant had drilled a dry hole in a "permitted location" of a spacing unit.[72] The defendant, relying on Oklahoma's forced pooling statute,[73] claimed the Commission had exclusive jurisdiction.[74] The unit in question had not been pooled, either voluntarily or by Commission order.[75]

The court held that because neither the drilling of unnecessary wells, nor the protection of correlative rights was at issue, the Commission had no "necessarily implied" jurisdiction under the Oklahoma statute.[76] Moreover, the court explicitly noted that there was no language in the statute which would confer jurisdiction on the Commission to try a damages suit sounding in tort.[77]

Although *Burmah* and *Kingwood* are both valid precedent for the general rule that the Commission has limited adjudicatory authority, neither case is factually similar to *Tenneco*. *Burmah* is relevant to ascertaining Commission jurisdiction when a statute is at issue, but involved neither Commission orders, nor any contractual rights relating to orders. *Kingwood* is more closely related to *Tenneco* insofar as it addresses Oklahoma's forced pooling statute, but can be distinguished because it involves a tort action. Due to these differences, neither case contributes

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70. *Id.*

71. *Kingwood*, 396 P.2d at 511.

72. *Id.*

73. *See* OKLA. STAT. tit. 52, § 87.1(d) (1981).

74. *Kingwood*, 396 P.2d at 512. Defendant's jurisdictional argument relied on Commission Order 49779 which stated:

> That in the event there are divided or undivided interests within any unit and the parties are unable to agree on a plan for the development of the unit, then their rights and equities shall be adjudicated by the Commission as provided for by subsection d, Section 87.1, Title 52, 1951 O.S.A.

Id. at 511. Defendant asserted that: "Under the terms of said order and under the provisions of Title 52, Okla. Stat., 1961, Sec. 87.1, the exclusive jurisdiction to determine the rights and obligations of lessees within the drilling and spacing unit is vested in the Oklahoma Corporation Commission." *Id.* at 511. Defendant further claimed that it was irrelevant that this was a tort action and what was material was that the dispute concerned "two lessees in a drilling and spacing unit growing out of their rights as such lessees." *Id.* at 512. Such disputes, it claimed, were within the jurisdiction of the Commission. *Id.*

75. *Id.* at 511.

76. *Id.* at 513.

77. *Id.* at 512.

to a logical argument demonstrating why the *Tenneco* controversy should be dealt with by the court instead of by the Commission.

B. *Conservation and Cost Allocations—The Commission's Domain*

One of the more puzzling aspects of the *Tenneco II* opinion is what the court has failed to address. Virtually omitted from the opinion is a line of Oklahoma authority directly involving the jurisdictional authority of the court vis-a-vis the Commission in controversies resulting from Commission orders.[78]

In 1955, the Supreme Court of Oklahoma decided the case of *Cabot Carbon Co. v. Phillips Petroleum Co.*[79] In *Cabot* the court recognized the power of the Commission to clarify its previous orders without invading the exclusive province of the courts.[80] The case involved a dispute over the price to be paid for gas.[81] The dispute arose from a conflict between the price set forth in two Commission pricing orders and the price paid pursuant to a private contract.[82] The court upheld a subsequent Commission order which explained the scope of the two previous pricing orders.[83] The subsequent order stated that the pricing orders the Commission had previously issued merely set forth the minimum price to be paid for the gas produced from a certain area and did not interfere in any way with the ability of private parties to contract for a price over and above that minimum amount.[84] In ruling on this matter, the court expressly adopted a jurisdictional view which emphasized the importance of the state's non-interference with private contract rights.[85]

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78. The Oklahoma precedent spans almost 30 years of decisions which appear to be relevant to a jurisdictional inquiry involving Commission orders. Conspicuously missing from the court's opinion are the following cases: Cabot Carbon Co. v. Phillips Petroleum Co., 287 P.2d 675 (Okla. 1955); Crest Resources & Exploration Corp. v. Corporation Comm'n, 617 P.2d 215 (Okla. 1980); and Amarex, Inc. v. Baker, 655 P.2d 1040 (Okla. 1982).

79. 287 P.2d 675 (Okla. 1955).

80. *Id.* at 679 (citing OKLA. STAT. tit. 52, § 112 (1951)).

81. *Id.* at 676.

82. *Id.* at 676-77. The power of the Commission to issue pricing orders is implied from section 239 of Oklahoma's oil and gas statutes which provides that the Commission has the authority to "prescribe rules and regulations . . . to regulate the taking of natural gas from any or all such common sources of supply . . . so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom." OKLA. STAT. tit. 52, § 239 (1981).

83. *Cabot*, 287 P.2d at 677-78.

84. *Id.* at 677.

85. *Id.* at 678. The court in *Cabot* adopted the jurisdictional viewpoint expressed by the dissenting opinion in Phillips Petroleum Co. v. Cabot Carbon Co., 210 F.2d 841, 846-47 (10th Cir. 1954). *Id.* at 678. In that case, Judge Pickett noted that: "A statute, rule or regulation may not, under the guise of police power or public interest, impair or interfere with private contracts or property rights." *Phillips*, 210 F.2d at 846-47 (Pickett, J., dissenting).

Another relevant case, mentioned only briefly in *Tenneco II*,[86] is *Southern Union Production Co. v. Corporation Commission*.[87] *Southern Union* involved an election dispute over the terms set forth in a Commission pooling order.[88] Under the order Eason Oil Company had an opportunity to elect to participate in a well or receive a cash bonus.[89] Eason chose to receive the cash bonus.[90] After Southern Union drilled and abandoned a nonproducing well, Eason requested that the Commission issue a second order to interpret the original pooling order.[91] Eason argued that it was, in fact, merely requesting that the Commission "supplement" its previous order.[92] Section 112 of Oklahoma's oil and gas statutes grants any person affected by a Commission order the right to petition the Commission to repeal, amend, modify, or supplement the same.[93] The Commission complied with Eason's request and entered an order terminating the rights of the parties under the previous order.[94] The court held that the Commission acted beyond its proper statutory authority when it executed an order which, in essence, determined the legal rights of the parties under the original pooling order.[95] For this reason, the subsequent Commission order was void.[96]

Crest Resources & Exploration Corp. v. Corporation Commission,[97] cited frequently in *Tenneco I*,[98] is totally omitted from the *Tenneco II* decision. Crest, a lessee subject to a Commission pooling order, sought to have the pooling order vacated or, in the alternative, modified after it found out that the Commission-designated operator had transferred its management responsibilities to a new operator and the new operator had revised the estimated chargeable drilling costs.[99] The court held that the Commission was correct in refusing to vacate the pooling order,[100] but

86. *See Tenneco II*, 687 P.2d at 1053.
87. 465 P.2d 454 (Okla. 1970).
88. *Id.* at 455-57.
89. *Id.* at 456.
90. *Id.*
91. *Id.* at 457. (Eason requested that the Commission declare "that all of the effectiveness of said [prior] Order is gone and that no party is either bound by, or has any further interest in, the provisions thereof").
92. *Id.*
93. OKLA. STAT. tit. 52, § 112 (1981).
94. *Southern Union*, 465 P.2d at 457.
95. *Id.* at 457-58.
96. *Id.* at 458.
97. 617 P.2d 215 (Okla. 1980).
98. *See Tenneco I*, 53 OKLA. B.J. at 2483-84 nn. 18, 23-27.
99. *Crest*, 617 P.2d at 216-17.
100. *Id.* at 218 ("As that plea collapsed for lack of evidentiary support, the Commission properly refused to vacate the pooling order.").

ruled that the Commission must act on Crest's modification request.[101]

Finally, the most recent case concerning the jurisdictional line between the district courts and the Commission when a Commission order is involved is *Amarex, Inc. v. Baker.*[102] *Amarex* was handed down by the court in December, 1982,[103] about two months after the court reached its decision in *Tenneco I.*[104] In *Amarex*, the court dealt with the specific issue of "whether the Commission had jurisdiction and power to determine . . . the wording in its order."[105] The court reviewed the holdings cited above[106] and stated that, in the *Amarex* case, "[t]he Commission was not asked . . . to determine the legal effect of its pooling order or the legal consequences thereof. Rather, it was asked to exercise its statutory authority to determine *additional development costs* and, if found to be necessary and reasonable, to fix the amount thereof."[107] The court then held that "the jurisdictional powers vested in the Commission under § 87.1(e)[108] to determine development costs carries with it those implied powers which are necessary to review and determine the true intent of the Commission as expressed in the language of its orders issued within its legislatively prescribed jurisdiction."[109] Thus, according to the power vested in it by section 87.1(e), the Commission was found to have the power and jurisdiction to construe the meaning of the language used by it in its order.[110]

The failure of the court to discuss the foregoing cases makes it difficult to ascertain how the *Tenneco II* decision impacts this line of prece-

101. *Id.* at 219. The court remanded for reconsideration of Crest's alternative claim for modification by redesignation of chargeable drilling costs. *Id.* The court noted that the Commission does retain primary jurisdiction to adjudicate the liability attachable to interest holders in the event of a dispute over the reasonableness of expenditures to be charged. *Id.* at 218. (citing Stipe v. Theus, 603 P.2d 347 (Okla. 1979); OKLA. STAT. tit. 52, § 87.1(e) (1977)).

102. 655 P.2d 1040 (Okla. 1982).

103. *Id.*

104. *See Tenneco I,* 53 OKLA. B.J. at 2476.

105. *Amarex,* 655 P.2d at 1043. Specifically, the court was asked to determine whether the operator, who encountered difficulties in drilling a Commission-authorized well, could "skid" his rig over six feet and recommence drilling operations on a second borehole while still binding those interest owners who elected to participate in the drilling of the initial well. *Id.* at 1042.

106. *Id.* at 1043-44 (discussing its previous rulings in *Cabot, Crest* and *Southern Union).*

107. *Id.* at 1044 (emphasis added).

108. OKLA. STAT. tit. 52, § 87.1(e) (1981). This statute generally gives the Commission the authority to establish well spacing and drilling units and states "[i]n the event of any dispute relative to . . . costs, the Commission shall determine the proper costs." *Id.*

109. *Amarex,* 655 P.2d at 1045; *see also* Lear Petroleum Corp. v. Seneca Oil Co., 590 P.2d 670, 673 (Okla. 1979) (Commission has the "lawful authority to 'determine the proper costs' " and the implied authority to provide for payment of development costs by participating interest owners "in a reasonable time certain").

110. *Amarex,* 655 P.2d at 1045.

dents. Nonetheless, a pattern for predicting future decisions can be established through an examination of these holdings.

Crest and *Amarex* are both cases involving controversies over the cost aspects of drilling wells on common sources of supply and as such are governed by section 87.1(e) of Oklahoma's oil and gas statutes.[111] Section 87.1(e) states that "[i]n the event of any dispute relative to . . . costs, the Commission shall determine the proper costs."[112] Thus, the Commission has been legislatively granted primary jurisdiction over drilling disputes which involve the determination of the proper costs to be assessed the parties to a pooling order.[113] When *Crest* spoke of the Commission having primary jurisdiction over the controversy before it and charged the Commission to review Crest's modification request,[114] the court was merely following the jurisdictional mandate set forth by the Legislature for the determination of drilling costs on common sources of supply.[115] Similarly, in *Amarex*, when the court encountered another dispute over costs incurred in drilling a well, the court held that the Commission had the implied powers necessary under section 87.1(e) to review and determine the true intent of the orders.[116]

Some commentators have interpreted *Amarex* more broadly and thus imply that *Amarex* has appeared to limit *Southern Union's* holding.[117] This interpretation is reached by broadly construing *Amarex* to

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111. *See supra* notes 97-110 and accompanying text.

112. OKLA. STAT. tit. 52, § 87.1(e) (1981).

113. *See Crest*, 617 P.2d at 218; *see also* Recent Development, *Interpretation of Corporation Commission Orders: The Dichotomous Court/Agency Jurisdiction*, 8 Okla. City U.L. Rev. 311, 329-30 (1983) (discussing the "primary jurisdiction" dicta of *Crest*).

114. *Crest*, 617 P.2d at 218-19.

115. *See* OKLA. STAT. tit. 52, § 87.1(e) (1981).

116. *Amarex*, 655 P.2d at 1045.

117. *See* Note, *supra* note 4, at 486, stating:

> To further complicate matters, the Oklahoma Supreme Court recently issued an interpretation of the Commission's powers that was *contrary to the interpretation* in *Southern Union* . . . . In *Amarex*, the court held that the jurisdictional powers vested in the Commission carry those implied powers necessary to review and determine the Commission's true intent as expressed in its orders issued within its legislatively prescribed powers.

(Emphasis added). *See also* Recent Development, *supra* note 113, at 313, noting that:

> The court in *Amarex* explains that the Commission has jurisdiction where the "clarification" of the original order does not assail that order but merely illuminates its meaning.
>
> *Amarex* does more than reconfirm the prior pronouncement in *Cabot Carbon Co. v. Phillips Petroleum Co.*, wherein the supreme court holds that the Commission has jurisdiction to "clarify" its previous orders. *Amarex* goes beyond the rule in *Cabot* in that the subsequent order may supply the Commission's intent where the original order is either general in nature or is silent on the matter. The previous order need not be merely ambiguous for the Commission to properly enter a clarification order.

(Footnotes omitted). *But cf.* Lowe, *Mineral Law Section Annual Survey of Significant Developments*, 54 OKLA. B.J. 859, 863 (1983) (discussing the *Amarex* opinion and stating that: "The court held

mean that the court has given the Commission almost unlimited authority to interpret its prior orders for the purpose of determining and carrying out its true intent.[118] Nonetheless, on carefully examining the court's holding[119] and analyzing the structure of the *Amarex* opinion,[120] a much narrower view of *Amarex* may be in order. According to this limited interpretation, *Amarex* is only holding that the Commission has the implied power to review and determine the true intent of its prior orders "within its legislatively prescribed jurisdiction"[121]—i.e., when it is determining a dispute relative to development and operation costs.[122] When the Commission is outside of a cost-type controversy, it generally has no express or necessarily implied legislatively granted authority to determine the *legal effect* of one of its orders or the *legal consequences* thereof.[123]

The only two other occasions where it could be inferred that the Commission has the authority to determine the legal effect of its own orders are when such a determination is necessary in order for the Commission to carry out its authorized powers and purposes of preventing waste and protecting correlative rights.[124] The court in *Southern Union*

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that the commission's power to determine development costs carries with it implied powers to review and determine the true intent of its orders.").

118. *See* Recent Development, *supra* note 113, at 312-13.

119. *See supra* notes 106-10 and accompanying text.

120. In setting forth the *Amarex* opinion, the court first stated that the continuing jurisdiction of the Commission to determine costs is no longer subject to question. *Amarex*, 655 P.2d at 1043 (quoting OKLA.STAT. tit. 52, § 87.1(e) (1981)). The court then discussed *Crest*, a case which dealt with the jurisdiction of the Commission in relation to a cost dispute and *Cabot*, a case involving the clarification of a pricing order based on title 52, section 112 of the Oklahoma Statutes. *Id.* at 1043-44. The *Amarex* court distinguished the facts before it from both *Cabot* and *Southern Union*. *Id.* at 1044. *Southern Union* involved an election under a pooling order. *Id.* The court in *Southern Union* declined to allow the Commission to "interpret" any of its prior orders or determine their legal consequences. *Id.* The court next discussed Stipe v. Theus, 603 P.2d 347 (Okla. 1979), another jurisdiction case dealing with costs. *Id.* at 1044-45. Finally, the court made a specific holding, citing title 52, section 87.1 of the Oklahoma Statutes and noting the Commission's legislative authority in regard to determining costs. *Id.* at 1045.

121. *Id.*

122. *See* OKLA. STAT. tit. 52, § 87.1(e) (1981). Another commentator views *Amarex* as turning not on the cost issue, but rather on the issue of whether the Commission is deciding legal rights or construing its own orders. Recent Development, *Oil and Gas: Ability of the Oklahoma Corporation Commission to Interpret Its Own Orders*, 36 OKLA. L. REV. 467, 469 (1983). This author suggested that: "Perhaps a case-by-case analysis of each fact situation will be required to determine whether the Commission is deciding legal rights of the parties or simply construing its order." *Id.*

123. *See Amarex*, 655 P.2d at 1044 (distinguishing the case before it from *Southern Union* and noting that the Commission is here being asked to determine additional development costs).

124. Section 87.1(a) of Oklahoma's oil and gas statutes sets forth the statutory powers of the Commission:

> To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of

noted this possibility, but found it inapplicable to the facts at hand:

> While such an order [a subsequent order interpreting a prior order] could perhaps be valid if it was necessarily incident to the exercise of the statutory powers of the Corporation Commission to "prevent or assist in preventing (waste)," or, to protect the correlative rights of interested parties in a common source of oil and/or gas, such was not the intended, nor was it in fact, the effect of the Commission's Order . . . .[125]

Tenneco was not a cost-based controversy as were *Crest* and *Amarex*. Although Justice Opala contended the *Tenneco* controversy affected the core of the Commission's statutory powers to prevent waste and protect correlative rights,[126] the majority of justices in *Tenneco II* did not adopt this position.[127] The facts in *Tenneco* more closely resemble a private contract dispute than a dispute impacting oil and gas conservation or correlative rights. The district court has the proper jurisdiction, as well as the expertise, to determine whether a party complied with the terms of a contract. Thus, it has the jurisdiction to determine whether or not Tenneco made a valid election to participate under the terms of the pooling order or the operating agreement.[128]

In summary, the *Tenneco* dispute does not fit into any of the three areas which the court had previously determined were properly within the Commission's domain.[129] In fact, *Tenneco*'s fact situation was closer to that of *Southern Union* than any of the other jurisdictional cases the court has ruled on in the last thirty years.[130] This would appear to explain the court's rationale for citing *Southern Union* for the general rule that "[r]espective rights and obligations of parties are to be determined by the district court"[131] and proceeding into a discussion of the public rights/private rights dichotomy.

> interested parties, the Commission . . . shall have the power to establish well spacing and drilling units.

OKLA. STAT. tit. 52, § 87.1(a) (1981).

125. *Southern Union*, 465 P.2d at 458 (the same quote also appears in *Amarex*, 655 P.2d at 1044) (parenthetical word in original).

126. Justice Opala argued, first in *Tenneco I*, 53 OKLA. B.J. at 2476, and also in the dissenting opinion in *Tenneco II*, 687 P.2d at 1049, that the Commission was the sole tribunal which could grant the relief requested since an election dispute over a pooling order struck the heart of one of the core provisions which the Commission utilized to carry out its authorized functions.

127. *Tenneco II*, 687 P.2d at 1049.

128. *Id.* at 1051.

129. *See supra* notes 121-28 and accompanying text.

130. *See supra* notes 7-17, 86-96 and accompanying text.

131. *Tenneco II*, 687 P.2d at 1053 (citing *Southern Union*, 465 P.2d at 454).

C. *Reliance on* Northern Pipeline Co. v. Marathon Pipeline[132]

Having addressed the issue of the Commission's limited jurisdiction, the court undertook the task of trying to define the difference between a public right and a private right. The court initiated its discussion of the private right/public right dichotomy by noting that "[t]he conflict or dichotomy as to subject-matter jurisdiction between Courts and Administrative Agencies has not been perfectly defined, by any Court."[133] It then discussed the United States Supreme Court's struggle with the distinction in the *Northern Pipeline* case.[134]

Northern Pipeline involved a jurisdictional dispute between the federal district court and the United States Bankruptcy Court.[135] In *Northern Pipeline*, the Court set forth the history and reasoning behind the public rights/private rights doctrine.[136] The Court noted that the doctrine could be explained by reference to the traditional principles of sovereign immunity and separation of powers.[137] In defining public rights the Court stated: "[I]t suffices to observe that a matter of public rights must at a minimum arise 'between the government and others.' "[138] In contrast, private rights have been defined as "the liability of one individ-

132. 458 U.S. 50 (1982).

133. *Tenneco II*, 687 P.2d at 1053.

134. *Id.* at 1053-54.

135. *Northern Pipeline*, 458 U.S. at 56. The case arose from a proceeding filed with the United States Bankruptcy Court for the District of Minnesota under the Bankruptcy Act of 1978. *Id.* at 56. Northern filed a petition for reorganization under the Act in January, 1980. *Id.* In March of that year, pursuant to the terms of the Act, Northern filed a suit against Marathon seeking damages for alleged breaches of contract and warranty as well as for alleged misrepresentation, coercion and duress. *Id.* Marathon motioned to dismiss, alleging that the Act unconstitutionally conferred Article III judicial power on judges who lacked life tenure and protection against salary diminution. *Id.* at 56-57. The United States intervened to defend the validity of the statute. *Id.* at 57. Although the bankruptcy judge denied the motion to dismiss, the district court, on appeal, entered an order granting the motion. *Id.* The district court based its dismissal on a finding that the Act, insofar as the delegation of authority to judges was concerned, was unconstitutional. *Id.* The United States Supreme Court affirmed the district court and asked Congress to correct the problem. *Id.* at 88.

136. *Id.* at 67-70. The Court noted that the "public rights" doctrine was first set forth in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855). *Id.* at 67.

137. *Northern Pipeline*, 458 U.S. at 67.

> The [public-rights] doctrine extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments, . . ." and only to matters that historically could have been determined exclusively by those departments . . . .
>
> The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently . . . judicial."

Id. at 67-68 (quoting, respectively, Crowell v. Benson, 285 U.S. 22, 50 (1932); *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929)).

138. *Northern Pipeline*, 458 U.S. at 69 (quoting *Ex parte* Bakelite Corp., 279 U.S. at 451).

ual to another under the law as defined."[139] In noting the proper adjudicatory authority for private rights, the court held that "[p]rivate-rights disputes . . . lie at the core of the historically recognized judicial power."[140]

In the plurality opinion of *Northern Pipeline*, the Court found that the United States Bankruptcy Court did not have jurisdiction over the dispute before it and observed that: "[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of . . . private rights, such as the right to recover contract damages."[141] The Oklahoma Supreme Court, in reviewing the quoted language, saw a distinguishing factor between the facts in *Tenneco* and those of *Northern Pipeline*, but was quick to realign itself with the *Northern Pipeline* public rights/private rights analysis noting that "[a]lthough admittedly Tenneco did not seek damages [as was sought by the plaintiffs in *Northern Pipeline*], the relief [*Tenneco*] sought was equitable and private in nature and was *not* an attack on the public rights function of the Corporation Commission."[142]

The Oklahoma Supreme Court's discussion of *Northern Pipeline* is not surprising, considering it is the most recent Supreme Court case to consider the doctrine of public rights.[143] What is surprising is the court's reliance on this case in finding a new "boundary line" for the *Tenneco* dispute within the public rights/private rights dichotomy. *Northern Pipeline*, though signifying the continued validity of the doctrine of public rights, gives no more guidance in applying it than did the earlier cases of *Ex parte Bakelite Corp.*[144] or *Crowell v. Benson.*[145] Moreover, the

139. *Northern Pipeline*, 458 U.S. at 69-70 (quoting *Crowell*, 285 U.S. at 51).

140. *Northern Pipeline*, 458 U.S. at 70. During its public rights/private rights analysis the Court relied heavily on the precedent it set down in 1932 in the case of *Crowell*. *See id.* at 68. The *Crowell* case involved a jurisdictional dispute with regard to a workers' compensation claim arising under the Longshoremen's and Harbor Worker's Act. *Crowell*, 285 U.S. 22 (1932). The Act was designed to compensate for injuries sustained by employees while working in navigable waters of the United States. *See* 33 U.S.C. §§ 901, 905 (1976). The Court ruled that the administrative agency did indeed have jurisdiction over the enforcement of the Act. *Crowell*, 285 U.S. at 49. The agency must, however, be confined to its "proper sphere" of legislatively determined jurisdiction. *Id.* at 65.

In its discussion of public rights and private rights, the *Crowell* Court attempted to catalog some of the matters which it felt would fall within the public rights area and noted that: "Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Id.* at 51 (footnote omitted).

141. *Northern Pipeline*, 458 U.S. at 71.

142. *Tenneco II*, 687 P.2d at 1054.

143. *See* Redish, *supra* note 4, at 204-08.

144. 279 U.S. 438, 458 (1929).

145. 285 U.S. 22, 50 (1932); *see Northern Pipeline*, 458 U.S. at 67-73 (Court cited extensively to both *Ex parte Bakelite Corp.* and *Crowell*).

"private versus public" nature of the dispute was not even addressed in *Northern Pipeline*—the court simply contended that the "adjudication of state-created private rights" was *obviously* not a public right.[146] Thus, aside from restating the doctrine as it had been developed in prior cases, this latest Supreme Court decision adds little which would aid Oklahoma in deciding whether the *Tenneco* dispute involves public or private rights.

D. *Custom and Usage*

The court further noted in *Tenneco II* that it was aware of the practice in the industry to refine, broaden and specify duties between parties with pooled interests in a spacing unit so that there will be specific rights and obligations between the parties.[147] This is usually done through an operating agreement.[148] The court noted that it was also common within the industry for a pooling agreement[149] to be in existence and executed by some of the interested parties in a common source of supply, but not executed by any of the "forced parties."[150]

In short, the court recognized that the actual forced pooling order issued by the Commission is generally just the "bare bones" of the relationship between the parties[151] and many problems commonly encountered in the industry must be covered by an operating agreement or another type of contract that sets forth the specifics of the venture.[152] Nonetheless, the court opined that it was "extremely doubtful" that in-

146. *Northern Pipeline*, 458 U.S. at 71.

147. *Tenneco II*, 687 P.2d at 1054. By way of example, the court mentioned several areas typically covered by the parties in operating agreements: procedures for payment, methods of accounting, liabilities of parties, regulations of expenditures and procedures for default. *Id.* "Particularly within the realm of costs and payment, the operating agreement may substitute and approve a farmout agreement as a method of division and may define the interests of such parties, giving one the working interest and the other royalty." *Id.*

148. *Id.*

149. "An agreement bringing together separately owned interests for the purpose of obtaining a well permit under applicable spacing rules." 8 H. WILLIAMS & C. MEYERS, supra note 7, at 652.

150. *Tenneco II*, 687 P.2d at 1054. A "forced party" is a party compelled by law to participate in a well by reason of the issuance of a forced or compulsory pooling order. *See supra* note 7. The court went on to explain why a "forced party" may be left out of the pooling agreement: "The forced-party's interest, of course, comes into existence after the forced pooling order is issued, and invariably at a later date than the voluntary agreement between parties." *Tenneco II*, 687 P.2d at 1054.

151. *Tenneco II*, 687 P.2d at 1054. "The forced-pooling order does not usually address such items as percentage of the interests owned by the parties, costs as to title examination or insurance, failure of title, successive operators by resignation, not to mention taxes, waiver or non-waiver of partition rights, etc." *Id.*

152. *Id.*

dustry custom or usage could decide a forum, confer jurisdiction or define public right/private right issues.[153] "No amount of custom or usage can change the constitutional status and powers of the district courts[154] or the constitutional and statutory powers of the Corporation Commission."[155]

In its rejection of the custom and usage theory the court, in effect, stated that merely because (a) the Commission has the authority to grant valid orders while pursuing its goal of conserving natural resources, and (b) a custom has arisen within the industry to expand upon those orders by allowing parties to privately contract as to areas not governed under the Commission's order, there is no valid justification for the court to establish a jurisdictional boundary line which is based on the common practice in the industry.

V. THE BOUNDARY LINE WAR—THE IMPACT OF *TENNECO II*

Although *Tenneco I* and *Tenneco II* reach diametrically opposite conclusions as to which entity will have the authority to govern disputes over the interpretation of an operating agreement arising out of a forced pooling order, both of the opinions rely on the public rights/private rights doctrine to support their decisions.[156] In *Tenneco I*, the court took the position that private rights which themselves arise from matters decided in the public interest—such as commission pooling orders—"must stand or fall with the core and source of their existence."[157] Thus, public rights appeared to be synonymous with any rights which flowed from an act done in the public interest. Inasmuch as the Commission was created to protect the public's interest in the conservation of oil and gas, the rights which Commission pooling orders bestowed must be adjudicated by the Commission.

In *Tenneco II*, private rights have been redefined by the court as "the liability of one individual to another,"[158] while public rights have been confined to disputes "between the government and others."[159] Inasmuch as Tenneco and El Paso are both private entities, their dispute is private in nature and must be decided by the district court.

153. *Id.*
154. *See* OKLA. CONST. art. VII, § 1 (sets forth power and jurisdiction of the district courts).
155. *Tenneco II*, 687 P.2d at 1054.
156. *Tenneco II*, 687 P.2d at 1053; *Tenneco I*, 53 OKLA. B.J. at 2482.
157. *Tenneco I*, 53 OKLA. B.J. at 2482.
158. *Tenneco II*, 687 P.2d at 1053.
159. *Id.*

After years of struggling over the question of jurisdiction it is important to ascertain where the Oklahoma Supreme Court has left the industry in the jurisdictional boundary line dispute. In essence, the court in *Tenneco II* held that the forced pooling order is generally seen as just a "bare bones" delineation of the parties' rights and duties.[160] Thus, as long as the operating agreement does not enter into the realm of tampering with issues concerning conservation of hydrocarbons or correlative rights of the parties, the construction and declaration of the rights and duties of the contracting parties fall within the domain of the district court.[161]

The most recent opinion reaches the conclusion that most industry participants are following; that is, as a general rule, operating agreements and other documents which deal with issues such as procedures for payments, methods of accounting, liabilities of the parties, regulations of expenditures, percentage ownership of the parties and failure of title are private contracts which do not impinge upon the Corporation Commission's jurisdiction and, therefore, are binding without Corporation Commission notice, hearing, and approval.[162] In this respect, the decision in

160. *Id.* at 1054.

161. *Id.* at 1053-55. The court emphasized this by stating, "At the fear of being repetitious, we repeat: no attempt is made by any party in the instant case to change or challenge the public issue of conservation of oil and gas; all items in the operating agreement are private and thus properly presented to the district court." *Id.* at 1054-55.

162. *See id.* at 1054. Nonetheless, at least one industry analyst has previously taken a stance which appears to be at odds with the *Tenneco II* decision. *See* Hart, *Interpreting Corporation Commission Orders—Should The Commission Be A Spectator Or A Player?*, 48 OKLA. B.J. 1343 (1977). Hart posed three hypothetical problems in which interpretation of a Commission pooling order is necessary in order to resolve a dispute. The factual situations posited included: (1) whether liquid hydrocarbons are to be considered "oil" or "gas" under a pooling order; (2) whether an operator can assign all of its rights to a new operator and keep the pooling order in force; and (3) whether an operator is allowed to complete a well to one formation, exhaust production from the well, then drill to a second formation and still be in compliance with the terms of a pooling order. Id. at 1343. In analyzing what tribunal would be best equipped to interpret the order in these situations, Hart wrote:

> [I]t is the Commission itself which should resolve the controversy as to what was intended by its order. Clearly, it can bring the matter to hearing and decision more quickly than can a district court. More importantly, it is, after all, the Commission which entered the order and which considers almost daily the endless variety of facts and circumstances involved in spacing and pooling applications and the arguments advanced by counsel in support of positions taken respecting those facts and circumstances. In short, the Commission does in fact have an expertise in these matters. Conversely, a district court does not. Only occasionally is a district court called upon to deal with spacing or pooling orders of the Commission in any context, much less to confront the task of construing such orders to ascertain the Commission's intent.

Id. at 1344. Hart viewed *Southern Union* as an obstacle to Commission jurisdiction over matters in which they, not the district court, has expertise. *Id*; *see also supra* notes 86-96 and accompanying text (discussing the *Southern Union* decision). Hart called for use of nunc pro tunc orders by the Commission to correct any problems in prior orders which could be viewed as clerical errors, mis-

Tenneco II will not greatly impact the industry. Nonetheless, the court's failure to set forth guidelines as to when a private contract right would intrude upon matters of conservation and correlative rights and, therefore, must be brought into the Commission's jurisdiction will likely leave some confusion in the industry.[163]

VI. CONCLUSION

Even after *Tenneco II*, the boundary line between the jurisdiction of the district courts and the Corporation Commission is somewhat blurred. *Tenneco II* does, however, come closer than *Tenneco I* to a more workable position—one which is at least in line with industry practice. Nevertheless, there still remains a need to establish a more distinct boundary line between the two judicial entities. Whether that boundary line can

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takes or omissions. *Id.* at 1346-47. For example, Hart feels that in the first fact situation posed above, a nunc pro tunc order would be the most appropriate means to correct the problem. *Id.* at 1347. Conceding that this would only solve interpretation problems in a handful of cases, Hart opined that the matter might justify legislative action. *Id.* Hart noted, however, that "any such legislation should be carefully drawn so as not to open up for Commission action other sorts of oil and gas disputes which *are* better left to resolution by the district courts." *Id.*

163. With regard to matters of "conservation," the court is likely to rely on statutory language setting forth the definition of waste. Waste of oil is currently defined as:

> [I]n addition to its ordinary meaning, shall include economic waste, under-ground waste, including water encroachment in the oil or gas bearing strata; the use of reservoir energy for oil producing purposes by means or methods that unreasonably interfere with obtaining from the common source of supply the largest ultimate recovery of oil; surface waste and waste incident to the production of oil in excess of transportation or marketing facilities or reasonable market demands.

OKLA. STAT. tit. 52, § 86.2 (1981). Waste of gas is defined as:

> [I]n addition to its ordinary meaning, shall include the inefficient or wasteful utilization of gas in the operation of oil wells drilled to and producing from a common source of supply; the inefficient or wasteful utilization of gas from gas wells drilled to and producing from a common source of supply; the production of gas in such quantities or in such manner as unreasonably to reduce reservoir pressure or unreasonably to diminish the quantity of oil or gas that might be recovered from a common source of supply; the escape, directly or indirectly, of gas from oil wells producing from a common source of supply into the open air in excess of the amount necessary in the efficient drilling, completion or operation thereof; waste incident to the production of natural gas in excess of transportation and marketing facilities or reasonable market demand; the escape, blowing or releasing, directly or indirectly, into the open air, of gas from wells productive of gas only, drilled into any common source of supply, save only such as is necessary in the efficient drilling and completion thereof; and the unnecessary depletion or inefficient utilization of gas energy contained in a common source of supply.

Id. § 86.3; *see also* Harris, *Modification of Corporation Commission Orders Pertaining to a Common Source of Supply*, 11 OKLA. L. REV. 125, 127-28 (discussing and categorizing types of oil and gas waste). Concerning the meaning of "correlative rights," the court has previously noted:

> The term "correlative rights" embraces the relative rights of owners in a common source of supply to take oil or gas by legal operations limited by duties to the other owners (1) not to injure the common source of supply and (2) not to take an undue proportion of the oil and gas.

Kingwood, 396 P.2d at 512 (citing 1 W. SUMMERS, THE LAW OF OIL AND GAS § 63 (1954)).

materialize from the problematic public rights/private rights dichotomy is doubtful. The court needs to set down specific guidelines for the industry to follow or, at a minimum, to structure its future decisions in this area in a manner in which litigants will be able to determine which entity has the proper jurisdiction to clarify their rights and duties.

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