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Is the Burford Abstention Doctrine Still Viable in the Oil and Gas Industry

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IS THE *BURFORD* ABSTENTION DOCTRINE STILL VIABLE IN THE OIL AND GAS INDUSTRY?

I. INTRODUCTION

Federal courts have a duty to rule on controversies properly brought before them.[1] However, the Supreme Court has developed the abstention doctrine as a narrow exception to this rule.[2] Proper circumstances for the exercise of the abstention doctrine are confined to categories which focus on state law or proceedings.[3] When a federal court decides that abstention is appropriate in a given case, it may exercise its equitable powers[4] and decline to exercise jurisdiction in the case.[5]

II. THE ABSTENTION DOCTRINE IN INTERSTATE COMMERCE

The commerce clause grants Congress the authority to regulate commerce among the states.[6] Yet, absent a contrary federal law, a state may exercise its police power over matters of genuine local concern despite the impact of such regulations on interstate commerce.[7] Oklahoma, Mississippi, and Kansas have asserted their right to regulate interstate

1. Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 813 (1976).

2. *Id.*

3. While the Supreme Court has vacillated in its holdings as to the number of abstention doctrines which it recognizes, the circumstances generally deemed to be appropriate for the application of the abstention doctrine are: (1) in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law; (2) when absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings, or collection of state taxes; (3) when the *Burford* abstention doctrine is appropriate due to difficult questions concerning state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar; and 4) where there are "exceptional" circumstances, such as the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction is obtained by the concurrent forums, which permit a federal court to refrain from exercising its jurisdiction for reasons of wise judicial administration due to the presence of a concurrent state proceeding. C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4241-47 (1978); *see also* Shapiro v. Cooke, 552 F. Supp. 581 (N.D.N.Y. 1982).

4. Baggett v. Bullitt, 377 U.S. 360, 375 (1964).

5. *Colorado River*, 424 U.S. at 813.

6. U.S. CONST. art. I, § 8 cl. 3.

7. Middle S. Energy, Inc. v. Arkansas Pub. Serv. Comm'n, 772 F.2d 404, 411 (8th Cir. 1985) (citing Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978)).

gas based on their police power to prevent waste and to protect correlative rights.[8] However, the adoption of federal law regulating interstate gas preempts the states' regulation in this area.[9] Furthermore, the abstention doctrine is inapplicable to questions concerning state regulation of interstate gas because preemption eliminates all unsettled state law questions and eliminates the need to protect state regulatory schemes.

III. DEVELOPMENT OF THE *BURFORD* ABSTENTION DOCTRINE

A. *Preemption Doctrine*

The supremacy clause[10] provides that where an actual conflict exists between a federal law and a state law, the federal law must "preempt" the state law.[11] Furthermore, when Congress exercises a constitutionally-based power, any concurrent and conflicting state law may be nullified pursuant to the preemption doctrine.[12] The Supreme Court case of *Pennsylvania v. Nelson*[13] provides the test for application of the preemption doctrine. In that case, a federal statute prohibiting the knowing advocacy of the overthrow of the national government by force and violence was held to supersede a similarly worded Pennsylvania statute.[14] Chief Justice Warren described the test for application of the preemption doctrine as follows: (1) that the federal regulatory scheme is pervasive, (2) that the statutes involved affect a field where the federal interest is so dominant that the federal regulatory system must be presumed to preclude the enforcement of concurrent state statutes, and (3) that serious danger of conflict exists between state laws and the administration of the federal program.[15] The courts have consistently ruled in favor of preemption in prior instances involving conflicting federal and state laws.

8. Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., 474 U.S. 409 (1986); Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84 (1963); ANR Pipeline Co. v. Corporation Comm'n of Okla., 643 F. Supp. 419 (W.D. Okla. 1986).

9. Natural Gas Act, 15 U.S.C. §§ 717-717z (1982); Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (1982).

10. U.S. CONST. art. VI, cl. 2.

11. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 295 (3d ed. 1986).

12. *Id.*

13. 350 U.S. 497 (1956).

14. *Id.* at 509. Chief Justice Warren, in the Court's opinion, wrote: "[W]e find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the Federal Government precludes state intervention, and that the administration of state Acts would conflict with the operation of the federal plan . . . ." *Id.* The Court affirmed the holding of the Pennsylvania Supreme Court that the Smith Act superseded the Pennsylvania Sedition Act therefore precluding enforcement of the Pennsylvania Act against a person charged with seditious acts against the Federal Government. *Id.*

15. *Id.* at 502-06.

B. *Abstention Doctrine*

The abstention doctrine, a "judge-made" doctrine,[16] was espoused by the Supreme Court in 1941[17] and has subsequently been refined into several distinct types.[18] This doctrine developed primarily because of federalism and the desire to preserve harmony between the federal and state governments.[19] Under certain circumstances, the doctrine permits a federal court to withhold consideration of a case and defer the matter to a state court, even though it has jurisdiction. However, the abstention doctrine should only be exercised in exceptional circumstances.[20]

1. *Burford* Abstention Doctrine

In 1943, the Supreme Court developed the second type of abstention doctrine in *Burford v. Sun Oil Co.*[21] The *Burford* abstention doctrine permits a federal court to defer action to a state court despite the existence of concurrent jurisdiction in order to avoid unnecessary interference with state activities.[22] The *Burford* court considered the conflicting and concurrent jurisdictions of the Texas and federal courts and held that the federal court should defer to the state court where the action involved a state activity.[23]

The Court based its holding on the state activities in the regulation and administration of energy policies. Texas had developed a general

16. Zwickler v. Koota, 389 U.S. 241, 248 (1967).

17. *See* 17 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE 429 (1978).

18. *See supra* note 3 and accompanying text.

19. *See supra* note 17, at 465.

20. Duke v. James, 713 F.2d 1506, 1510 (11th Cir. 1983).

21. 319 U.S. 315 (1943). Justice Black's opinion held that "[t]hese questions of regulation of the industry by the state administrative agency, whether involving gas or oil prorationing programs or Rule 37 cases, so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." *Id.* at 332. For a discussion of the *Burford* doctrine see generally C. WRIGHT, LAW OF FEDERAL COURTS 308 (4th ed. 1983).

22. *Burford*, 319 U.S. at 322-24.

23. *Id.* at 334. Sun Oil Company sought injunctive relief in federal court against the enforcement of an exception order issued by the RRC. *Id.* at 316-17. The RRC is the administrative agency charged with the duty of making and enforcing oil and gas conservation and production rules in Texas. *See* 8 H. WILLIAMS & C. MEYERS, MANUAL OF OIL AND GAS TERMS 998-99 (7th ed. 1987). The RRC's rule 37 had provided for certain minimum spacing between wells while also allowing exceptions when necessary to prevent waste and to protect correlative rights. The exception order in *Burford* involved an exception to rule 37's minimum well spacing requirement granted to Burford for the drilling of four wells on a small tract of land in the East Texas Field. *Burford*, 319 U.S. at 322. Jurisdiction was based on the diversity of citizenship of the parties and because the plaintiffs claimed that the exception order denied them due process of law. *Id.* at 317.

regulatory scheme to promote the conservation of oil and gas by minimizing loss and waste.[24] The state legislature had given the Texas Railroad Commission (RRC) the responsibility of fact finding and policy making[25] and had given the state courts the power to test the reasonableness of the RRC orders.[26] Furthermore, the legislature made direct review of RRC orders available only in the state district courts of Travis County[27] in order to ensure uniformity of interpretation and avoid confusion which would result from multiple review of the same general issues.[28] The court noted that limiting access to judicial review allowed the state courts, like the RRC, to develop expertise in the regulation and administration of energy policies. However, the court determined that confusion had resulted from the exercise of federal equity jurisdiction despite actions by the Texas legislature in limiting review to one court.[29]

The Court relied on the general proposition that even if a federal court has jurisdiction over a matter, it may refuse to exercise its jurisdiction where it would be contrary to a state's public interest.[30] Because questions concerning the RRC's regulation of the oil industry clearly involved Texas policy, the Texas state courts should have the first opportunity to consider them.[31] The court concluded that the federal court should stay its proceedings because Texas had a system of policy formulation and judicial review involving the RRC and the state courts.[32] Furthermore, review by the state court was prompt and thorough, and the review in the federal court would only be contrary to the success of state policies.[33] Therefore, the rule in *Burford* permits a federal court to allow a state to hear a matter even though a federal court has jurisdiction.

2. Application of the *Burford* Abstention Doctrine

Courts have considered the *Burford* abstention doctrine on numerous occasions. However, while recognizing the validity of *Burford*,[34] the

24. *Id.* at 332.
25. *Id.* at 326 (citing Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73 (1939)).
26. *Id.* (citing Railroad Comm'n v. Shell Oil Co., 39 Tex. 66, 161 S.W.2d 1022 (1942) and Railroad Comm'n v. Gulf Production Co., 134 Tex. 122, 132 S.W.2d 254 (1939)).
27. Austin, the capital city of Texas, is the county seat of Travis County as well as the location of the Railroad Commission of Texas.
28. Burford v. Sun Oil Co., 319 U.S. 315, 326 (1943).
29. *Id.* at 327.
30. *Id.* at 317-18.
31. *Id.* at 332.
32. *Id.* at 333-34.
33. *Id.* at 334.
34. Duke v. James, 713 F.2d 1506, 1510 n.19 (11th Cir. 1983).

courts have been reluctant to apply it in recent times. The courts have principally applied the doctrine in situations when invoking federal jurisdiction would disrupt the administration of state regulatory schemes or when a plaintiff is seeking to restrain a state official from exercising authority.[35] Further, courts have used the doctrine when invoking federal jurisdiction would interfere with state attempts to formulate a coherent state policy.[36] However, courts have refused to apply the doctrine when the state had no overriding interest in the determination of the issue the federal court is asked to consider.[37]

a. Middle South Energy, Inc. v. Arkansas Public Service Commission

The applicability of the *Burford* abstention doctrine was examined in *Middle South Energy, Inc. v. Arkansas Public Service Commission*.[38] The court was petitioned by the Arkansas Public Service Commission (APSC) to abstain from considering the challenge by Middle South Energy (MSE) regarding the constitutionality of the actions of the APSC pending the outcome of APSC's proceedings. The APSC sought to declare MSE contracts to purchase power from a Mississippi nuclear power plant void *ab initio*. The APSC believed that the cost of such power would result in enormous rate increases for Arkansas customers.[39] However, because the power plant was a cooperative effort involving public utilities in Arkansas, Louisiana, and Mississippi,[40] the court determined

35. Bergeron v. Estate of Loeb, 777 F.2d 792 (1st Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986) involved claims based on both state and federal securities laws. The First Circuit affirmed the district court's decision to dismiss the state law claims and to grant summary judgment on the federal law claims. The court held that the *Burford* abstention doctrine had no application in the matter. The court further stated that the case did not involve the threat of assumption of federal jurisdiction disrupting the orderly administration of state regulatory schemes or a plaintiff in a diversity action seeking to restrain a state official from exercising vested authority. *Id.* at 796-800.

36. Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1976). This case involved a claim over which the state and federal courts had concurrent jurisdiction. The United States Supreme Court, holding that none of the three categories of the abstention doctrine applied to this case, ruled that *Burford* was not applicable because the state law involved was settled and the decision would not impair efforts to implement state policy. *Id.*

37. Colorado Interstate Gas Co. v. Hufo Oils, 626 F. Supp. 38 (W.D. Tex. 1985). The court held that the application of the abstention doctrine was improper since Colorado Interstate's claims only involved matters of private contract rights. Consequently, there was no unsettled issue of state law or a possibility that state law determination would moot any federal constitutional question raised in a federal proceeding. *Id.*

38. 772 F.2d 404 (8th Cir. 1985).

39. *Id.* at 412.

40. Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service, Inc. are each wholly-owned subsidiaries of Middle South Utilities, Inc. These companies provide electric service to customers in Arkansas, Louisiana, and Mississippi. Because the need for additional power generating facilities was foreseen in the early 1970's, the construction of the nuclear power plant was proposed. However, because the

that the cancellation of the contracts by the APSC would merely shift the financial burden of the project to Mississippi and Louisiana citizens who had no direct influence on Arkansas' internal affairs.[41]

The court based its holding on the commerce clause and also found that the *Burford* abstention doctrine was inappropriate. The court upheld the injunction against the APSC proceeding because the APSC's intent to protect Arkansas' economic interest "resulted in an impermissible burden on interstate commerce."[42] Therefore, the APSC proceedings were unconstitutional as violations of the commerce clause. Furthermore, the court stated that when the constitution or federal laws have preempted an area, the state has no regulatory scheme to protect. Consequently, the *Burford* abstention doctrine was held to be inappropriate.[43]

b. Canaday v. Koch

The *Burford* abstention doctrine was considered by the district court in *Canaday v. Koch*.[44] The court in *Canaday* considered concurrent state and federal laws regarding emergency housing for homeless families. The court relied on the basic premise of *Burford* which is to prevent federal interference with state attempts to establish state policy.[45] However, the court also noted that while the federal court should not abstain in cases where the state law is clear on the issues presented,[46] the federal court may be compelled to abstain where the issues pertain to predominantly local matters.[47]

Although the court recognized other important factors,[48] the

operating subsidiaries did not have sufficient resources to finance the construction of the plant, Middle South Utilities formed Middle South Energy to finance the project. Consequently, each operating subsidiary contracted to purchase power from the plant, and those contracts were used to obtain financing for the plant. *Id.* at 406-07.

41. *Id.* at 417.

42. *Id.* at 412.

43. *Id.* at 417.

44. 608 F. Supp. 1460 (S.D.N.Y. 1985).

45. *Id.* at 1467. The court ruled that the *Pullman* doctrine requires: (1) that the state statute must be unclear or the issue of the state law be uncertain, (2) that resolution of the federal issue depends upon the interpretation given to the state law, and (3) that the state law be susceptible of an interpretation that would avoid or modify the federal constitutional issue. Since the court found that the federal issue was not dependent on the interpretation of state law, the *Pullman* doctrine did not apply. *Id.*

46. *Id.* at 1468-69 (citing Hawks v. Hamill, 288 U.S. 52, 53 (1933)).

47. *Id.* at 1468.

48. *Id.* at 1469. One factor is the importance of the subject matter of the action to the state and the manner in which the state chooses to handle the problem presented. *Id.* The court noted by way of example that in New Mexico, cases "presenting questions of access to water are of intense local interest and of predominantly local concern." *Id.* The court held that abstention is warranted under such circumstances. The court also held that the same could be said of cases involving intrastate

Canaday court held that the *Burford* abstention doctrine was properly applied because the case involved an issue of predominantly local concern. Furthermore, the pertinent state law was unsettled and unclear, and the local officials were attempting to develop a coherent state policy to address the issue.[49]

The abstention doctrine was formulated to improve the relationship between state and federal authority.[50] However, the doctrine enjoyed its most frequent use during Justice Frankfurter's tenure on the Court.[51] Although the doctrine's use has in fact declined, it is still used in specific situations.[52]

IV. *BURFORD* ABSTENTION DOCTRINE INAPPROPRIATE IN PREEMPTED AREA

State regulation of interstate commerce, pursuant to an exercise of the state's police power over matters of legitimate local concern, is permissible where no conflicting federal law exists.[53] However, the supremacy clause[54] provides that federal law "preempts" conflicting state law.[55] Therefore, abstention may not be exercised in areas where state law has been preempted by federal law because no state policy needs to be protected.[56]

A. Northern Natural Gas Co. v. State Corporation Commission

Northern Natural[57] involved a conflict between state agency requirements and the jurisdiction of the Federal Power Commission (FPC).[58]

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transportation facilities. *Id.* Also, the "[e]xistence of a comprehensive system of state administrative decision making with specified channels of judicial review" is an important consideration in determining the applicability of *Burford*. *Id.* Another factor was that while the presence of a federal constitutional issue is a factor which favors exercising jurisdiction by a federal court, a constitutional claim does not necessarily bar abstention. *Id.*

49. *Id.*

50. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 501 (1941).

51. *See supra* note 15, at 95-98. Justice Frankfurter, who authored the Court's opinion in *Pullman*, as well as a concurring opinion in *Burford*, retired in 1962.

52. *See supra* note 1.

53. *Middle S. Energy*, 772 F.2d at 411.

54. U.S. CONST. art. VI, cl. 2.

55. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 295 (3d ed. 1986).

56. Baggett v. Dep't of Professional Regulation, Bd. of Pilot Comm'rs, 717 F.2d 521, 524 (11th Cir. 1983).

57. 372 U.S. 84 (1963).

58. *Northern Natural*, 372 U.S. at 85-86. The Federal Power Commission was terminated and its functions, personnel, property, funds, etc. were transferred to the Secretary of Energy (except for certain functions which were transferred to the FERC) by 42 U.S.C. §§ 7151(b), 7171(a), 7172(a), 7291, and 7293.

Agency regulations required an interstate pipeline company to ratably purchase from all wells connected to its pipeline system.[59] Northern Natural had gas purchase contracts with numerous producers in Kansas' Hugoton Field; however, its oldest contract required it to take the maximum production allowed from that producer's wells. Although Northern Natural's other gas purchase contacts were expressly subject to the contract, Northern Natural was nonetheless able to purchase on an essentially ratable basis.[60] In 1958, Northern Natural was forced by lack of market demand and by the terms of its oldest contract to reduce the purchases from the other producers to less than their production allowables. The Kansas Corporation Commission (KCC) then issued its order requiring Northern Natural to purchase ratably from all of the producers in the Hugoton Field.[61]

The Court held that the KCC order was preempted by the FPC's exclusive jurisdiction over sale and transportation of natural gas for resale granted by the NGA.[62] The Court found that the federal regulations left no room for state regulations.[63] Therefore, the order was invalid because the KCC order directly affected the FPC's ability to regulate transportation and sale of natural gas and to achieve the NGA's goal of uniform regulation.[64] Furthermore, the Court held that where Congress has pervaded the regulatory field, the state, not the federal, regulation must be preempted.[65] Also, while acknowledging the power of the states to allocate and conserve its natural resources, the Court concluded that the scope of this power was limited to production of those natural resources and did not extend to the transportation and sale of the same.[66]

59. *Northern Natural*, 372 U.S. at 85-86.
60. *Id.* at 86-87.
61. *Id.* at 88-89.
62. *Id.* at 89. The Natural Gas Act, 15 U.S.C. § 717(b) (1982) provides the following:
The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.
63. *Northern Natural*, 372 U.S. at 91.
64. *Id.* at 91-92.
65. *Id.* at 93.
66. *Id.* at 94.

B. Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board

The Court applied reasoning similar to *Northern Natural Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board (Transco)* to hold that Mississippi's ratable take requirement was preempted by the NGA and NGPA.[67] Transco had entered into several gas purchase contracts with producers in Mississippi's Harper Sand Field during a period of high market demand for gas production. At the same time, Transco also made numerous non-contract purchases from other producers in the field to meet its demand for gas.[68] As the market demand decreased, Transco suspended its non-contract purchases. Subsequently, one of the non-contract producers in the Harper Sand Field filed a petition with the Mississippi Oil and Gas Board (the Board) seeking enforcement of its rule 48 "ratable take" requirement.[69]

The Mississippi courts upheld rule 48 based on their determination that the NGPA had overruled *Northern Natural*.[70] The Board had found Transco in violation of rule 48 and had ordered Transco to make ratable purchases from all of the Harper Sand Field producers. Transco had appealed the order to the Mississippi Circuit Court and, subsequently, to the Mississippi Supreme Court. Both courts held that the NGPA had effectively overruled *Northern Natural* and that the Board's authority was not preempted by the NGA because the NGPA removed the transportation and sale of "high-cost" gas[71] from the FERC's jurisdiction.[72] Consequently, Transco appealed these holdings to the United States Supreme Court.

In *Transco*, the Court held that Mississippi's regulation subverted

67. Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., 474 U.S. 409, 425 (1986). Transco executed contracts with Getty and Tomlinson Interests, Inc., whereby Transco was obligated to purchase only Getty and Tomlinson's shares of gas produced from wells they operated. Transco also executed a contract with Florida Exploration Company whereby Transco was obligated to take all gas produced by Florida's wells regardless of whether Florida owned the production or not. *Id.* at 412-13.

68. *Id.*

69. *Id.* at 414. Mississippi's Oil & Gas Board Statewide Rule 48 provides that "[e]ach person now or hereafter engaged in the business of purchasing oil or gas from owners, operators, or producers shall purchase without discrimination in favor of one owner, operator, or producer against another in the same common source of supply." *Id.*

70. *Id.* at 415.

71. *Id.* 15 U.S.C. § 3317(c)(1) (1982) states the following:

> For purposes of this section, the term "high-cost natural gas" means natural gas determined in accordance with Section 3413 of this title to be—
>
> (1) produced from any well the surface drilling of which began on or after February 19, 1977, if such production is from a completion location which is located at a depth of more than 15,000 feet.

72. *Transco*, 474 U.S. at 414-15.

Congress' determination that the supply, the demand, and the price of "high-cost" gas should be determined by the marketplace.[73] The Court found that Congress, by enacting the NGPA, attempted to increase exploration by removing the transportation and resale of "high-cost" gas from the FERC's regulation.[74] Furthermore, the court stated that removal of jurisdiction from the FERC cannot be interpreted as an invitation to the states to increase their regulation.[75] Also, the Court in *Transco* held that allowance of state regulation of "high-cost" gas would disrupt the uniformity of the federal regulatory scheme, contribute to increased costs to the consumer, and therefore would be contrary to the goals of the NGPA.[76]

C. ANR Pipeline Co. v. The Corporation Commission of Oklahoma

ANR Pipeline Co. v. The Corporation Commission of Oklahoma,[77] like *Northern Natural* and *Transco* before it, presented the court with the question of whether a state's ratable take provision conflicted with the federal regulatory scheme. The court held in *ANR*, as did the Supreme Court in *Northern Natural* and *Transco*, that the state's regulations were unconstitutional because they interfered with the federal regulatory

73. *Id.* at 422. Congress enacted the NGA in 1938 in response to Supreme Court decisions which held state regulation of interstate pipelines to be unconstitutional under the commerce clause of the Constitution. Missouri v. Kansas Natural Gas Co., 265 U.S. 298 (1924); Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911). The scope of the NGA included transportation of natural gas in interstate commerce, sales of natural gas for resale in interstate commerce, and companies engaging in either transportation or sales for resale of natural gas in interstate commerce. Natural Gas Act, 15 U.S.C. §§ 717-717w (1982). The FPC was in charge of administration of the NGA and was granted broad authority in rate-setting in interstate transportation and sales for resale of natural gas. *Id.* at § 717d (1982). However, the NGA's pricing structure increasingly caused new production to be diverted from the interstate market to unregulated intrastate markets until the under supply of the interstate market reached crisis proportions in the mid-70's. *See Transco*, 474 U.S. at 420. Congress therefore enacted the NGPA in 1978 eliminating the price differences between the interstate and intrastate markets. Natural Gas Policy Act, 15 U.S.C. §§ 3301-42 (1982).

74. *Transco*, 474 U.S. at 420.

75. *Id.* at 423-24.

76. *Id.* Prior to the enactment of the Natural Gas Act in 1938, the Supreme Court had held previous efforts by the states to regulate interstate pipelines unconstitutional under the commerce clause of the Constitution. *See* Missouri v. Kansas Natural Gas Co., 265 U.S. 298 (1924); Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911). In *Transco*, while the Mississippi Supreme Court held that ratable take requirements were not violative of the commerce clause, the United States Supreme Court held that preemption of ratable take requirements by the NGA and NGPA precluded the necessity of determining whether Mississippi's action was nevertheless preempted by the commerce clause. *Transco*, 474 U.S. at 425. However, Justice Rehnquist's minority opinion held that such requirements are not violative of the commerce clause. *Id.* at 435 (citing Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950)). Consequently, a reversal of the holding in *Transco* would not only allow ratable take to avoid preemption by the NGA and NGPA but also avoid conflict with the commerce clause.

77. 643 F. Supp. 419 (W.D. Okla. 1986).

scheme. Consequently, in *ANR* the court ruled that the state regulation, in this case a regulation of Oklahoma, was invalid as preempted by the NGA and NGPA[78] despite the argument of the Oklahoma Corporation Commission (the Commission) that the *Burford* abstention doctrine should be invoked.[79]

The issue considered by the court in *ANR* was whether Oklahoma's ratable take provision, section 240, and the rules promulgated thereunder, particularly rule 1-305, were preempted by federal law. The purpose of rule 1-305[80] was to establish the priority in which natural gas production was to be taken by pipeline companies in the event of a market demand/supply imbalance.[81] Further, the rule provides for the ratable taking of gas when the supply exceeds the market demand. The commission referred to section 240 as its basis of authority to enact rule 1-305. Section 240, the ratable take requirement, provides that purchasers of natural gas in Oklahoma must purchase all natural gas offered for sale to them without favoring one source of supply over another.[82]

The Commission asserted that even if the court had jurisdiction over the matter, it should have applied the *Burford* abstention doctrine and deferred consideration of the constitutionality of the statute to the state courts.[83] The Commission argued that the *Burford* abstention doctrine was applicable because Oklahoma's regulatory policy of correlative rights and preventing waste would be disrupted by federal interference. Additionally, Oklahoma courts have special knowledge concerning this policy, and the Oklahoma Supreme Court has exclusive jurisdiction over appeals of commission orders. Also, the question involved an Oklahoma regulatory agency, and the Oklahoma state courts provided an adequate remedy.[84]

Finally, the Commission claimed that rule 1-305 was not only a product of section 240, a ratable take statute, but that it was also based on section 239, a ratable production statute.[85] Asserting that the scope

78. *Id.* at 423-24.

79. *See* Initial Brief for Corporation Commission of Oklahoma at 16, *ANR*, 643 F. Supp. 419 (W.D. Okla. 1986) (No. 85-1929A) [hereinafter cited as Initial Brief].

80. Rule 1-305, 1 Okla. Reg. 37-38 (1983).

81. *Id.*

82. OKLA. STAT. tit. 52, § 240 (1981).

83. *See* Initial Brief, *supra* note 79, at 15.

84. *Id.* at 16.

85. *Id.* OKLA. STAT. tit. 52, § 239 (1981) provides the following:

> Whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take

of the NGA and the NGPA was limited to the wellhead price of interstate gas, to the cost structures of interstate pipelines, and to the supply and cost of gas for the consumer, the Commission maintained that the state retained jurisdiction over conservation. Consequently, the Commission claimed that the ratable take provision in *Transco* was unconstitutional because it was based exclusively on regulation of interstate pipelines. The Oklahoma provision, however, differed because it regulated producers and production as well as the pipelines[86] and was constitutional.

Despite the Commission's claim of the applicability of the *Burford* abstention doctrine to the circumstances present in *ANR*, the court found section 240 to be unconstitutional because it was "a *purchase* statute."[87] Therefore, the statute was an invasion of the FERC's exclusive jurisdiction over the transportation and sale for resale of interstate natural gas. Furthermore, the court held that a comparison of Oklahoma's ratable take statute and order with the regulations held unconstitutional by the Supreme Court in *Northern Natural* and *Transco* result in a determination that all three devices regulate the *taking* of gas.[88]

In *ANR*, the court also held that Oklahoma's section 240 and rule 1-305 were similar to the regulations in *Northern Natural* and *Transco* because they attempted to prevent discrimination in favor of any one common source of supply to the detriment of another. This type of regulation would permit an individual state to "skew the free market of gas." Consequently, the court held this to be contrary to the federal policy of permitting the gas market price to be determined by the free flow of interstate commerce.[89] Therefore, section 240 and rule 1-305 were

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therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears of the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom . . . .

86. Southern Natural Gas Co.'s Brief in Opposition to ANR's Motion for Summary Judgment and Northwest Central's Supplemental Brief in Support of Motion for Summary Judgment at 2, *ANR*, 643 F. Supp. 419 (W.D. Okla. 1986) (No. 86-1929A).

87. *ANR*, 643 F. Supp. at 422. The court held that a comparison of Oklahoma's section 240 and rule 1-305 with Kansas' statute 550-703 and Mississippi's rule 48, which were held to be unconstitutional in *Northern Natural* and *Transco*, compelled the decision that all three devices were intended to result in the regulation of the *taking* of natural gas by pipeline purchasers. Furthermore, the court held that the Commission's order of July 3, 1985, which asserted that rule 1-305 was also a product of section 239, a statute which regulated the amount of natural gas that would be produced, and which was issued a year and a half after the effective date of rule 1-305, had no effect on its holding. *Id.* at 422-23.

88. *Id.*

89. *Id.* at 423.

unconstitutional.

In relying on *Northern Natural* and *Transco* to declare Oklahoma's ratable take provisions unconstitutional, the court in *ANR* chose not to address the applicability of *Burford* regarding the issue of the effect such provisions have on natural gas in interstate commerce. The Commission claimed that *Burford* should apply in *ANR* because all the factors necessary for its application were present.[90] However, the issue of application of Oklahoma's ratable take provision to natural gas in interstate commerce is not one of predominantly local concern, but instead is one of national concern. Furthermore, the pertinent state law is neither unsettled nor unclear because such laws were held to be unconstitutional by the Court in *Northern Natural* and *Transco*.

V. CONCLUSION

The ideological balance of the Supreme Court has arguably shifted since the holding in *Transco* was announced. This shift could result in a holding that ratable take provisions are applicable to some types of interstate gas. Consequently, the applicability of such provisions could once again become unsettled and unclear. The state's prevention of waste and protection of correlative rights may become the predominant concern as the depletion of current reserves continues to exceed the discovery of replacement reserves. However, barring a reversal of the holdings in *Northern Natural* and *Transco*, the *Burford* abstention doctrine has no application in situations involving natural gas in interstate commerce.

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90. *See* Defendant's Brief in Support of Motion to Dismiss or, in the Alternative, Motion to Abstain at 16, *ANR*, 643 F. Supp. 419 (W.D. Okla. 1986) (No. 85-1929A).