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JURISDICTION OF COMMISSION AND COURT: THE PUBLIC RIGHT/PRIVATE RIGHT DISTINCTION IN OKLAHOMA LAW

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I. INTRODUCTION

In 1984, the Oklahoma Supreme Court announced and began to apply a test to determine whether a district court or the Oklahoma Corporation Commission (the Corporation Commission or the Commission) has the authority to adjudicate disputes between parties that are subject to an order of the Corporation Commission.¹ The cases to which the test applies typically involve parties that have entered into a contract that relates to a Commission order. The test attempts to distinguish between public rights and private rights, with the Commission having jurisdiction over the public rights aspects of its orders and the district court having jurisdiction over private rights relating to orders of the Commission. Unfortunately, the supreme court did not originally provide a clear basis for determining what is a public right and what is a private right. Since the announcement of the distinction, a number of cases have been decided by the Commission and courts in Oklahoma that attempt to apply the public right/private right distinction. The results have been less than satisfactory. Although the distinction attempts to serve legitimate goals, the continued application, much less the expansion, of the doctrine is not desirable. It threatens to undermine the authority of the Commission and prevent it from fulfilling the tasks given it by the legislature. The

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1. *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 687 P.2d 1049 (Okla. 1984). See generally Note, *Corporation Commission Jurisdiction: The Oklahoma Supreme Court's "About Face" in Tenneco Oil Co. v. El Paso Natural Gas Co.*, 20 TULSA L.J. 495 (1985).

interests of all concerned would be best served by abandoning the effort to distinguish between public rights and private rights and returning to the traditional principles of deference to agency authority. This would neither enlarge the authority of the Commission in any way nor relax judicial review of agency action. Concern about the Commission's carrying out its responsibilities can best be effectuated by judicial review of agency action rather than judicial displacement of the agency's functions.

A harmonious interplay between the courts and the administrative agencies of a state is essential to the proper functioning of state law. Since the mid-1930s a body of state and federal administrative law has developed that defines the relationship between court and agency and attempts to delineate their proper roles. This law consists of, and has been shaped by, both statutory provisions and judicial doctrines. Basic principles include the prohibition of collateral attacks on the orders of an agency, the doctrine of primary jurisdiction, the requirement that parties exhaust their administrative remedies before seeking judicial review, and application of a limited scope of review of agency determinations.² These principles of comity and deference have been developed not only because of concerns for judicial economy but more importantly because the state constitution or the legislature has given certain important tasks to the agencies, and the agencies possess the expertise to carry out these responsibilities. In recent years there has been a lessening of the sense of deference, prompted perhaps by a growing distrust of agencies and by a heightened notion of the necessities of due process.³ The formulation of the public right/private right distinction is perhaps symptomatic of the shift in judicial treatment of agency functions. It limits the role of the

2. For a recent discussion of these overlapping doctrines focusing on separation of powers principles, see Wright, *The Timing of Judicial Review of Administrative Decisions: The Use and Abuse of Overlapping Doctrines*, 11 AM. J. TRIAL ADVOC. 83 (1987). See also Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1 (1984); Power, *Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547. See generally 2 B. KRAMER & P. MARTIN, *THE LAW OF POOLING AND UNITIZATION* §§ 24-25 (3d ed. 1989) (the role of administrative agencies in oil and gas regulation).

3. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). The rise of suits under 42 U.S.C. § 1983 imposing liability on state officials and the erosion of immunity for state and federal officials are developments deriving from a sense in the courts that an active judiciary is necessary to protect citizens from administrative officials. The number of suits brought annually against government officials rose from 500 to 27,000 from 1961 to 1983. Note, *Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness*, 38 VAND. L. REV. 1543, 1544 n.3 (1985). For discussion of suits against government officials see P. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983). For indication that the current Supreme Court is reconsidering this harsh approach to administrative agencies and officials, see *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989).

Oklahoma Corporation Commission on oil and gas matters and correspondingly enhances the role of the state district courts.⁴

There are two aspects of the public right/private right doctrine that should be carefully distinguished. One is readily recognizable as the *ultra vires* doctrine: an administrative agency has only such authority as has been expressly granted it by the state constitution or by the legislature, or is necessarily implied from its grant of authority. Any exercise of authority by the agency that is beyond the express or necessarily implied grant is unlawful.⁵ The public right/private right distinction proceeds first from the premise that an agency may not adjudicate contract rights, tort rights, or title disputes unless the legislature has delegated those specific powers to the agency. The second aspect of the public right/private right doctrine as it is emerging is a judicial recognition of the power of private parties to supplant the authority of the agency through private agreement; that is to say, the agency has authority but that authority is capable of being displaced by the actions of private parties. The authors have no quarrel with the first aspect of the public right/private right distinction. It is the second aspect that we find troublesome and potentially disruptive of the state regulatory program.

The Oklahoma pooling statute provides that: "All orders requiring . . . pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive

4. The Oklahoma Constitution provides that district courts have original jurisdiction over all justiciable matters except those that are delegated by statute to another body. OKLA. CONST. art. VII, § 7. One of those delegated areas is oil and gas conservation matters, in which decisions by the Corporation Commission are directly appealed to the Oklahoma Supreme Court. OKLA. CONST. art. IX, § 20. The statute governing review provides that appeals may be taken from any rule, regulation, or order of the Commission by any person aggrieved and by the Attorney General, the Conservation Attorney, and the Director of Conservation. OKLA. STAT. tit. 52, § 113 (1981). For other provisions for judicial review related to specific other acts that follow the same pattern, see OKLA. STAT. tit. 52, §§ 242, 260.10, 277, 287.6 (1981).

5. *Burmah Oil & Gas Co. v. Corporation Comm'n*, 541 P.2d 834 (Okla. 1975); *Southern Union Prod. Co. v. Corporation Comm'n*, 465 P.2d 454 (Okla. 1970); *Merritt v. Corporation Comm'n*, 438 P.2d 495 (Okla. 1968); *Kingwood Oil Co. v. Hall-Jones Oil Corp.*, 396 P.2d 510 (Okla. 1964). The *ultra vires* doctrine applies to all agencies, not just the Corporation Commission. See, e.g., *Gibson v. Elmore City Tel. Co.*, 411 P.2d 551 (Okla. 1966); *Southwestern Light & Power Co. v. Elk City*, 188 Okla. 540, 111 P.2d 820 (1940). The *ultra vires* doctrine involves both statutory and constitutional issues: (1) has the legislature delegated certain powers to the administrative agency (as a matter of statutory interpretation), and (2) can the legislature delegate certain powers to the agency (as a matter of constitutional separation of powers). The Oklahoma Supreme Court has not clearly distinguished these two issues, but its reliance on the United States Supreme Court's opinion in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which we believe is misplaced (see *infra* text accompanying note 38), indicates a constitutional concern over the authority of the Corporation Commission.

without unnecessary expense his just and fair share of the oil and gas.”⁶ The Commission has certain enforcement powers and has jurisdiction to make, amend, or modify orders, rules, and regulations to carry out its authority.⁷ Under the Oklahoma Supreme Court’s public right/private right distinction, private parties can make agreements relating to these orders and it will be up to a district court to determine in the first instance whether the agreement contravenes any public rights aspect of the order. This puts the district court in the position of determining what actions of a party under a conservation order will or will not prevent waste and what will or will not be necessary to protect correlative rights. When a dispute is initially taken to the district court, only the private parties will be before the court. The Commission will not be a party to the litigation. To determine jurisdiction, the district court will necessarily decide what is or is not related to public rights issues in oil and gas matters and will do so without bringing to bear the expertise of the Commission. Even though the district court’s decision is subject to review by the Oklahoma Supreme Court, the court will still not have the benefit of the Commission’s views (unless of course the Commission has attempted to intervene). The legislature and constitution have allocated responsibility and authority for the prevention of waste, for the protection of correlative rights, and for other specified functions to the Commission, subject to review by the supreme court, but the public right/private right distinction takes the Commission out of a decision process relating to fulfillment of the Commission’s own orders.

Few would doubt that parties operating under an order can enter into contracts that relate to the order. Indeed, the agency pooling order is likely to contemplate agreements being made pursuant to the order, most often an operating agreement after an owner elects to participate in well costs. Typically, too, the parties may agree to a balancing of production where one has a market for that owner’s share of gas and the other owner has no market. The question over the public right/private right distinction is not whether the parties can enter into agreements that relate to the order, but who has jurisdiction to resolve disputes arising out of agreements that may impinge upon the fulfillment of the order—the district courts or the Commission.

The lack of clarity in the Oklahoma Supreme Court’s approach has left many confused. As a result, proceedings may bounce around among

6. OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1988).

7. OKLA. STAT. tit. 52, §§ 97, 112 (1981).

the Commission and state court and federal court. One may file with the Commission only to be told to go to district court, or one may file with the court and be told to go to the Commission.⁸ Both court and agency or neither of them may assert jurisdiction.⁹ It may be required that the Commission stay or arrest a proceeding before it while awaiting court adjudication of a jurisdictional issue.¹⁰ The prudent attorney must of necessity file dual actions in a doubtful case, one in the district court and another in the Commission to preserve a cause of action.

To provide the appropriate perspective for understanding the significance and consequences of the development of the public right/private right distinction, we shall first consider the principles of deference that the Oklahoma courts employed in cases before announcing the public right/private right distinction. We shall then analyze recent cases that have made and applied the public right/private right distinction.

The pre-*Tenneco* cases resolved the jurisdictional dispute by applying traditional administrative law principles without resort to the private right/public right distinction. They properly emphasized the need to allow the Commission to exercise the discretion given it by the legislature in areas of its expertise. The decisions reflect a judicial reluctance to interfere with Commission orders until the orders become final, and once they become final review is solely through the Commission upon a showing of changed circumstances or knowledge. The obfuscating public right/private right distinction should not interfere with the basic allocation of power decisions affecting the agency/court relationship.

II. LIMITATIONS ON COURT JURISDICTION: EXHAUSTION OF ADMINISTRATIVE REMEDIES, RIPENESS, AND PRIMARY JURISDICTION

Prior to invoking the power of a court for judicial review, a party is required to exhaust its administrative remedies. The purpose of this is to avoid a premature interruption of the administrative process. The agency must be given an opportunity to bring its expertise to bear upon a matter within its jurisdiction or to exercise the discretion that has been

8. See, e.g., *GHK Exploration Co. v. Tenneco Oil Co.*, 847 F.2d 650 (10th Cir. 1988) (in which the Tenth Circuit reversed and remanded to the district court to dismiss the action for lack of subject-matter jurisdiction); *Tenneco Oil Co. v. Corporation Comm'n*, 775 P.2d 296 (Okla. 1989) (discussed *infra* notes 48-54 and accompanying text). See also *Leck v. Continental Oil Co.*, No. 72,054 (Okla. Nov. 28, 1989) (Westlaw, 1989 WL 142,458) (not released for publication).

9. See *Nilsen v. Ports of Call Oil Co.*, 711 P.2d 98, 101 (Okla. 1985). See also discussion *infra* notes 40-45 and accompanying text.

10. *Tenneco Oil Co. v. Corporation Comm'n*, 775 P.2d 296 (Okla. 1989).

conferred upon it by the legislature. While statutes in many states require exhaustion before allowing a court to assume jurisdiction, judicial recognition of the doctrine in Oklahoma reflects the court's acknowledgment of the status conferred upon the agency by the legislature. Moreover, when the agency has the opportunity to act it may pretermitt any further questions, thereby making judicial review moot. Requiring parties to exhaust their administrative remedies serves the same goals and purposes as the judicial prohibition against interlocutory appeals from preliminary rulings of a trial court.

Exhaustion of administrative remedies has much in common with the "ripeness" doctrine.¹¹ Both seek to avoid premature adjudication and to protect agencies from judicial interference until an agency decision is formalized. The ripeness determination, however, focuses more upon the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration than on the finality of the agency decision. Thus, an agency decision or order might be final but not yet ripe because it has not come to be felt in a concrete way by a party adversely affected. And an agency decision might not be ripe because it is not yet the final decision of the agency on the matter before it.¹²

The exhaustion doctrine also merges into the rule against collateral attack in some cases in which a party has failed to object properly to a matter in an agency hearing. For example, in *Wood Oil Co. v. Corporation Commission*,¹³ the plaintiffs filed an application to change the terms of a unit order, contending the order was inequitable, unjust, and unconscionable. But, said the court, the basis of the plaintiffs' contentions had been known and could have been urged at the original hearing. The plaintiffs had thus consented to the original order and could not attack it after it had become final.

The exhaustion doctrine and the primary jurisdiction doctrine are related and similar. Each concerns the timing of judicial review. But primary jurisdiction concerns whether a court should defer action on a matter on which it has jurisdiction, pending input from an administrative agency that may assist the court in resolving the matter properly before

11. See, e.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

12. See, e.g., *H & L Operating Co. v. Marlin Oil Corp.*, 737 P.2d 565, 568 (Okla. 1987), in which the Oklahoma Supreme Court held that an order staying the effect of an emergency order was not ripe for judicial determination where an agency hearing was still to be held on the substance of the initial application. See *infra* notes 19-20 and accompanying text.

13. 205 Okla. 534, 239 P.2d 1021 (1950).

it; exhaustion, on the other hand, deals with whether review may be had at all of agency action that is not the last agency word on the matter.¹⁴ A case may present factual elements that would give rise to both doctrines, and in such circumstances it is most difficult to distinguish the two doctrines, nor is there a real need to do so where the proper resolution is to require the matter to be addressed first by the agency.¹⁵

In *Constantin v. Martin*¹⁶ the Tenth Circuit applied the exhaustion doctrine to dismiss a claim involving issues of both contract law (which the Corporation Commission could not adjudicate) and interpretation of a Commission order (which the Commission could interpret or clarify under its continuing jurisdiction). The case, which was filed in a federal district court by royalty owners against a unit operator, involved a unitization plan that was ordered by the Commission. The parties disputed its effect on the overriding royalties that had been reserved by several working interest owners. The underlying issue was the ability of the unit operator to deduct from the royalty owners a proportionate share of the costs of constructing and operating a gas processing facility. The question involved construction of the overriding royalty provisions of leases and the provisions of the unitization plan; the Commission had continuing jurisdiction over the unitization plan for the purpose of determining, modifying, and interpreting its terms and provisions. Because there was ambiguity in the unitization plan, the court concluded that the plan required interpretation and possible clarification by the Commission. Thus, the plaintiffs should have resorted first to the Commission for the administrative remedy available to them. Not having exhausted their administrative remedies, the plaintiffs were not entitled to judicial relief.

14. The United States Supreme Court has explained the distinction between the two doctrines as follows:

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pac. R.R., 352 U.S. 59, 63-64 (1956).

15. See *Southern Natural Gas Co. v. Mound Co.*, 229 F. Supp. 422, 426-27 (E.D. La. 1964).

16. 216 F.2d 312 (10th Cir. 1954). See generally Merrill, *Compulsory Unitization and Individual Interests: Judicial or Administrative Jurisdiction?*, 8 OKLA. L. REV. 389 (1955), in which Professor Maurice Merrill perceptively analyzed the *Constantin* decision and predicted the problem of clearly delineating between Commission and district court jurisdiction. *Id.* at 404-07.

A recent example of an application of the principle of deference that underlies the primary jurisdiction doctrine is found in the Oklahoma case of *Stipe v. Theus*,¹⁷ a case that preceded the development of the public right/private right distinction and that has possibly been undermined by it. Stipe was a mineral owner who had been pooled in a unit operated by Davis. Stipe had elected to pay his proportionate share of drilling costs. After several payments, he stopped paying, and Davis sued him in district court to recover the sum due. Stipe then sought to dismiss on the ground that the Commission was the proper forum for a well-cost dispute. Upon being overruled by the district court, he went to the Commission with an application regarding the well-cost dispute, and sought to stay the district court's proceeding. He then brought an original proceeding in the state supreme court to stay the district court. The Oklahoma Supreme Court found itself faced with the dilemma that both the district court and the Commission had jurisdiction on such a well-cost dispute, even though the Commission could not provide a complete remedy to the operator should a sum be owed. The court resolved the matter by letting the Commission decide the question first without discussing whether an agreement of the parties was involved. Although the court did not mention the primary jurisdiction doctrine, the ruling is essentially an application of the doctrine.

In *Sooner Oil & Gas Corp. v. State*¹⁸ a party sought review by the Oklahoma Supreme Court of an order of an Administrative Review Panel within the Corporation Commission. The party had not sought review of the order by the Corporation Commission, presumably because the party had failed to seek a rehearing from the Administrative Review Panel within the ten-day period allowed by regulation, and appeal to the Commission was conditioned on a filing for rehearing by the Administrative Review Panel. The Oklahoma Supreme Court refused to allow the appeal because no appeal to the Commission had been taken first.

In *H & L Operating Co. v. Marlin Oil Corp.*,¹⁹ the Oklahoma Supreme Court held that an order staying the effect of an emergency order was not ripe for judicial determination where an agency hearing was still to be held on the substance of the initial application. Here H & L Operating applied to the Corporation Commission for a permit to drill

17. 603 P.2d 347 (Okla. 1979).

18. 635 P.2d 599 (Okla. 1981). The use of the Administrative Review Panel was subsequently held unconstitutional in *Hair v. Corporation Comm'n*, 740 P.2d 134 (Okla. 1987).

19. 737 P.2d 565 (Okla. 1987).

at an exception location. Hearing was set for July 20, 1981, on this application. But H & L Operating then sought an emergency order in April 1981 to permit immediate drilling at the exception location based on contractual necessity and availability of a drilling rig. The Administrative Review Panel of the Commission granted the emergency application, but the Commission then stayed the effect of the emergency order after a motion for rehearing and request for stay by an adjacent lessee. H & L Operating sought judicial review of the stay order, complaining that it was based on no evidence at all. After indicating that evidence was not needed by the Commission where entitlement to relief could be demonstrated by legal argument, the court dismissed the appeal as not ripe for decision.²⁰ Interference by the court would have immersed it in the administrative process, and the Commission had yet to address the substantive issue of the propriety of granting an exception location.

III. COLLATERAL ATTACK AND CONTINUING JURISDICTION

The Oklahoma statutes expressly prohibit collateral attacks on Commission orders.²¹ A collateral attack has been defined in an Oklahoma case as "an attempt to avoid, defeat, or evade [a judicial proceeding], or to deny its force and effect in some manner not provided by law; that is, in some other way than by appeal, writ of error, certiorari, or motion for a new trial."²² This prohibition clearly has an impact on the jurisdictional issues sought to be resolved by the public right/private right distinction. District courts do have jurisdiction to review Commission orders but solely on jurisdictional grounds and solely where the jurisdictional defects appear on the face of the order.²³ In all other cases only the Commission has the jurisdiction to review its prior orders and then only on a showing of changed circumstances or new evidence or knowledge. The collateral attack doctrine prevents even the Commission

20. *Id.* at 567-68. The court looked to the United States Supreme Court decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

21. OKLA. STAT. tit. 52, § 111 (1981) provides in part: "No collateral attack shall be allowed upon orders, rules and regulations of the Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeals from such orders, rules or regulations to the Supreme Court." *Id.*

22. *State v. Corporation Comm'n*, 590 P.2d 674, 677 (Okla. 1979) (quoting *Pettis v. Johnson*, 78 Okla. 277, 290, 190 P. 681, 694 (1920)). In *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438, 441 (Okla. 1986), the Oklahoma Supreme Court set forth standards regarding jurisdiction of the courts where a collateral attack issue is raised.

23. See *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438 (Okla. 1986); *Gulfstream Petroleum Corp. v. Layden*, 632 P.2d 376 (Okla. 1981). See also *Mullins v. Ward*, 712 P.2d 55, 59 n.7 (Okla. 1985); *Miller v. Wenexco, Inc.*, 743 P.2d 152, 155 (Okla. Ct. App. 1987).

from reviewing its own orders after the time for supreme court appeal has passed unless it can be shown that there has occurred a change in circumstances or new information has become available.²⁴ If the Corporation Commission had no jurisdiction with respect to a matter, or if an order does not pertain to a matter over which the Commission has jurisdiction, then litigation over the matter will not be a collateral attack. Although the scope of the collateral attack doctrine was well-defined in litigation, application of the doctrine has become more difficult because of the Oklahoma Supreme Court's public right/private right distinction. Where a contract is entered into after the order and private rights only are involved, then the jurisdictional "defect" will not appear on the face of the order. If only "private rights" are involved then there can be no attack on the order even though one of the parties is contending that the order is without effect.

Where the Corporation Commission had jurisdiction to enter an order, an action concerning the effects of the order will be a collateral attack on the order. Thus in *Woods Petroleum Corp. v. Sledge*,²⁵ the claim in a quiet title action could not go forward. In this case, Woods Petroleum had petitioned the Commission to force pool certain interests within a 320-acre gas unit. The last of four orders of the Commission increased density and required Woods to drill additional wells within 120 days. The additional wells were not drilled. Woods did not directly appeal any of the orders but instead filed, as operator of the unit, a quiet title action in state district court. It sought an interpretation of the orders that would avoid the problems created by its failure to drill three additional wells. The Oklahoma Supreme Court held that the district court lacked jurisdiction because the quiet title action was an impermissible collateral attack on the Commission's orders. The Commission clearly had jurisdiction to issue the orders in question, and the only issue was the equities of the mineral interest owners; the Commission had sole authority to adjust the equities and protect the correlative rights of interested parties. Similarly, in *Drake v. Southwest Davis Unit*,²⁶ in which there was an apparent conflict between two Commission orders, the

24. See generally *Union Tex. Petroleum v. Corporation Comm'n*, 651 P.2d 652 (Okla. 1981), cert. denied, 459 U.S. 837 (1982); *Marlin Oil Corp. v. Corporation Comm'n*, 569 P.2d 961 (Okla. 1977); *Phillips Petroleum Co. v. Corporation Comm'n*, 482 P.2d 607 (Okla. 1971).

25. 632 P.2d 393 (Okla. 1981). See also *Chancellor v. Tenneco Oil Co.*, 653 P.2d 204 (Okla. 1982).

26. 698 P.2d 15 (Okla. 1985).

Oklahoma Supreme Court ruled that the district court had no jurisdiction to resolve the conflict as it had no authority to interpret a Commission order. If the district court were asked to review, annul, modify, or correct either of the two orders, it would be a collateral attack forbidden by the Oklahoma statute.

In *McDaniel v. Moyer*,²⁷ unleased landowners who had been force pooled went to the district court for "clarification" of a unit order which had the effect of allowing the operator to use their land. Apparently seeking to challenge the site of the unit well, the plaintiff claimed that the operator needed to post a bond to secure payment to compensate for the use of an abandoned wellbore. The court recognized the Commission's jurisdiction to clarify or amend its earlier orders even though the Commission's determination might have an incidental effect on the private relationship between the surface owner and the operator. The Oklahoma Supreme Court ruled the district court lacked jurisdiction of the subject. The court stated that:

Cognizance to interpret and construe pooling orders would permit the district court to exercise a significant aspect of the Commission's regulatory authority. It would place the court in charge of an integral part of regulating the conservation and production of oil and gas. Our constitution clearly prohibits such institutional encroachment. The district court is powerless to interfere with any Commission order that establishes the boundaries for well location.²⁸

In *Chenoweth v. Pan American Petroleum Corp.*²⁹ the Tenth Circuit held that the validity of a Corporation Commission unitization order that was on appeal in the state court system could not be litigated in an action to cancel leases for failure to develop. Nor could the plaintiff attack a spacing order when he had not exhausted the available administrative remedy of seeking an amendment of the order. This spacing order determined the McLish formation to be a common source of supply, which the plaintiff contended was wrong because there were two productive zones in the formation that were separate sources of supply. While the plaintiff had not been a party to that determination in 1954, he had available the administrative remedy of petitioning the Commission to amend the original order.

A case involving the Commission's jurisdiction over well costs and holding that the Commission does have continuing jurisdiction over such

27. 662 P.2d 309 (Okla. 1983).

28. *Id.* at 312 (citations omitted).

29. 314 F.2d 63 (10th Cir. 1963).

costs was *Amarex, Inc. v. Baker*.³⁰ In this case the operator of a unit well had encountered difficulty with the initial borehole after drilling only 416 feet. He then skidded the rig over and drilled to 12,500 feet at a cost of \$2,000,000. When he sought to collect from the other interest owners, they claimed their election to participate in the well did not extend to the second hole. The operator then filed with the Commission for a well cost determination. The Commission dismissed the operator's action saying it was a collateral attack on the Commission's order, that the Commission had no authority to construe or interpret its own order, and that the order did not provide for an additional, replacement, or twin well. The operator sought a writ of mandamus. While mandamus was held not to be appropriate, the Oklahoma Supreme Court ruled that the Commission did have jurisdiction to interpret or construe its order. The court based its ruling on the specific provision of the Commission's authorizing statute, which states that "[i]n the event of any dispute relative to such costs [*i.e.*, development and operation costs], the Commission shall determine the proper costs after due notice to interested parties and a hearing thereon."³¹ The court ruled that the jurisdictional power vested in the court by this section 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."³² The court then concluded that there was not substantial evidence to support the Commission's conclusion that a new well had been commenced: minor vertical or horizontal variations do not convert the operation to a new well. Because the matter involved the Commission's continuing jurisdiction, the operator's petition was not a collateral attack on the Commission's order.

The case of *Shell Oil Co. v. Keen*³³ involved a question of the jurisdiction of the Commission to construe its own order. Here the Commission allowed a well to produce oil in excess of allowables with the proviso that overproduction would be made up if and when the tract was taken into the Elk City Unit. It was taken into the unit, and its overproduction was allocated to other tracts in the unit; the tract was not allowed to

30. 655 P.2d 1040 (Okla. 1983).

31. *Id.* at 1043 (quoting OKLA. STAT. tit. 52, § 87.1(e) (1981)).

32. *Id.* at 1045. For another case involving the scope of the Commission's jurisdiction over well-cost disputes, see *Lear Petroleum Corp. v. Seneca Oil Co.*, 590 P.2d 670 (Okla. 1979), discussed *infra* note 84.

33. 355 P.2d 997 (Okla. 1960).

participate until the overproduction had been made up. A dispute arose over the inclusion of certain plant products in the order from the effective date of the inclusion of the well in the unit. Lessors and lessees of the tract filed a petition with the Commission for interpretation or amendment of the order to establish that the overproduction provision related only to oil and not plant products of the unit. The Commission denied the application on the basis that the order was clear and unambiguous. The plaintiffs then filed for an accounting in the district court against the lessee and the unit operator. The unit operator filed for a writ prohibiting the district judge from exercising jurisdiction in the case. The prohibition was granted. The Oklahoma Supreme Court held that the parties could sue for accounting, but the district court had no jurisdiction to rewrite the order or give a construction contrary to the meaning given by the Commission. Under the Commission's construction, the plaintiff was not entitled to an accounting. The plaintiff had not sought review of the order itself. Although an action for an accounting belongs in the district court, the court ruled that a party cannot seek to modify a Commission order with a district court suit to serve as the basis for his demand for accounting.

It was against this backdrop of deference to the Commission, even when legal issues involved interpretation or application of private agreements, that the Oklahoma Supreme Court issued its opinion in *Tenneco Oil Co. v. El Paso Natural Gas Co.*³⁴ In this decision, the court announced and began to apply the public right/private right distinction. Since then, discussion and application of the public right/private right distinction has appeared in four types of cases: disputes over whether a party has elected to participate in a well, over unit operator status, over well costs, and over tort claims.

IV. ELECTION DETERMINATION

The distinction between public and private right aspects of an order of the Oklahoma Corporation Commission was first made and applied in *Tenneco Oil Co. v. El Paso Natural Gas Co.*³⁵ The distinction was used to

34. 687 P.2d 1049 (Okla. 1984). The court based the public right/private right distinction on the United States Supreme Court opinion in *Northern Pipeline Constr. Co. v. Marathon Pipe Line*, 458 U.S. 50 (1982), which involved the ability of the Congress to grant broad judicial authority to bankruptcy judges who were not article III judges. See *infra* note 38 and accompanying text.

35. 687 P.2d 1049 (Okla. 1984). A precursor to *Tenneco* was *Southern Union Prod. Co. v. Corporation Comm'n*, 465 P.2d 454 (Okla. 1970). In this case an operator abandoned a well and a non-participating interest owner applied to the Corporation Commission to "interpret" the effect of

resolve an issue of whether the district court or the Commission had jurisdiction to resolve a dispute over an election to participate in well costs under a forced pooling order. An order of the Corporation Commission provided that Tenneco was to be the operator of a well in a unit, but that El Paso would become the operator if Tenneco did not commence operations for drilling the unit well within ninety days. In the event El Paso became operator, the order provided that Tenneco would have fifteen days to elect whether to participate in the working interest of the proposed well and five days thereafter within which to pay El Paso its proportionate part of the costs; if the election to participate was not made, El Paso could pay a cash bonus and overriding royalty for Tenneco's working interest. The order did not spell out in detail the manner in which the election was to be made or communicated by the affected parties.

El Paso did become the operator, and it sent Tenneco an executed operating agreement. Tenneco delayed returning it for about a month, during which time El Paso tendered to Tenneco the cash bonus provided for in the unit order when the non-operator does not make a timely election to participate. Tenneco brought a quiet title action in district court against El Paso, claiming that it had communicated an election to El Paso, and that the operating agreement between the parties allowed it to participate in the well, irrespective of whether a proper election had been made under the order.

The Oklahoma Supreme Court itself raised the question of jurisdiction. It ruled that the district court had jurisdiction to determine if an election was timely and properly made and that parties may modify or limit rights they have under a Commission order so long as this does not intrude upon matters of public rights in an order.³⁶ The forced pooling order was "bare-bones," according to the court, and the parties were free

abandonment on the pooling order. The Commission determined that the abandonment of the initial well had the effect of terminating all rights under the pooling order and restored all interest owners to the position they had enjoyed before the pooling order. The Oklahoma Supreme Court held that the Commission had exceeded its authority because the Commission was "without authority to hear and determine disputes between two or more private persons or entities in which the public interest is not involved." *Id.* at 458 (citing *Gibson v. Elmore City Tele. Co.*, 411 P.2d 551, 553-54 (Okla. 1966)). The thrust of *Southern Union* seems to be that the Commission cannot make what amounts to a declaratory order of interpretation, although one can certainly make the case that the decision does set forth the essential elements of the public right/private right distinction. This case is further discussed *infra* note 45.

36. *Tenneco*, 687 P.2d at 1050. The court's decision discussed here is the opinion issued on rehearing which reversed an earlier opinion. That earlier decision is reported at 53 OKLA. B.J. 2476 (Oct. 19, 1982). It is discussed in Note, *Subject Matter Jurisdiction of the Oklahoma Corporation Commission: Tenneco Oil Co. v. El Paso Natural Gas Co.*, 19 TULSA L.J. 465 (1984), and in Note,

to cover any matter not related to waste or correlative rights by agreement. It was thus within the domain of the court to determine if the election to participate in well costs had been made; this was not a matter regarding waste or correlative rights. Because the court ruled that parties can "modify"³⁷ an order so long as they do not intrude into the public rights area, the court may resolve disputes between the parties of private rights. If the public rights aspects of the order are involved, then it is the Commission that is to hear the matter.

The court was taking its public/private right distinction from the United States Supreme Court opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,³⁸ involving the ability of the Congress to grant judicial authority to non-article III bankruptcy judges. This reliance on *Northern Pipeline* was misplaced. That case concerned the delegation of judicial authority to non-article III judges to adjudicate contract rights that arose independently of, and prior to, the administration of a bankruptcy proceeding. Furthermore, the United States Supreme Court found objectionable Congress's grant to article I bankruptcy courts of all of the jurisdiction of the article III courts and all of the ordinary powers of the district courts. These factors are simply not present in the cases in which the Oklahoma Supreme Court has applied the public right/private right distinction. There is a fundamental distinction between adjudicating private contract rights and entering orders that have an effect on contract rights. The issue in *Northern Pipeline* was the power of an article I judge to adjudicate contract rights created under state law. The issue was not whether an article I judge, and by logical extension an administrative agency, could enter an order that would affect private rights. In the typical case in Oklahoma involving the public right/private right distinction, the Corporation Commission is asked to enter an order that may affect contract rights, but not to interpret or adjudicate directly the contract rights themselves.

The dissent by Justice Opala in *Tenneco* would have held that the

Interpretation of Corporation Commission Orders: The Dichotomous Court/Agency Jurisdiction, 8 OKLA. CITY U.L. REV. 311 (1983). The decision on rehearing is discussed in Note, *supra* note 1.

37. *Tenneco*, 687 P.2d at 1052. The majority bristled at the use of the word "modify": "We are critical and condemn the use of the word 'modify,' a derivative, or synonym thereof, as used in the trial court's journal entry of judgment when describing the effect of the operator's agreement on the order of the Commission within the purpose of the conservation act." *Id.* However, no other word will do to describe the thrust and effect of the approach taken by the majority.

38. 458 U.S. 50 (1982). See *Tenneco*, 687 P.2d at 1053-54. On the *Northern Pipeline* decision generally, see Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197. See also Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988).

Corporation Commission had exclusive jurisdiction over election-related issues.³⁹ Justice Opala said that it was exclusively within the jurisdiction of the Corporation Commission to resolve disputes over participation rights based on a Commission pooling order. He reasoned that only the supreme court could review a Commission order under the Oklahoma Constitution and thus a district court could not determine compliance with an order. An operating agreement made under an order was not a purely private arrangement but instead an extension of a statutorily created and regulated interest. He noted finally that the post-pooling-order claims were vital to the enforcement scheme of the Corporation Commission's regulatory power.

Some cases subsequent to *Tenneco* regarding well election determinations suggest that the court may have backed away from the full import of the decision. In such decisions, the court has been able to distinguish *Tenneco*. For example, in *Nilsen v. Ports of Call Oil Co.*⁴⁰ the court made a distinction between clarifying an order and determining the effect of the order. Ports of Call was designated as operator in a pooling order and given 180 days to begin drilling of a well. If drilling had not begun within 180 days, the order would become null and void by its own terms. The company began operations within 180 days but then experienced several blowouts and had to commence new boreholes. The second and third holes were begun beyond the 180-day period. Several attacks were mounted on the operator's power to commence new holes, and Ports of Call filed an application for clarification with the Commission. The Commission ruled that it had subject-matter jurisdiction under its power to repeal, amend, modify, or supplement its orders.⁴¹ But the Commission said it did not have jurisdiction to decide if the operations in question constituted a continuous drilling operation. At the same time, a district court said in a parallel suit that it lacked jurisdiction over a related title matter because jurisdiction was in the Commission.

Ports of Call then asked the Oklahoma Supreme Court for a writ of mandamus, which the court granted, directing the Commission to address the issue. The supreme court held that while a court has the power to adjudicate the legal effect of an order of the Commission, the Commission does have authority to "clarify" its own order by determining the

39. *Tenneco*, 687 P.2d at 1056 (Opala, J., dissenting). For an able discussion of the case's implications, see Professor Eugene Kuntz's Discussion Notes at 82 OIL & GAS REP. 345-49 (MB 1985).

40. 711 P.2d 98 (Okla. 1985).

41. *Id.* at 100. The Commission relied on OKLA. STAT. tit. 52, § 112 (1981).

continued effectiveness of its order.⁴² Citing a prior decision the court said it "distinguished between the power granted to clarify, or 'supplement,' previous orders, the exercise of which does not effect a change in the prior order or in the rights accrued under that order, and the powers granted to repeal, amend or modify a previous order."⁴³ Here the application was in the nature of a clarification. The Commission could say whether the order related to a completed well in the target formations or was limited to the initial borehole. It necessarily followed "that the Commission as well has the authority to determine whether [the order] has ceased, by its own terms, to be of force and effect."⁴⁴ The court held that only the district court had the power to adjudicate the legal effect of a Commission order on the private interests involved, but the Commission still had continuing jurisdiction over questions of construction of its own orders, and was the proper forum for such issues.⁴⁵ While the Commission's clarification or modification may affect the rights of the parties, that does not necessarily divest the Commission of jurisdiction. The Commission clearly has the statutory power and duty to prevent waste and protect correlative rights, and it may be essential to affect private rights to achieve these goals.

The Oklahoma Supreme Court followed the rationale of *Nilsen* in the case of *Samson Resources Co. v. Corporation Commission*.⁴⁶ A dispute arose over whether a force-pooled interest in a unit had timely

42. *Id.* at 102.

43. *Id.* (citing *Cabot Carbon Co. v. Phillips Petroleum Co.*, 287 P.2d 675, 679 (Okla. 1955)).

44. *Id.* at 102.

45. *Id.* at 103. *Cf.* *Southern Union Prod. Co. v. Corporation Comm'n*, 465 P.2d 454 (Okla. 1970), in which the court set aside an effort at continuing jurisdiction on the basis that while the Commission could interpret an order, it could not determine its legal effect. Here an operator abandoned a well and a non-participating interest owner applied to the Corporation Commission to "interpret" the pooling order to spell out the effect of abandonment, which the applicant said was to nullify the Commission's pooling and spacing order. The Commission issued an order determining that the abandonment of the initial well had the effect of terminating all rights under the pooling order and restored all interest holders to the position they enjoyed prior to the entry of the pooling order. The court held this was beyond the authority of the Commission. According to the court:

While such an 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 No. 62,532. Because the latter order was not expressly nor by necessary implication authorized by either the Constitution or the statutes of Oklahoma, the same was void as beyond the power of the Commission to enter.

Id. at 458. *See also* *Buttram Energies, Inc. v. Corporation Comm'n*, 629 P.2d 1252, 1254 (Okla. 1981), in which the court held that the Commission had authority to determine if a prior pooling order was still effective; the determination was incidental to the Commission's authority to determine whether or not the application to re-pool should be approved or denied.

46. 742 P.2d 1114 (Okla. 1987).

elected to participate in the costs of drilling the unit well. The Commission concluded that the election had not been timely, and the court upheld this decision. The Corporation Commission was attempting to clarify its pooling order, and thus had jurisdiction. Another dispute over the timeliness of an election to participate in the costs of a well was addressed in *Samedan Oil Corp. v. Corporation Commission*.⁴⁷ The Commission concluded that the election had been timely, and this decision was also upheld as a proper exercise of the Commission's jurisdiction to clarify an order. In *Samedan* there was no discussion regarding the proper jurisdiction of the Commission to determine the validity of the election made by the non-operator.

The needless complexity engendered by the public right/private right distinction is reflected in *Tenneco Oil Co. v. Corporation Commission*.⁴⁸ Tenneco filed an application with the Corporation Commission to determine whether it had elected to participate in the drilling of a well pursuant to a Corporation Commission forced pooling order. The Corporation Commission found that the issue of participation was being litigated in federal district court and was on appeal to the Tenth Circuit Court of Appeals, and therefore dismissed the cause without prejudice. The federal district court ruled, in a case brought by the unit operator, that it had jurisdiction and subsequently held that Tenneco was a participant in the well. The federal district court had concluded it had jurisdiction because of the Oklahoma precedents; the correspondence between the parties was so clearly an election that the court did not have to interpret a Commission order, but only determine its legal significance. The Tenth Circuit reversed and remanded to the district court to dismiss the action for lack of subject-matter jurisdiction.⁴⁹

In the meantime, Tenneco appealed the Corporation Commission's declining of jurisdiction and the Oklahoma Supreme Court reversed.⁵⁰ The court defined the issue as whether the Corporation Commission had erroneously dismissed Tenneco's application pending the Tenth Circuit's resolution of the dispute. The court ruled that: "[w]hen a party's right to participate in a well flows from a Corporation Commission Forced Pooling Order, rather than from private agreement, the Corporation Commission has exclusive jurisdiction to determine whether the party has

47. 755 P.2d 664 (Okla. 1988).

48. 775 P.2d 296 (Okla. 1989).

49. GHK Exploration Co. v. Tenneco Oil Co., 847 F.2d 650 (10th Cir. 1988).

50. *Tenneco v. Corporation Comm'n*, 775 P.2d at 298.

elected to participate in compliance with the Forced Pooling Order.”⁵¹ The court said that in *Samson Resources Co. v. Corporation Commission*⁵² it had held that without a private agreement, the Commission was the proper forum for disputes over the status of elections under pooling orders. It also stated that the Corporation Commission had jurisdiction to construe and clarify an earlier order to determine whether a party had complied with the order.⁵³ The court ruled that “absent a change or challenge of a public rights issue of conservation, it is the exclusive jurisdiction of the district courts to adjudicate a party’s status of election when the party’s right to participate flows and arises from private agreements.”⁵⁴ Here there were no allegations made regarding the existence of a private agreement. The Corporation Commission, the court held, should have stayed or arrested the proceeding pending disposition of the federal appeal.

The movement of the dispute back and forth between the Commission, the federal courts, and the state courts well illustrates the problems inherent in the public right/private right distinction of the Oklahoma Supreme Court. Moreover, the court’s ruling demonstrates the dilemma of the Commission in handling proceedings before it. It appears that the Oklahoma Supreme Court should have ruled that the Corporation Commission should have proceeded to hear the matter if there were no allegations relating to the existence of a private agreement. Comity should not have been an issue because the court had concluded that the federal courts lacked subject-matter jurisdiction in the absence of private agreements. Yet for the Corporation Commission to proceed while a matter is pending in a court subjects the parties to a great possibility of inconsistent rulings and unnecessary expenditures. It would appear that comity ought to run the other way; that is, the interests of all concerned would be better served if the courts deferred exercise of jurisdiction until the Corporation Commission ruled upon a matter that touches upon its jurisdiction.

The interpretation/clarification problem was also discussed in *Kaneb Production Co. v. GHK Exploration Co.*⁵⁵ A detailed look at the

51. *Id.* at 297.

52. 742 P.2d 1114 (Okla. 1987). *See supra* note 46 and accompanying text.

53. *Tenneco v. Corporation Comm’n*, 775 P.2d at 297-98 (citing *Nilsen v. Ports of Call Oil Co.*, 711 P.2d 98 (Okla. 1985)).

54. *Id.* at 298 (citing *Samson Resources Co. v. Corporation Comm’n*, 742 P.2d 1114 (Okla. 1987)).

55. 769 P.2d 1388 (Okla. 1989).

facts in *Kaneb* will again illustrate the elusive nature of the interpretation/clarification dichotomy as well as the public right/private right distinction. In this case the owner of a pooled interest, Kaneb Exploration Company, filed an application with the Corporation Commission to determine whether its predecessor had elected to participate in the drilling of a well pursuant to a forced pooling order. The Commission found that the interests of Kaneb's predecessor had not been pooled under the Commission order because of a prior voluntary pooling agreement. Kaneb appealed this invalidation of the forced pooling order, and the Oklahoma Supreme Court reversed, holding that the Commission's order was an impermissible collateral attack on the forced pooling order. The court ruled that the Corporation Commission may invalidate an earlier forced pooling order for lack of jurisdiction to have entered that earlier order only when the jurisdictional infirmity appears of record in the earlier proceeding. Otherwise the second order is a collateral attack upon the first.⁵⁶

The dispute began when Kirby Exploration, the prospective well operator, filed an application with the Commission to pool certain units. A Commission trial examiner conducted a hearing on Kirby's pooling application. A few days after the hearing, Kirby received a letter from Kaneb's predecessor, Moran Exploration, which included an authorization for expenditure to participate in a proposed well in one of the units to be pooled. The Commission issued an order that named Kirby as the operator of the unit well and pooled the interests involved. The order stated that a bona fide effort had been made to reach an agreement with each respondent and that Kirby had not agreed with all of the owners to pool interests and to develop each of the units as a unit. The order was not appealed and became final. GHK Exploration was later named by the Commission as successor operator to Kirby for the well.

After a well was completed, Moran Exploration filed an application with the Commission requesting it to find that Moran had elected to participate in the well drilled by GHK. The Commission found that Moran had entered into a voluntary pooling agreement with Kirby prior to the pooling order. As a result, the Commission concluded that the earlier forced pooling order had no jurisdictional basis because of the voluntary pooling agreement it now found to have been in existence. Kaneb, as successor to Moran, appealed the Commission's order, contending that it

56. *Id.* at 1391 (citing *Nilsen v. Ports of Call Oil Co.*, 711 P.2d 98 (Okla. 1985)).

constituted an impermissible collateral attack on the earlier pooling order.

The Oklahoma Supreme Court recognized the Commission's power to clarify or supplement its earlier orders,⁵⁷ subject to the prohibition against collateral attack.⁵⁸ The court found that Kaneb had not demonstrated any new conditions that could justify "clarification" of the earlier order, thus making the proceeding before the Commission a collateral attack on a final decision. In such a collateral proceeding, the court held that the Commission's jurisdiction to issue the earlier order could be attacked,⁵⁹ but only if the jurisdictional defect appeared on the face of the earlier order.⁶⁰ Because the voluntary pooling agreement between Moran and Kirby was outside the record of the earlier order, it could not be the basis for a collateral attack.

The authors find no occasion to quarrel with the *Kaneb* decision but we note that the court's approach is somewhat disingenuous. The collateral attack doctrine prevents parties from challenging Commission orders except on direct appeal. The narrow exception made for attacks based on facial jurisdictional flaws is appropriate. Here the jurisdictional flaws, if any, were outside of the record. Yet we must raise the question of what the result might have been if the case had been brought in the district court by Moran's successor, Kaneb, for a declaratory judgment

57. *Kaneb*, 769 P.2d at 1391 (citing *Samson Resources Co. v. Corporation Comm'n*, 742 P.2d 1114 (Okla. 1987)).

58. *Id.* The court quoted from *Nilsen v. Ports of Call Oil Co.*, 711 P.2d 98, 102 (Okla. 1985):

In the case of *Cabot Carbon Co. v. Phillips Petroleum Co.* we specifically recognized the power of the Commission to clarify its previous orders under the authority of 52 O.S. 1951 § 112. In making this ruling we distinguished between the power granted to clarify, or "supplement," previous orders, the exercise of which does not effect a change in the prior order or in the rights accrued under that order, and the powers granted to repeal, amend or modify a previous order. The power to effect a *change* in a previous order, we have held, requires a showing before the Commission of a change in conditions or knowledge of conditions necessitating the repeal, amendment or modification. Failure to make such a showing renders an attempt to modify a prior order subject to the prohibition on collateral attacks set forth by the Legislature in 52 O.S. 1981 § 111.

Kaneb, 769 P.2d at 1391 (quoting *Nilsen*, 711 P.2d at 102) (citation omitted) (emphasis in original).

59. *Id.* at 1391-92 (quoting *State v. Corporation Comm'n*, 590 P.2d 674, 677 (Okla. 1979)).

The court stated that:

The prohibition against a collateral attack on an order of the Corporation Commission does not prevent inquiry into the jurisdiction of the tribunal where the questioned ruling is relied upon in a subsequent proceeding. The jurisdiction of any court exercising authority over any subject may be inquired into in every other court when the proceedings in the former are relied upon by a party claiming the benefit of that former proceeding.

Id. (quoting *State v. Corporation Comm'n*, 590 P.2d 674, 677 (Okla. 1979)).

60. *Id.* See *Mullins v. Ward*, 712 P.2d 55, 59 n.7 (Okla. 1985): "A collateral attack on an order of the Commission which is not facially void is impermissible." *Id.* (citing OKLA. CONST. art. IX, § 20 and OKLA. STAT. tit. 52, § 111 (1981)).

regarding its responsibilities for well costs under the letters exchanged between it and the operator. If GHK/Kirby had then challenged such a suit on the ground that this was a collateral attack on the forced pooling order, it seems fairly clear that under the public right/private right distinction forged by the Oklahoma Supreme Court, the district court would be justified in holding that it could look to the documents or agreements that were not part of the record and interpret them as private rights matters outside the jurisdiction of the Commission.⁶¹ We point this out not because we believe it would have been a desirable result, but to observe that the confusion arising from the public right/private right distinction can result in such inconsistencies and thus encourages litigation.

V. THE DESIGNATION OF THE UNIT OPERATOR

Where parties enter into pooling or unitization by agreement, they will themselves designate the operator of the unit. Such agreements may make unnecessary Commission exercise of jurisdiction through the compulsory pooling process. There is no need to have a compulsory pooling order where all of the working interest owners have agreed to joint operation of the unit well or wells. The typical operating agreement will provide for both the designation of an operator and procedures for change of the operator.

Where compulsory pooling is involved, the Commission normally designates as operator the applicant for the spacing or pooling order; or, where there is an existing well, the operator of the well will be designated as the unit operator. Normally, the operator will also be the interest owner who has the majority interest in the area to be unitized or has an agreement with the majority of interest owners. But occasionally there will be a conflict over who should be the operator.⁶² This may come in the initial hearing for the pooling order or it may come in an effort to

61. The case of *MM Resources, Inc. v. Huston*, 710 P.2d 763 (Okla. 1985), for example, involved an alleged oral agreement made subsequent to the order that could not have been part of the record before the Commission. See *infra* notes 79-84 and accompanying text.

62. A recent article on the problems involved in changing operators, including a discussion of the proper forum for seeking such a change, is Jimerson, *Removal of Operator: How, When, and Where*, 60 OKLA. B.J. 1329 (1989). On the Corporation Commission's approach to designation of operator, see Dunmire, *Oklahoma Forced Pooling*, in INSTITUTE ON OIL AND GAS CONSERVATION LAW AND PRACTICE, Paper 6, at 6-2 (1985). In deciding a contested case regarding the operator the Oklahoma Corporation Commission considers a number of factors including which party first proposed the well and filed its application to pool, which party owns the largest share in the unit, which party has operated wells in the area, and which party has experienced personnel who will supervise the drilling, completion and operation of the well.

change the designated operator, as, for example, when the designated operator has refused to share production or otherwise fulfill the requirements of the unit order or the statute.

The Commission has a significant interest in ensuring that the operator is fiscally responsible. Otherwise, a well that is not properly maintained or operated may cause waste, pollution, or other public injury. In addition, an irresponsible operator might not provide the Commission with the information required by law. As observed earlier, the Oklahoma Supreme Court first developed its public right/private right distinction or test in the context of a dispute over who was properly to be considered the unit operator.⁶³ An examination of several earlier cases suggests that the court has some difficulty in determining whether the operator designation is a matter of public or private right. In one case, the court has held that the designation of the operator is a matter for the Corporation Commission as part of its responsibility to see that leaseholds are operated as a unit and that correlative rights of the interest holders are protected; thus, the operator status could not be delegated.⁶⁴ After the announcement of the public right/private right distinction, the court ruled in a later case that the question of whether correlative rights in a unit were being protected by the operator was a matter involving only private rights, and the Commission could not entertain a proceeding to change the unit operator.⁶⁵

In *Crest Resources & Exploration Corp. v. Corporation Commission*⁶⁶ the Oklahoma court held that an attempted transfer of operator status is not effective unless accomplished through an order of the Commission. Thus, when the transferee of the Commission-designated operator submitted revised cost estimates for drilling the unit well, the revised estimate could have no legal effect on the parties to the unit.⁶⁷

63. *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 687 P.2d 1049 (Okla. 1984). See *supra* notes 35-39.

64. *Crest Resources & Exploration Corp. v. Corporation Comm'n*, 617 P.2d 215, 217 (Okla. 1980).

65. *Samson Resources Co. v. Corporation Comm'n*, 702 P.2d 19 (Okla. 1985).

66. 617 P.2d 215 (Okla. 1980).

67. In *Stoltz, Wagner & Brown v. Duncan*, 417 F. Supp. 552 (W.D. Okla. 1976), a federal court in Oklahoma ruled a transfer of the right to operate a unit well may be effective insofar as lease maintenance is concerned. Top lessees in this case claimed that the defendant transferees had no right to drill the well as the Corporation Commission had not approved of the transfer of operator status. The court rejected this contention, noting that "as a practical matter the operation of a well for a unit is essentially an arrangement between the parties interested in the unit." *Id.* at 561. These two cases are not inconsistent. The *Crest Resources* decision related to an issue of rights and obligations arising subsequent to the entry of the pooling order and that were under the pooling order, namely the obligation to share in costs. The Commission has a direct interest in such a matter and is

The Oklahoma Supreme Court invoked the public right/private right distinction it set forth in *Tenneco* to prohibit the Commission from exercising jurisdiction to entertain an application to change the well operator in *Samson Resources Co. v. Corporation Commission*.⁶⁸ The court held that this was a purely private dispute and thus the Commission had no jurisdiction. Samson had gotten a farmout of acreage from Tenneco. Samson and other working interest owners entered a voluntary pooling agreement, with Samson designated as the operator. The agreement covered a 640-acre drilling and spacing unit established by the Commission. Tenneco challenged Samson's operation of the unit because Samson also operated an adjacent offset well in which Samson had a greater interest. Tenneco then applied to the Commission to have itself named as operator for the unit. Tenneco and the Commission asserted the matter involved correlative rights between two competing drilling/spacing units and thus came under the Commission's jurisdiction. Samson caused a writ to be issued by the Oklahoma Supreme Court enjoining the Commission. The court stated that "[t]he present case appears, even more clearly than *Tenneco*, to involve a question of private rights. The unit in this case had been developed under the auspices of a voluntary pooling agreement, clearly sanctioned by the terms of 52 O.S. 1981 § 87.1(e)."⁶⁹ Because of the existence of a pooling agreement, rather than a pooling order, the Commission had no jurisdiction in the matter. The court stated that:

[t]he recognized power and responsibility of the Commission to act to protect correlative rights must be interpreted, in light of our holding in *Tenneco*, to be confined to situations in which a conflict exists which actually affects such rights within a common source of supply and thus affects the public interest in the protection of production from that source as a whole.⁷⁰

The Commission could protect the public interest in correlative rights

the entity with jurisdiction to resolve controversies relating to well costs. In *Stoltz, Wagner & Brown*, the court was called upon to determine the effects of operations in a unit under a lease, not implementation of the Commission order and rights and duties arising under the order. See also *Simpson v. Stanolind Oil & Gas Co.*, 210 F.2d 640 (10th Cir. 1954) (in which the court held that the continuation of an oil and gas lease was not affected by a well location because the well location was situated in violation of a Commission order); *Superior Oil Co. v. Corporation Comm'n*, 206 Okla. 213, 242 P.2d 454 (1952) (in which the court held that the owner of leasehold rights has the right to drill a well though not designated the operator by the Commission).

68. 702 P.2d 19 (Okla. 1985).

69. *Id.* at 21.

70. *Id.* at 22.

only through its jurisdiction over spacing, the setting of allowables, allowing additional wells to offset drainage, and requiring pooling. It was the court's opinion that "[a]side from the recognized power to monitor certain terms and conditions of the contract imposed on the parties through a forced pooling order, no other powers to protect correlative rights are granted or implied by this statute."⁷¹

The relief requested here—to replace the operator designated under a voluntary pooling agreement in order to protect correlative rights—was found by the court to be clearly beyond the jurisdiction of the Commission. Neither well at the time of the lawsuit was producing in excess of its allowables. This did not mean, said the court, that the plaintiff could not seek relief:

The lack of jurisdiction of this matter on the part of the Commission, however, does not preclude Tenneco from seeking relief in the proper forum. We have previously held that the status of unit operator confers a duty to operate the leaseholds as a unit and to safeguard the correlative rights of the various interest holders. Therefore, just as a mineral lessor has a right to enforce a lessee's implied covenant to develop a lease as a prudent operator, which includes a duty to protect against drainage by the lessee's other operations, an interest holder in a unitized section has a right to enforce the unit operator's duty to conduct operations as a prudent operator.⁷²

The court's comment missed the mark entirely. The case referred to by the court, *Crest Resources*, stood for the proposition that the status of operator could not be transferred without Commission approval. The reason for this was that the operator was carrying out functions under the police power of the state. It was the charge of the Commission to oversee this carrying out of the police power. This is no less true when the operator is carrying these functions out under a drilling and spacing unit order rather than under a pooling order. The effect of a spacing order in Oklahoma is to entitle all owners, royalty and working interest, to a share of production. The Commission's responsibility is to see that all owners under the drilling and spacing unit order have their correlative rights protected. The statute itself, in connection with drilling and spacing units, provides that "the Commission shall adjust the allowable production within said common source of supply, or any part thereof, and

71. *Id.* at 23 (citations omitted).

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

take such other action as may be necessary to protect the rights of interested parties."⁷³ Any duty to operate the drilling and spacing unit as a prudent operator arises under this statute and the drilling and spacing unit order which the Commission entered and for which the Commission has jurisdiction and responsibility. Implied covenants arise in oil and gas leases because of the contractual relationship of the parties.⁷⁴ Any obligations of an operator under an order of the Corporation Commission arise from the Commission order, and the Commission should in the first instance determine the extent of the order's obligations. Contrary to the dictum of the court in this case, the Commission orders and the statute under which they are issued do not impose the same implied covenant to act as a prudent operator as the oil and gas lease.⁷⁵

As the learned dissent of Justice Opala noted, Tenneco was not a party to the operating agreement, only the farmout. In Justice Opala's view, the Commission has power over voluntary pooling just as over compulsory pooling. One need not even go to this point to realize that the court majority extended the public/private distinction to the point that it ousted the Commission of important responsibilities. The Commission was not being asked to interpret or enforce a private agreement. Instead, the relief sought related to rights arising under the drilling and spacing unit order of the Commission, which is clearly a public rights matter. Tenneco's complaint related to the prudent operation of the unit, which it contended was being affected by the operator's conflict because of its status as an operator on an adjacent unit. The operator's dual status arguably prevented Tenneco from having a fair opportunity to share in production from the spacing unit. The opportunity was threatened because of the operator's potential or actual conflict of interest. This presents a claim cognizable under the correlative rights powers of the Commission and should have been treated as such by the courts.

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

74. See generally Martin, *A Modern Look at Implied Covenants to Explore, Develop, and Market Under Mineral Leases*, 27 INST. ON OIL & GAS L. & TAX'N 177 (1976); 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §§ 821-826, 831-835 (1989); Donohoe, *Implied Covenants in Oil and Gas Leases and Conservation Practice*, 33 INST. ON OIL & GAS L. & TAX'N 97 (1982); Pickerell, *Is There a New Implied Covenant of Explordevelopment?*, 31 INST. ON OIL & GAS L. & TAX'N 245 (1980); Ploeg, *The Implied Covenant of Reasonable Development—A Delicate Balance*, 3 E. MIN. L. FOUND. 18.1 (1982); Ver Schure, *Another Look at the Implied Covenants*, 26 ROCKY MTN. MIN. L. INST. 887 (1980); Williams, *Implied Covenants in Oil and Gas Leases: Some General Principles*, 29 U. KAN. L. REV. 153 (1981).

75. The appropriate distinction between lease obligations and unit order obligations is made in *Tenneco Oil Co. v. Bogert*, 630 F. Supp. 961, 970-71 (W.D. Okla. 1986). For a contrary view, see Walker, *The Oil and Gas Operator's Duty to Protect Non-Operators from Drainage*, 59 OKLA. B.J. 3675 (1988).

The Oklahoma Court of Appeals distinguished *Samson Resources* in the case of *Hold Oil Corp. v. Corporation Commission*⁷⁶ and upheld orders of the Corporation Commission that removed the unit operator of three wells, designated a new operator, and required the former operator to turn over to the new operator all revenues for the unit wells and certain documents. The Commission had taken these actions based on its findings that the operator consistently failed to distribute revenues received for production in a timely manner, persisted in a pattern of clearly improper accounting practices, failed to send other owners intelligible billings or cost statements, and was uncommunicative about the well operations to other owners. To the former operator's claim that the dispute as to the manner and method of operation of the unit wells was a private one that did not confer jurisdiction on the Corporation Commission, the court replied that the operator had been appointed by order of the Commission; *Samson Resources* and *Tenneco* had both involved private agreements. This case illustrates the public interest in having a prudent operator, both in terms of protecting correlative rights and preventing waste. Unless the Commission can get accurate information about production and mechanical factors, it cannot determine whether there is either underground or aboveground waste. Likewise, when the operator makes inaccurate or late payments, the non-operators who have been force-pooled have lost their opportunity to share in production. They cannot resort to private litigation because their correlative rights were allegedly protected by the Commission's order. *Hold Oil* was properly decided and its rationale should be extended to other cases. Correlative rights and waste prevention may well be at issue even if a private agreement is involved.

The public right/private right distinction was invoked again in *Pasternak v. Lear Petroleum Exploration, Inc.*⁷⁷ In this case, Shar-Alan got a farmout of acreage that was subject to an existing joint operating agreement. Shar-Alan claimed it was not bound by this agreement because it had not read the farmout agreement it signed. It further claimed a Corporation Commission order despadding the section from one 640-acre unit to eight 80-acre units effectively limited the scope of the operating agreement to the 80-acre unit on which the companies drilled their initial well. The court rejected this claim, holding that the jurisdiction of the Corporation Commission is limited to protecting the public interest in orderly

76. 746 P.2d 692 (Okla. Ct. App. 1987).

77. 790 F.2d 828 (10th Cir. 1986).

development and the prevention of drilling of unnecessary wells. Here the public interest was not involved:

[T]he rights to produce a designated quantity of hydrocarbons from a well and owner-operator interests and obligations are the proper subject of the private contract, as long as the contract does not cause or grant a license to commit waste or diminish correlative rights.

Shar-Alan has not demonstrated that the joint operating agreement in any way encourages waste or allows a party to take more than its share from a common source in derogation of the rights of others. There is no indication that the division of rights and obligations set out in the agreement undermines the public interest served by despadding a 640-acre unit. Consequently, the Corporation Commission despadding order could not limit the scope of the joint operating agreement.⁷⁸

It should be noted that the issue in *Pasternak* involved the effect of a Commission order under a prior contract, not a question of rights and obligations arising under or flowing from the Commission's order. The Commission would not have been able to interpret the prior contract had they been asked to. The Commission should have been able, had the issue presented itself, to clarify or interpret the despadding order. The farmouttee here did not show that its interpretation of the farmout agreement or the joint operating agreement would affect in any way the public purposes served by the spacing or pooling orders. Thus, even under a primary-jurisdiction-doctrine approach, the district court would have jurisdiction to resolve this dispute regarding the farmout and joint operating agreements. Only if the court were interpreting the despadding order should the court have referred the case to the Commission.

VI. WELL COSTS

The Oklahoma statute for pooling provides for the Corporation Commission to determine well cost disputes:

Such pooling order of the Commission shall make definite provisions for the payment of cost of the development and operation, which shall be limited to the actual expenditures required for such purpose not in excess of what are reasonable, including a reasonable charge for supervision. In the event of any dispute relative to such costs, the Commission shall determine the proper costs after due notice to interested parties and a hearing thereon.⁷⁹

This language, it should be noted, does not restrict the Commission's

78. *Id.* at 836 (citations omitted).

79. OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1988).

responsibilities and duties to well cost determinations where the parties have made no agreements concerning the operation of the well. Likewise, one should note that there may arise situations involving pooling orders in which some parties in a unit have entered into an agreement that would involve costs and other interest owners will not have joined such an agreement. The potential for inconsistent rules from court and Commission on the same matters is significant.

Several recent cases from the Oklahoma Supreme Court have held that once the parties to a compulsory pooling order enter into a contract for well costs, the Corporation Commission no longer has jurisdiction to resolve disputes over well costs. In *Leede Oil & Gas, Inc. v. Corporation Commission*⁸⁰ the designated operator of a unit well applied to the Corporation Commission for a determination of the proper drilling costs for the well. The Commission dismissed the application on a finding that its jurisdiction over the unit well costs was terminated by a joint operating agreement among those participating in the well. The court upheld this determination, applying its now familiar distinction between public and private rights: the jurisdiction of the Corporation Commission is limited to public rights aspects of its pooling orders. A similar holding was given in *MM Resources, Inc. v. Huston*.⁸¹ In neither case did the petitioners allege that their correlative rights were being violated or that waste was occurring.

In *Hadson Petroleum Corp. v. Jack Grynberg & Associates*⁸² the operator of a compulsory unit claimed that a pooled party owed it for well costs under a voluntary agreement between the parties. The defendant, who was the pooled party, claimed that it had paid all of the costs it owed under the pooling order and that the Corporation Commission had exclusive jurisdiction over any well-cost issues. In a certified question from a federal court, the Oklahoma Supreme Court ruled that the Corporation Commission has no jurisdiction over well-cost issues when the parties under a forced pooling order had entered into a contract governing well costs. The issue, said the court, did not involve the Commission's public law jurisdiction over conservation of natural resources. Thus, the court ruled that:

Under the terms of a pooling order reserving specifically to the Commission the jurisdiction to determine reasonableness of well costs, the

80. 747 P.2d 294 (Okla. 1987).

81. 710 P.2d 763 (Okla. 1985). See also *G.H.K. Co. v. Janco Invs., Inc.*, 748 P.2d 45 (Okla. Ct. App. 1987).

82. 763 P.2d 87 (Okla. 1988).

Commission does not have exclusive jurisdiction to determine the reasonable drilling costs of a well and grant relief between the operator designated in the pooling order and another interest owner who has entered into a private contractual agreement for the drilling and operation of the well.⁸³

The authors entertain doubts about this ruling and how far it should extend. For example, suppose the operator under a forced pooling order approaches a non-operator with a proposed agreement that merely states that the non-operator shall be liable for reasonable costs, and the non-operator signs it. Such an agreement would provide no more than the pooling order itself provides. Under the court's statement of legal principle, would the existence of an agreement that does no more than incorporate the order and its standard oust the Corporation Commission from jurisdiction over the reasonableness of well costs under the order? Even if waste or correlative rights are not involved, it would seem that the Corporation Commission should be able to make the determination of whether the costs incurred by the operator are reasonable. The legislature has entrusted the determination of the reasonableness and necessity of well costs to the expertise of the Corporation Commission. While we do not doubt that parties can make agreements that are determinative of the reasonableness of well costs, the mere fact that an agreement exists relating to costs should not automatically supplant the jurisdiction of the Corporation Commission. In a doubtful case, we think it preferable for a court to employ the approach of the court in *Stipe v. Theus*⁸⁴ and allow the matter to be resolved in the first instance by the Corporation Commission.

83. *Id.* at 89.

84. 603 P.2d 347 (Okla. 1979) (discussed *supra* note 17 and accompanying text). *See also* Lear Petroleum Corp. v. Seneca Oil Co., 590 P.2d 670 (Okla. 1979), a case that arose from a pooling order designating Lear as the operator. Lear billed the parties on a monthly basis for their share of the costs rather than demanding costs up-front in cash or security. A dispute arose as to proper costs after actual costs exceeded the cost estimate given with the pooling order. Lear asked the Commission for a determination of the reasonable costs and an adjudication of the rights of the parties. The Commission determined that three items of cost were not properly chargeable and ordered them deleted. It then stated that Lear should send a billing to the parties reflecting the reductions, adding that the parties then would have 10 days in which to pay. The protesting parties appealed, arguing that the Commission order was a money judgment that the Commission had no jurisdiction to enter.

The Oklahoma Supreme Court held that the Commission had not rendered a money judgment, but rather had properly exercised its authority under statute to determine costs and specify a time for payment. This is different from a money judgment in that the order provides no coercive relief. We believe this approach, allowing the Commission to determine the reasonableness of well costs under its statutory authority, should be used even if the parties under a pooling order have entered into a contract, so long as the parties have not stipulated to the reasonableness of well costs.

VII. TORT AND OTHER PRIVATE LAW CLAIMS

It is clear that the Corporation Commission has no authority to adjudicate tort claims and award damages for tort liability. Yet tort liability may on occasion be premised upon private party negligence for violation of Corporation Commission regulations. In such circumstances should the claimant be required first to go before the agency for determination of violation of regulations? Should a court stay its unquestioned tort jurisdiction for the light that an agency determination may shed upon issues that are in litigation? In some instances, courts have relied on the primary jurisdiction doctrine to seek agency expertise before deciding liability for contract, antitrust, or tort claims.⁸⁵ An instance of this is *Sun Oil Co. v. Martin*,⁸⁶ in which a federal court in Texas was presented with a claim of wrongful production of gas from a triple-completed well. The court sent the matter to the Texas Railroad Commission to be raised there first so the court could have the benefit of the Commission's technical expertise and avoid intruding unnecessarily into prorationing issues important to the Commission.⁸⁷

In two decisions in which primary jurisdiction arguments were presented, the Tenth Circuit has rejected application of the doctrine, expressly relying upon the public right/private right distinction in the most recent of these.

The Tenth Circuit brought up the public right/private right distinction in *Marshall v. El Paso Natural Gas Co.*⁸⁸ This was a tort case in which the plaintiff property owners sought damages for defendant's failure to plug a well properly, claiming it created a "time bomb" that could "explode" in the immediate future. The jury's instructions allowed it to find liability based on negligence or negligence per se for violation of Corporation Commission rules. One of the defendants, Meridian Oil Productions, asserted that the matter should be referred to the Commission under the primary jurisdiction doctrine and that certain evidence relating to the Corporation Commission should have been admitted by the trial court. The Tenth Circuit rejected these defenses, holding that

85. *United States v. Western Pac. R.R.*, 352 U.S. 59, 64 (1956); *Far E. Conference v. United States*, 342 U.S. 570, 574-75 (1952).

86. 218 F. Supp. 618 (S.D. Tex. 1963), *aff'd*, 330 F.2d 5 (5th Cir. 1964).

87. *Id.* at 620-21. See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), which involved an equity proceeding to enjoin enforcement of a Commission order permitting the drilling of four East Texas plot wells. The Court noted the complicated nature of the problems in oil production requires regulation of an entire field as a unit for conservation purposes and affirmed a judgment of the district court dismissing the complaint.

88. *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373 (10th Cir. 1989).

the doctrine of primary jurisdiction did not require the district court to refer the case to the Commission.⁸⁹ The court also held that the district court had not abused its discretion by excluding evidence of the Corporation Commission's authority to take remedial action.

The court said the issues of negligent plugging of an oil and gas well and of negligence per se in plugging an oil and gas well had been determined by the Oklahoma courts without referring the cases to the Corporation Commission.⁹⁰ Based on these cases the appeals court could not say that under Oklahoma law the question of negligence or negligence per se in the plugging of a well was a factual issue that was not within the conventional knowledge of judges and jurors. Similarly, the issue of whether Meridian's acts had caused water or soil pollution was held not to be a determination outside the conventional knowledge of the judge and jury. The Tenth Circuit cited the many cases in which Oklahoma courts had "determined the existence of water and soil pollution from oil and gas activities without referring the issue to the Commission."⁹¹ The district court thus did not abuse its discretion by refusing to apply the primary jurisdiction doctrine to the question of water and soil pollution.

The court was also unpersuaded by Meridian's motion to stay the district court proceedings on the ground that Meridian had filed an application with the Corporation Commission to review the plaintiffs' claims

89. *Id.* at 1378. The court noted that the circuit court and the Oklahoma courts had applied the doctrine in other matters which related to Commission activities. *Id.* at 1377 (citing *GHK Exploration Co. v. Tenneco Oil Co.*, 847 F.2d 650 (10th Cir. 1988); *Arkla Exploration Co. v. Shadid*, 710 P.2d 126 (Okla. Ct. App. 1985); *W.L. Kirkman, Inc. v. Corporation Comm'n*, 676 P.2d 283 (Okla. Ct. App. 1983)). The factors to be considered in applying the doctrine of primary jurisdiction included "whether the issues of fact raised in the case are not within the conventional experience of judges; . . . whether the issues of fact require the exercise of administrative discretion, or require uniformity and consistency in the regulation of the business entrusted to a particular agency." *Id.* (citing *Far E. Conference v. United States*, 342 U.S. 570, 574-75 (1952)).

90. *Id.* at 1378. See *Sunray Mid-Continent Oil Co. v. Tisdale*, 366 P.2d 614 (Okla. 1961) (the issue of negligence in plugging an exploratory well left to the jury); *Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947 (Okla. 1957) (issue of negligent plugging of an oil and gas well submitted to a jury); *Nichols v. Burk Royalty Co.*, 576 P.2d 317, 320 n.2 (Okla. Ct. App. 1977) (jury instructed on negligence per se theory); *Sheridan Oil Co. v. Wall*, 187 Okla. 398, 103 P.2d 507 (1940) (issue of negligence per se where a well was not plugged in accordance with Corporation Commission rules submitted to the jury).

91. *Marshall*, 874 F.2d at 1378 (quoting *United States v. Zweifel*, 508 F.2d 1150, 1156 (10th Cir.), *cert. denied*, 423 U.S. 829 (1975)). See, e.g., *Ohio Oil Co. v. Elliott*, 254 F.2d 832 (10th Cir. 1958) (action for damages to cattle that drank water from a stream polluted by the release of salt water); *Tenneco Oil Co. v. Allen*, 515 P.2d 1391 (Okla. 1973) (action to recover damages caused by escaping oil and salt water); *Sunray DX Oil Co. v. Brown*, 477 P.2d 67 (Okla. 1970) (action for damages caused by leaking pipelines); *Sunray Mid-Continent Oil Co. v. Tisdale*, 366 P.2d 614 (Okla. 1961) (action for negligent plugging of an oil well that polluted a fresh water well); *Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947 (Okla. 1957) (same); *Nichols v. Burk Royalty Co.*, 576 P.2d 317 (Okla. Ct. App. 1977) (action for damages to land where defendant admitted injurious spillage).

of pollution. The motion had failed to state when the application was filed, its status before the Commission, or the fact that it had been filed only two months before the jury trial. The potential for inconsistent orders, the court ruled, was not so likely that the district court had abused its discretion by not referring the case to the Commission.

The court rejected Meridian's contention that primary jurisdiction should be applied in the interest of "orderly and sensible coordination of the work of agencies and of the courts."⁹² The court observed that once a federal court had tried the case on its merits, judicial resources would rarely be conserved by abstaining on appeal. The court gave little weight to the fact that the plaintiffs had initially pursued their remedies with the Corporation Commission in September 1982. Their application had been dismissed in October 1982, the court said, without any meaningful action.

The Tenth Circuit gave the following analysis of the Oklahoma Supreme Court's public right/private right distinction:

The exercise of primary jurisdiction between the courts and the Commission has often hinged on whether the disputes involves public or private rights. In *Tenneco Oil Co. v. El Paso Natural Gas Co.*, the Oklahoma Supreme Court determined that parties to a forced-pooling order issued by the Commission could contract as to specific terms of the operating agreement. The court analyzed its jurisdiction to review the rights under the contract. It found the relief Tenneco sought was private in nature and not an attack upon the public rights function of the Commission, i.e., to regulate and administer the conservational laws and policies of the state. It concluded the district court had jurisdiction to review the rights under the contract.

In this case [the plaintiffs] sought to recover damages to their property and water caused by Meridian's negligent operations in drilling the well. This is a private rights dispute derived from the liability of one individual to another under the laws as defined. In *Greyhound Leasing* we held that a district court properly exercised jurisdiction over a claim of *private* nuisance for encroachment of saltwater. The court stated there was no administrative remedy available under the primary jurisdiction of the Commission for the tort action asserted. Under the private versus public test for jurisdiction, we do not find the district court abused its discretion in refusing to defer this matter to

92. *Id.* at 1379. The court stated that "[e]xercise of primary jurisdiction may be based on preventing the disruption of state efforts to establish a coherent policy with respect to a matter of substantial public concern," *id.* (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)), or "based on a policy of conserving judicial resources in situations involving the contemporaneous exercise of concurrent jurisdictions," *id.* (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)).

the Commission under primary jurisdiction.⁹³

Meridian also asserted that the district court had erred in refusing to admit material and relevant evidence critical to its defense: that the Commission had continuing authority to determine the existence of unsafe conditions from oil and gas operations and could order remedial action be taken by the well operator; that Meridian had initiated proceedings before the Commission to determine whether its operations caused environmental damage and what remedial actions were required; and that if the Commission held a hearing regarding the plaintiffs' well, a Commission field inspector would testify that the well was not dangerous and he would not recommend that it be replugged. The district judge had concluded that this evidence was not relevant, and was speculative and confusing, thus requiring exclusion. The appeals court affirmed the district court's exclusion of the evidence.

The doubts the authors entertain about the merits of the decision in *Marshall* do not arise from the application of the public right/private right distinction as discussed by the court of appeals. The court's decision can be readily explained on traditional primary jurisdiction grounds, as brought out by the court itself, rather than being necessarily based on the public right/private right distinction.

VIII. CONCLUSION

The public right/private right distinction of the Oklahoma Supreme Court bumps into and threatens, with Pac-Man-like energy and voraciousness, to gobble up the long-recognized principles that an order of the Corporation Commission cannot be attacked collaterally and that the Commission has the authority or continuing jurisdiction to interpret and modify its own orders.

The court needs to recognize that contracts made by the parties that relate to an order of the Commission cannot oust the agency of its responsibilities. Because it is the agency that made the order and that is entrusted with the responsibility and duty of carrying out the statutory scheme it should be the agency in the first instance that determines whether public rights are at issue. The Commission must in the first

93. *Marshall*, 874 F.2d at 1379-80 (citations omitted) (emphasis in original). In *Greyhound Leasing & Fin. Corp. v. Joiner City Unit*, 444 F.2d 439 (10th Cir. 1971), the Tenth Circuit held that the doctrines of primary jurisdiction and exhaustion of administrative remedies had no application when the Corporation Commission had no jurisdiction over an action for damages arising from operation of an approved unit. The court stated: "This is not a collateral attack on any order of the Commission as no order is drawn in issue." *Id.* at 445.

instance determine whether the conduct of the parties under the order is consistent with the requirements of the statutes and regulations that are enforced by the agency.

Where a court says that it has jurisdiction to declare rights under a contract relating to a conservation order because only private matters are involved, it is at the same time establishing what the agency may not take action on. The effect of the court's delineation of public and private right matters is to limit the ability of the agency to interpret, modify, or enforce its own orders. A proper regard for harmonious relations among the branches of government would lead to an application of the primary jurisdiction doctrine in cases in which doubt may be entertained about the impact of an agreement and a court decision which relates to an order of the conservation agency. Under a proper application of this doctrine, the court will defer exercise of its jurisdiction on a matter until an administrative agency has had an opportunity to consider one or more aspects of the matters at issue in the litigation. A court that too readily finds matters to be of private right only encourages litigation and a disregard for conservation orders. This is undesirable in the administration of a sound regulatory program for the conservation of oil and gas. The concern that the administrative agency might intrude into matters more properly decided by a court or that the agency will not adequately protect the rights of private parties can be met by judicial review of the agency action, rather than judicial displacement of agency action.⁹⁴ We believe that the Oklahoma courts could lessen the jurisdictional confusion by shifting the question of jurisdiction of court and Commission from a delineation of spheres of "public right" and "private right" back to more traditional queries: when the court is reviewing an order of the Commission, the inquiry should be whether the Commission has acted beyond the authority delegated to it by the legislature; when the parties have come to the district court in the first instance and the matter is not clearly one of exclusive jurisdiction for the Commission, the question should be whether the goals of the primary jurisdiction doctrine would be served by letting the Commission hear the matter first.⁹⁵

94. See Fallon, *supra* note 38, at 918. Professor Fallon writes that:

adequately searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of article III. This conclusion, I argue, is commended by good sense and supported by sound theory. It neither calls for the evisceration of the administrative state nor sacrifices article III values on the altar of bureaucratic efficiency.

Fallon, *supra* note 38, at 918 (footnote omitted).

95. The authors recognize that there is some difficulty in the application of primary jurisdiction

in Oklahoma because orders of the Corporation Commission are reviewable only by the Oklahoma Supreme Court. Yet the difficulty is not insurmountable. One has the flexibility of the precedent of *Stipe v. Theus*, 603 P.2d 347 (Okla. 1979) (discussed *supra* note 17 and accompanying text), in which the supreme court ruled that a party was entitled to a stay of a district court proceeding until the Commission had disposed of an application to determine proper well costs. This seems to us to be a sensible and practical approach.