The Courts and the Commissions: 
Recent Developments in Judicial Review 
of Oil and Gas Agency Orders

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§ 17.01 Introduction.

The rules, regulations, and orders of conservation agencies, like other administrative agencies, will be subject to review by a court. Judicial review of agency action, whether rule or adjudication, is generally available in each of the producing states by a specific grant. The grant will state the court that may hear the case, and it will provide a time limit within which the suit must be brought. There may be a parallel or conflicting provision for judicial review in the state’s administrative procedure act.

Technical matters are given to agencies so that they may bring specialization and expertise to complex problems and a uniformity of treatment that might not be available if the state committed such matters to the courts. The agencies often undertake quasi-judicial functions that the legislature assigns to them in the first instance. As a result of these factors, there is often a high degree of deference from the courts to the conservation agencies. The relationship is similar to that between a court of appeals and a trial court.
Judicial review is available, but that review generally is of a limited character. This is because there are several interrelated doctrines, either statutory or judicial in character, which make litigation against a state conservation agency sometimes difficult for the litigant. These principles go to the heart of the relationship between the courts and the agencies and to the allocation of functions between them by the legislature. Review will be confined to the court(s) and the time specified by the statute authorizing review; a party must exhaust all administrative remedies before invoking review; even when a court is empowered to hear a matter, it may defer to the agency by requiring the parties to obtain a decision or guidance first from the agency; and when a court does review the decision of the agency it will give substantial deference to the factual determinations of the agency and also generally to the rulings of the agency on questions that are of mixed fact and law.

Most producing states recognize the great significance that an agency order may have for the business planning of the oil and gas industry and for an individual’s property rights. Millions of dollars for the drilling of a well will be expended on the basis of a pooling order. Similarly, lease assignments, royalty conveyances and other property transactions will be made in reliance on the agency decision, which can affect those property rights. Judicial review that might set aside an agency order should be undertaken promptly because of the reliance that is placed on the agency’s order; indeed, the agency decision is as much law as a statute of the legislature or the decision of a trial judge, and the affected parties are bound to adhere to the agency’s decision. Typically, a statute for review of the conservation agency’s action will specify that the suit for review or appeal must be commenced within a limited time period, such as 30 or 60 days from the time when the rule or order was promulgated or when notice of the order was mailed to or received by the affected party. When the statute does not specify a time in which review must be sought, a court will find that it must be brought within a reasonable time. A court might also apply the doctrine of laches to bar a suit by a claimant.1

1 See, e.g., Combs v. State, 526 S.W.2d 648, 52 Oil & Gas Rev. 552 (Tex. Civ. App. 1975), writ ref’d n.r.e., cert. denied, 426 U.S. 922 (1976), which held that judicial review was to be limited to a reasonable time, and Railroad Comm’n v. Aluminum Co. of America, 380 S.W.2d 599, 20 Oil & Gas Rev. 880 (Tex. 1964), which was to the same effect and
From time to time the state’s administrative procedure act may conflict with the more specific provisions applicable to the conservation agency. This is in large part due to the fact that the state conservation statutes generally preceded by some years the more general administrative procedure acts. A very recent case reflecting this potential for conflict is Richmond Petroleum, Inc. v. Oil & Gas Conservation Commission. In Colorado, judicial review is under the state administrative procedure act. Pursuant to this statute, an action for judicial review must be commenced “within thirty days after such agency action becomes effective.” The same statute provides that an agency decision is effective pursuant to the APA, “on the date mailed or such later date as is stated in the decision.” However, the Colorado conservation act provides that the date an order is entered on the commission’s books is the “date of entry” for “the purpose of section 34-60-111,” which is the date upon which the agency order becomes final agency action. Richmond Petroleum sought judicial review within 30 days of the mailing of the agency order but not within 30 days of the “date of entry” of the order. The trial court concluded that the action was not timely filed, as the date of entry was the date that the order became effective; that court ruled that the conservation act superseded the more general administrative procedure act. The Colorado appeals court reversed, finding that the Commission order was final agency action as of the “date of entry” but was not effective until the mailing. The appellate court read the two statutes in such a manner as to avoid a conflict between the two.

Generally, a person must be “adversely affected” or “aggrieved” in order to seek review of an order. If a person will suffer no adverse effect

relied on the same criteria as the doctrine of laches but without stating that the doctrine was being applied. A Louisiana court applied the doctrine of laches to bar suit in one case, Jordan v. Sutton, 424 So. 2d 305, 77 Oil & Gas Rev. 89 (La. App. 1982), but a subsequent decision of the Louisiana Supreme Court, Corbello v. Sutton, 446 So. 2d 301, 82 Oil & Gas Rev. 79 (La. 1984), ruled that the common-law equitable doctrine of laches has no basis in Louisiana law.

5 34-60-108(6).
from an order, then there will be no basis for seeking court review of the decision. Until the agency’s decision is final, a party will not be aggrieved by the decision. A decision may not be final because the party has not yet availed himself or herself of an available administrative remedy, and the statute may require that such administrative remedy first be sought. Likewise, a statute may require that a party who seeks judicial review first seek a rehearing from the agency. Failure to adhere to a requirement of exhausting an administrative remedy or of applying for a rehearing will be fatal to a claim for relief from an agency order.

§ 17.02. Statutory Review — Grants and Limitations.

In most states the court or courts in which an agency order or regulation can be litigated will be specified. When the court is specified, this will be jurisdictional venue; that is, another court will not have jurisdiction to hear the proceeding even when a party fails to object to the venue or waives objection to venue. A suit against the agency in a different court or forum will be a collateral attack on the order. In some states, all suits against the conservation agency must be heard in a single trial court, such as the parish or county where the principal office of the agency is located or the county in which the land or any portion of the land affected by the order is located. In others, the plaintiff may have the option of seeking review in the county where the principal office of the agency is located or the county where the affected land is located. In Oklahoma, review of Corporation Commission orders and regulations is directly in the Supreme Court of the state. In Texas, statutes have provided two different courts

6 See, e.g., Champlin Exploration, Inc. v. Railroad Comm’n, 627 S.W.2d 250, 73 Oil & Gas Rev. 81 (Tex. App. 1982), writ ref’d n.r.e.; Phillips Petroleum Co. v. Batchelor, 560 So. 2d 461 (La. App. 1990) (no justiciable controversy when the Commissioner’s determination was not adverse to the party).


in which to seek review; it was held in one case that a suit involving an order effecting pooling must be brought in Travis County and that an order denying pooling (or other suit involving an order of the Railroad Commission) must be brought in the county where the land is located.\footnote{Railroad Comm’n v. Miller, 434 S.W.2d 670, 30 Oil & Gas Rev. 651 (Tex. 1968) rev’g Miller v. Railroad Comm’n, 428 S.W.2d 162, 29 Oil & Gas Rev. 443 (Tex. Civ. App. 1968). The statutes have now been codified and the provisions changed as discussed below, but according to two knowledgeable commentators the act creating the Natural Resources Code was to make no substantive change in the law as it then existed, and the change regarding judicial review clearly is a change in the court that may hear a claim under the Mineral Interest Pooling Act. See Douglass and Whitworth, “Practice Before the Oil and Gas Division of the Railroad Commission of Texas,” 13 St. Mary’s L. J. 719, 750-51 (1982).}

Because of the importance of prompt decisions on the validity of an agency order or regulation, the statutes providing for judicial review often provide that such a suit or appeal will be given preference on the reviewing court’s docket and that further appellate review will also be expedited.\footnote{Miss. Code Ann. 53-1-39(a), 53-1-45.} The statute for judicial review may further specify that the review will be limited to the record of the hearing before the agency.\footnote{E.g., La. Rev. Stat. Ann. 30:12B(4).} The review thus will be as an appeal from the agency determination and treated essentially like a judgment of a trial court.

In some states there can be review \textit{de novo}, with additional evidence being permitted to be gathered and introduced to the court. However, even if additional evidence is permitted, a court may not allow its introduction if a party had the opportunity to present the evidence to the administrative agency and failed to do so. The party will have failed to exhaust an administrative agency remedy by failing to present the evidence or claim. In such circumstances a party may also be said to have waived the claim that he or she failed to make before the administrative agency. Likewise, the statute may provide that even if review is de novo, deference will be given to the agency’s determination of credibility. Moreover, whether the review is limited or de novo, the statutes for review will generally provide that the order or other action of the agency is presumed
to be valid, and the burden of proving its unlawfulness is upon the person challenging the order.¹⁴

The same statutes that provide for judicial review also provide that the agency may initiate legal proceedings for the enforcement of its regulations or orders.¹⁵ This may be in the agency’s own name or through the attorney general of the state. An agency may be able to seek penalties for a party’s refusal to adhere to an order of the agency or for a violation of agency regulations. This is significantly different from a local prosecutor having the authority to initiate civil or criminal proceedings for violation of regulations, because the agency is not dependent on the exercise of prosecutorial discretion. Indeed, the agency may be able to impose civil penalties itself and have these enforced by a court.¹⁶

§ 17.03. **Ultra Vires Doctrine.**

Assuming that you can get into court, an initial question may be raised whether an agency is asserting power that it does not possess. This is the *ultra vires* doctrine. The administrative agency is a creature of statute (unless it is a constitutionally created agency), and it has only so much authority as has been granted to it. Several recent cases have illustrated the operation of this fundamental principle of administrative law.

In *Kerr-McGee Corp. v. Wyoming Oil and Gas Conservation Commission*,¹⁷ the Commission, as the Wyoming Supreme Court put it, “endeavored to combine oil and water.” The Commission certified a tertiary recovery project, which was to be conducted in a production unit that previously had been certified for a tertiary recovery project and had


¹⁵ E.g., Wyo. Stat. 30-5-114.

¹⁶ *See* *Stamford Energy Cos. v. Corporation Comm’n*, 764 P.2d 880, 101 *Oil & Gas Rev*. 95 (Okla. 1988) where the court held that the Oklahoma Corporation Commission has the authority to hold an operator in civil contempt for violation of a Corporation Commission order because of unlawful acts of service contractors hired by operator.

received the benefit of a tax exemption. The new application for certification was based upon the utilization of a different recovery process. But the Commission, while certifying the project, purported to deny the tax exemption. The Commission, responding to an objection lodged by the Department of Revenue, concluded the newly certified project should not receive the benefit of the exemption. The Revenue Department contended the proposed second project for the Unit did not qualify for the five-year tax exemption, because using the process constituted only a change in recovery technique, rather than the initiation of a new project. However, the Commission had no power to adjudicate revenue or taxation issues. The court remanded the matter to the Commission because its order was without statutory authority and contrary to law.

In Coastal Petroleum Co. v. State Department of Environmental Protection, the court invalidated a DEP order which attempted to require a well permit applicant to post a bond in addition to the applicant’s submission of a cash payment to the state’s Petroleum Exploration and Production Bond Trust Fund. The court found that a well permit applicant is statutorily required to post a bond or to make the payment into the Fund. The DEP could not require additional security once that payment was made.

In Eads Operating Co. v. Thompson, the court determined that under Act 156 of 1940 the Commissioner was not authorized to compel reservoir wide unitization. His power was limited to pooling acreage sufficient to constitute a drilling unit. Therefore, several orders recognizing a reservoir wide unit, made prior to 1960 (when the Commissioner was given certain additional powers to order field-wide units), were ultra vires and the unit had no legal effect. The court stated the ultra vires doctrine as follows:

Generally, the power of any administrative officer or agency to take valid action is conditioned upon first establishing that

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19 See also State Dep’t of Envt’l Regulation v. Puckett Oil, 577 So. 2d 988 (Fla. Ct. App. 1991).
the action to be taken falls within the legislative grant of authority.\textsuperscript{21} Therefore, in order to be valid, the actions of administrative agencies must be taken in accordance with valid legislative authority. Considering the above, we find that the Commissioner of Conservation has only those powers expressly granted to him by the legislature. Absent a grant of authority by the legislature, the Commissioner is without authority to act.\textsuperscript{22}

An agency may have an implied power in some instances even when the legislature has not expressly granted a power. Such an implied power was found in \textit{Union Pacific Resources Co. v. Texaco}.\textsuperscript{23} Here, an operating agreement was agreed to by four oil and gas companies that made reference to a 640-acre drilling unit that had just been established by the Wyoming Oil and Gas Conservation Commission. A gas well was successfully drilled, and the Wyoming Conservation Commission in December 1990 ordered that the size of the drilling unit for that formation be enlarged from its former boundaries to 760 acres to protect correlative rights. After application by one of the parties to the dispute over the change in the drilling unit, the Commission in June 1991 entered a compulsory pooling order based on the new drilling unit. Did the Commission order supersede the terms of the joint operating agreement? In this case, the Wyoming Supreme Court held that it did. In doing so, the court had to determine that the Commission had authority to enlarge the unit. Although the relevant statute\textsuperscript{24} did not expressly authorize an order enlarging the size of a particular drilling unit, the court held that the statute grants the Commission implied authority to modify its orders in such a manner (the statute expressly allows the Commission to decrease the size of a unit).

\section*{§ 17.04. Collateral Attack, Collateral Estoppel, and \textit{Res Judicata}.}

A suit that challenges directly or indirectly an order or regulation of the conservation agency in a court other than that specified by the statute

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  \item \textsuperscript{21} Hunter v. Hussey, 90 So. 2d 429, 436 (La. App. 1st Cir. 1956).
  \item \textsuperscript{22} 646 So. 2d at 951.
  \item \textsuperscript{23} Union Pacific Resources Co. v. Texaco, 882 P.2d 212 (Wyo. 1994).
  \item \textsuperscript{24} Wyo. Stat. 30-5-109(d).
\end{itemize}
for review or at a time beyond that specified by the statute is a collateral attack on the agency’s order or regulation. Most states have an express statutory or judicial prohibition against a collateral attack on an order of the conservation agency. This prohibition has both a timing and a venue aspect. If the statute provides that a decision of the commission can only be reviewed in Travis County, one cannot bring suit in Harris County. Likewise, if the statute provides for review of an agency decision only to a specified court within 60 days, one cannot bring a suit against a private party in a different location at a different time that is predicated on the invalidity of the agency action.

A definition of a collateral attack has been given by an Oklahoma court as follows: “A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, 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.”

The agency need not be made a party to the judicial proceeding in order for the suit to constitute a collateral attack. It is sufficient that the suit be premised upon the asserted invalidity of the agency rule or order. For example, when a claimant to land seeks a declaratory judgment as to his or her rights in the land vis-a-vis an operator, which is premised upon the invalidity of an order of the state agency, the suit will be an impermissible collateral attack.

There is an exception to the rule against a collateral attack. When the agency order is void on its face, a litigant is not restricted to seeking review of the order in the manner otherwise specified by statute. An order is said or found to be void on its face when it clearly discloses a want of jurisdiction in the agency that issued it. For example, the order may show on its face that notice to interested owners has not been provided in

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25 See, e.g., Okla. Stat. Ann. tit. 52, 111: “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 appeal to the Supreme Court. . . .”
circumstances in which the notice is jurisdictional in character.\textsuperscript{28} When, however, there is no facial showing of inadequacy of notice, a claim based on the invalidity of the notice and the order will be a collateral attack on the order.\textsuperscript{29} When an agency failed to spell out options for a non-consenting owner who was force-pooled, the order was not void, only voidable, and thus a collateral attack on the order could not be maintained.\textsuperscript{30}

The doctrine against collateral attack should have no application to rules and regulations of an agency. Rules and regulations are standards of general applicability and normally cannot be brought to bear against an individual until a hearing has been held and the standard applied to the concrete facts of the proceeding. Until this has occurred, the matter will often not be suitable for adjudication by a court. This is not to say that a rule or regulation could not be challenged as being beyond the authority of the agency to make. Statutes for review will often authorize such suit. One need not wait for the application of the rule or regulation in order to seek to establish that the rule or regulation is invalid no matter how it may be applied.

The individual may not know how the agency will approach or apply the regulation or whether exceptions can be granted. Thus, the individual should not be precluded from suit before the rule or regulation has come to be felt in a concrete way through an order of the agency. This should be true even when the individual has participated in the rulemaking.\textsuperscript{31}

It may be possible to challenge an order in an enforcement proceeding. In \textit{State v. Nacelle Land and Management Corp.},\textsuperscript{32} the defendant held a permit for brine injection and a 12,000,000 gallon impoundment for use prior to injection of the brine. The permit was issued subject to certain conditions, and the permittee did not appeal these conditions at the time of issuance. The state brought an enforcement action claiming a violation of the permit conditions. The court held that the defendant was not precluded

\begin{footnotes}
\item[29] Katter v. Arkansas Louisiana Gas Co., 765 F.2d 730, 85 \textit{Oil & Gas Rev.} 443 (8th Cir. 1985).
\end{footnotes}
from challenging the permit conditions in an enforcement proceeding even though it had not appealed within the time period provided for in the statutory appeal.\textsuperscript{33} The appeal procedure of the statute was neither mandatory nor exclusive by virtue of the express provision of the statute. The defendant’s collateral attack on the order was not barred by failure to pursue an appeal under the statute. The court went on to reject the defendant’s contention that the permit conditions were part of a rule and thus required rulemaking procedures in their promulgation. The agency’s action was thus upheld.

Growing out of the same legal concerns as collateral attacks are several other doctrines that should be discussed. \textit{Res judicata} and collateral estoppel are similar. \textit{Res judicata} is sometimes spoken of as claim preclusion and collateral estoppel as issue preclusion.\textsuperscript{34} The terms may have fairly precise meanings, but in conservation litigation these terms, together with “collateral attack,” have been used to refer to the binding quality for purposes of other litigation of a determination of particular issues by the administrative agency.

The effect to be given agency determinations in law suits that are not a direct challenge to the agency order is a difficult problem for the courts. On the one hand, the agency is a creature of limited jurisdiction primarily concerned with the prevention of waste and the protection of correlative rights. The agency uses informal procedures, and the hearing examiners and the commission members may not even be trained in law.\textsuperscript{35} Their determinations may be for very limited purposes related to the direct responsibilities of the agency. Thus, the courts may have reason to be

\begin{enumerate}
\item \textsuperscript{33} Ohio R. C. 1509.36.
\item \textsuperscript{34} Richardson v. Phillips Petroleum Co., 791 F.2d 641, 89 Oil & Gas Rev. 44 (8th Cir. 1986).
\item \textsuperscript{35} See Ohmart v. Dennis, 188 Neb. 260, 196 N.W.2d 181, 184, 42 Oil & Gas Rev. 621 (1972) in which the court discussed the issue of the preclusive effect of an agency determination and stated:

The law is not settled, especially when an administrative body made the first decision. The preclusive effect of an administrative decision depends upon many factors. It is important that the fact-finding process of the administrative body approximate that of a court, that the body observe fair standards of evidence, that the facts be adjudicative, and that the process not deprive a party of his right to a jury trial. Those criteria are not exclusive . . . .

\end{enumerate}
reluctant to accord a binding quality to an agency finding or determination that will impact upon contract, tort, or other rights of a party. However, if a matter has been dealt with by the agency and a full and fair hearing has been given to the parties, the agency determination reflects a quasi-judicial ruling by which the parties must abide until it is set aside. For a court not to give a binding quality to the determination may render the agency order without effect altogether or seriously undercut the position of a party who has relied on the order. A refusal to accord that binding quality to the agency determination may intrude into the work of the agency that was delegated to the agency by the legislature and will serve to encourage parties to litigate in court those very issues they have already litigated before the agency. That is, a failure to give a binding quality to the agency determination will give a party more bites at the apple on the issue decided by the agency.36

As mentioned, the doctrines of res judicata, collateral estoppel, claim or issue preclusion and prohibiting collateral attack are similar and sometimes not distinguished by those who use the terms. Several recent cases have arisen in Oklahoma in which the principle that matters litigated before the Corporation Commission should not be re-litigated in court have used the term collateral estoppel or issue preclusion to describe the doctrine being applied or have employed the prohibition against collateral attack as an alternative.

In Ruyle v. Continental Oil Co.,37 the plaintiffs in federal court were the owners of mineral interests in a certain section of land in Oklahoma; some of the plaintiffs had leased their acreage to Conoco but others of the plaintiffs had not. The plaintiffs claimed that defendant Conoco had failed to protect the section from drainage and had failed to develop as a prudent operator. The section was the subject of an existing Corporation Commission unit and there was already a unit well for which Conoco was the operator.

36 However, giving a binding quality to the particular determinations may also encourage litigation because a party who does not wish to challenge the order itself of the agency may feel compelled to do so in order not to be bound by the agency’s determination of a particular fact issue or mixed finding of law and fact. See, e.g., Cities Service Gas Co. v. State Corporation Comm’n, 197 Kan. 338, 416 P.2d 736, 25 Oil & Gas Rev. 646 (1966); Champlin Exploration, Inc. v. Railroad Comm’n, 627 S.W.2d 250, 73 Oil & Gas Rev. 81 (Tex. App. 1982), writ ref’d n.r.e.
37 Ruyle v. Continental Oil Co., 44 F.3d 837 (10th Cir. 1994).
A company called Great Bear Exploration (GBE) sought from the Commission an exception to the existing spacing order and a permit to drill another well in the section. The plaintiffs entered agreements with GBE for it to represent them in conjunction with the Commission proceeding and the plaintiffs also appeared at the Commission hearing. After the hearing, the Administrative Law Judge (ALJ) found that Conoco had shown an additional well was not necessary and that the existing well could adequately drain the hydrocarbons underlying the unit. The ALJ concluded that an additional well would not be in the interest of the prevention of waste and the protection of correlative rights. The decision of the ALJ was upheld by the Corporation Commission, and the Oklahoma Supreme Court affirmed when GBE appealed to that court. Despite these developments in the state court, the federal district court had entered a judgment for the plaintiffs. The Tenth Circuit reversed, applying both the doctrine of collateral estoppel and the statute, discussed supra, that prohibits collateral attacks upon Commission orders. The appellate court found that the Oklahoma courts would treat the issue of collateral estoppel as one of issue preclusion; under Oklahoma law, issue preclusion will prevent a collateral attack on a judgment when the issue sought to be barred has been fairly and fully litigated in the prior proceeding. The court here found that the issue of Conoco acting as a prudent operator in its operation of the unit well and in not drilling an additional well had been fairly and fully litigated before the Corporation Commission. The court went on to rule that the prohibition against a collateral attack on an order of the Commission applies even when the Commission order is still the subject of a judicial appeal. The district court erred in not giving preclusive effect to the Commission’s order.

The claims in Fransen v. Conoco, Inc. were essentially the same as those presented in Ruyle v. Continental Oil Co. Here other lessors claimed that lessees/operator breached their implied covenants under the leases to fully develop the leases, to protect them from drainage and to take whatever administrative or judicial action was necessary to protect section 14 from drainage. The plaintiffs claimed that the defendants breached their

38 See also Leck v. Continental Oil Co., 971 F.2d 604, 119 Oil & Gas Rev. 338 (10th Cir. 1992); Woods Petroleum Corp. v. Sledge, 632 P.2d 393, 71 Oil & Gas Rev. 80 (Okla. 1981).

39 Fransen v. Conoco, Inc. 64 F.3d 1481 (10th Cir. 1995).
obligation to act as a prudent operator by failing to drill an additional well in section 14. The plaintiffs also claimed that Conoco breached the fiduciary duty it owed the plaintiffs as operator for the section 14 unit. The plaintiffs claimed that Conoco’s actions in fostering the completion of the Downing No. 1-15 well caused fraudulent drainage of section 14 and were tortious, wanton and malicious, subjecting Conoco to punitive as well as compensatory damages. Ruyle held that the plaintiffs’ claims were barred on two grounds — under the doctrine of collateral estoppel (or issue preclusion) and under the Oklahoma statute prohibiting collateral attacks on OCC orders. But Ruyle was different in that the plaintiffs in Ruyle had taken part in the Corporation Commission proceedings. Collateral estoppel could not apply here because the plaintiffs in this case had not taken part in the Corporation Commission proceedings. The court noted that the rule against collateral attacks and the common law doctrine of collateral estoppel or issue preclusion were related but were not the same. The court found that the collateral attack doctrine can apply even where collateral estoppel does not; a person can be barred from collaterally attacking an order entered in a proceeding to which he or she was not a party. The Oklahoma statute quoted earlier bars collateral attacks, and because the plaintiffs’ claims would avoid, defeat or deny the force and effect of the OCC’s order in this case, they were barred as a collateral attack on that order. Only one well was permitted by the Corporation Commission on section 14, and no prudent operator would drill a well that was prohibited by law. The plaintiffs therefore could not establish an essential element of their claims for breach of the implied covenants of development and protection without avoiding, evading or denying the effect of the OCC order.

A case applying both the primary jurisdiction doctrine (which will be more fully discussed below) and the collateral estoppel principle is Wagner

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40 The court did not decide whether they were “parties” to the Corporation Commission as it was not clear to the court whether section 87.2 of Title 52 automatically makes a mineral owner a party to an Oklahoma Corporation Commission proceeding or merely designates who may be a party to an OCC proceeding (in which case some further action would be necessary to make the potential party an actual party to the proceedings).

41 64 F.3d at 1488.
& Brown v. Ward Petroleum Corp. Here Ward was the operator of a unit well which was drilled as a dry hole. Wagner & Brown, a nonoperator working interest owner, filed a suit against the operator for negligence in drilling the well and simultaneously sought from the Corporation Commission a determination of reasonable well costs. The district court, evidently applying the primary jurisdiction doctrine, stayed the law suit in recognition of the fact the Commission had continuing jurisdiction to determine proper unit costs. The Commission found that the costs incurred were all reasonable and prudent, and the Oklahoma court of appeals affirmed the Commission order. The federal district court then reopened the suit filed therein and gave preclusive effect to the Commission’s factual findings and cost determination. The court stated the legal standard:

Thus, the Commission’s decision on a disputed issue of fact or law within its lawful cognizance must be given preclusive effect in a later suit between the same parties involving a different claim. The doctrine ‘applies with equal force to jurisdictional and nonjurisdictional questions’ and operates to bar relitigation of correct and incorrect decisions, if the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. . . . A district court’s examination of a final order of the Commission is limited to determining, from inspection of the record, whether the Commission had jurisdiction to issue the order.43

The factual issues raised by plaintiff’s tort claims were the same factual issues that were actually tried and decided by the Corporation Commission. The Commission’s findings were determinative in the federal suit.

A very similar approach is found in a recent Texas case. In Arkla Exploration Co. v. Haywood, Rice & William Venture,44 the plaintiffs brought suit against Arkla for allegedly negligent production that depleted a gas reservoir. They claimed that Arkla violated Railroad Commission rules in its production. Arkla sought and received a continuance from the

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43 876 F. Supp. at 258.
trial court to seek a Railroad Commission ruling on the alleged rule violations. The plaintiffs chose not to participate in the Railroad Commission hearings. The Commission determined that (a) Arkla did not produce gas from the Upper Pettit sand through the Cromer 2-C sand, (b) that Arkla’s operation of the Cromer 2-C did not violate Commission rules, and (c) that the Upper Pettit was not suitable for commercial oil production. When the case was then tried to a jury, the jurors returned a verdict for plaintiffs; they found that (a) Arkla depleted a common reservoir in the Upper Pettit, (b) Arkla’s conduct was negligent, (c) Arkla’s conduct proximately caused loss of recoverable oil from the Upper Pettit underlying the plaintiffs’ leases, and (d) the plaintiffs sustained $1,000,000 in damages. The jury failed to find that Arkla’s conduct was illegal or willful. Arkla appealed. The appeals court reversed in a 2-1 decision, holding that a determination by the Railroad Commission that its rules were not violated by Arkla is binding in a court proceeding for damages. The court found that this case was similar to Sun Oil Co. v. Martin, where the doctrine of primary jurisdiction was applied. Since the district court granted a continuance the court here did not have to rule on what would be the case had the district court not granted the continuance and had there been no Railroad Commission determination. The court found then that the damage award was a collateral attack on the Railroad Commission order, despite the plaintiffs’ contention that it was not a collateral attack because their suit was couched in terms of negligence and because the Railroad Commission could not award them damages. The court said: “The entire case hinges on whether Arkla violated the Railroad Commission rules by producing a zone without the Railroad Commission’s approval. Couching

None of the provisions of this chapter that were formerly a part of Chapter 26, Acts of the 42nd Legislature, 1st Called Session, 1931, as amended, no suit by or against the commission, and no penalties imposed on or claimed against any party violating a law, rule, or order of the commission shall impair or abridge or delay a cause of action for damages or other relief that an owner of land or a producer of oil or gas, or any other party at interest, may have or assert against any party violating any rule or order of the commission or any judgment under this chapter.
the allegations of the conduct of Arkla in terms of negligence does not alter the thrust of the Appellees’ suit. Whether such conduct had been done by Arkla intentionally or negligently, it would still constitute a violation of the Railroad Commission rules.” 47 Thus the court concluded:

The findings by the Railroad Commission that Arkla had not violated its rules by producing at a sand level not authorized by the Railroad Commission is a finding which is not subject to collateral attack. The Railroad Commission’s findings cover all of the allegations made by the Appellees in this suit. These findings are not subject to collateral attack; thus, Arkla is entitled to judgment. 48

A concurring opinion added that the jury determination was against the great weight and preponderance of the evidence. A dissent took the position that the district court judgment could not be a collateral attack because the suit was filed before the defendant sought the Railroad Commission hearing.

§ 17.05. Exhaustion of Administrative Remedies; 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 principle 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 confided in it by the legislature. Thus, statutes often require exhaustion before allowing a court to assume jurisdiction, and judicial recognition of the doctrine even without a statute 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 preterm 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.

47 Id. at 119.
48 Id.
The requirement that one exhaust an administrative remedy may arise in several ways. For example, when an agency provides for review of an initial decision of an administrative panel, it will be necessary to seek timely the agency’s internal administrative review before seeking judicial review. The exhaustion doctrine may also be asserted when a person has failed to go before an agency for relief at all or when the person has participated in an agency proceeding but has failed to take up an issue that it wishes to raise on appeal. When an agency remedy is available and the party fails to request the remedy, it has not exhausted the administrative remedy; matters that could have been presented but were not raised before the agency may not be heard for the first time on appeal.

Exhaustion of administrative remedies has much in common with the “ripeness” doctrine. 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 on 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.

49 Sooner Oil & Gas Corp. v. State, 635 P.2d 599, 71 Oil & Gas Rev. 551 (Okla. 1981). The Corporation Commission’s Administrative Review Panel, which made the initial decision that the appellant failed to seek rehearing in Sooner Oil & Gas, was declared unconstitutional in Hair v. Corporation Comm’n, 740 P.2d 134, 96 Oil & Gas Rev. 333 (Okla. 1987).


52 See H & L Operating Co. v. Marlin Oil Corp., 737 P.2d 565, 96 Oil & Gas Rev. 325 (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 when an agency hearing was still to be held on the substance of the initial application.
The exhaustion doctrine also merges into the rule against collateral attack in some cases when a party has failed to oppose a matter in an agency hearing. For example, in the recent case of *Waller Brothers, Inc. v. Exxon Corp.*, the Mississippi Oil and Gas Board established a 640-acre gas unit. This gave the operator Exxon the right to force integrate the 640-acre gas unit and the right to charge “alternate charges” as well as drilling and completion costs to non-consenting owners who did not agree to participate in the well or agree to assign or lease their interest within a given time period. The plaintiff brought a declaratory action in part to challenge Exxon’s compliance with the pooling statute, and claimed that as a result of such noncompliance Exxon breached duties of good faith and of a fiduciary relationship. The court ruled that the time the plaintiff should have brought up this argument was before the Oil and Gas Board. The plaintiff failed to appear before the Oil and Gas Board at the time of the hearing, did not take any action within 20 days after the Oil and Gas Board’s decision, and did not appeal the decision. The court believed that the plaintiff was indirectly collaterally attacking the order by arguing to the court that equities were not done. This argument, ruled the court, should have been made before the Oil and Gas Board. Review of such claims was precluded.

In many states it will not be necessary to file for a rehearing of a final decision of an agency before invoking judicial review. When an application for rehearing would clearly be futile, a court may not find the party has failed to exhaust an administrative remedy by not applying for rehearing. In some states, however, application for rehearing or notice of intent to appeal will be a prerequisite to seeking judicial review. Failure to file

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for rehearing will preclude subsequent review in a state that has such a requirement.

The exhaustion doctrine does not preclude an administrative agency from initiating a court proceeding rather than taking administrative action. When an agency is authorized to invoke judicial authority for the imposition of civil or criminal penalties it is not necessary for the agency to institute first an administrative proceeding against the party it wishes to take to court.57

The exhaustion doctrine and the primary jurisdiction doctrine are similar. Each concerns the timing of judicial review. However, 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 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.58 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; there is, however, no real need to distinguish where the proper resolution is to require the matter to be addressed by the agency first.59

58 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 Pacific Rail Road, 352 U.S. 59, 6364 (1956).
A Texas court described the primary jurisdiction doctrine as follows:

[W]hen the Legislature has delegated the power to an administrative body to regulate a particular industry or business, the courts may not or will not interfere until the board or bureau has had an opportunity to pass upon the matter and has remedied, or attempted to remedy, the situation. Two of the main arguments supporting this theory are: (1) That the commission, board or bureau is staffed with experts trained in the handling of the complex problems presented, and (2) great benefit is to be derived from a uniform interpretation of laws, rules and regulations by an administrative body whereas different results might be reached under similar fact situations by various courts or juries.60

A court will give the agency an opportunity to rule upon one or more issues in a case in which the court has jurisdiction, even though the agency may not be able to provide a complete remedy, when the agency’s expertise may be of assistance and the court wishes not to intrude upon matters of importance to the agency.61 However, the primary jurisdiction doctrine is not well understood and is confused by some courts with the question of whether the court or the agency has jurisdiction at all. Even in the United States Supreme Court the doctrine is applied rather inconsistently.62

When the issue sought to be adjudicated is inherently judicial in character,63 when an agency cannot give adequate relief to the complaining party,64 or when there is no potential for conflicting decisions by agency

60 Gregg v. Delhi-Taylor Oil Corp., 162 Tex. 26, 344 S.W.2d 411, 413, 14 Oil & Gas Rev. 106 (1961).
61 Sun Oil Co. v. Martin, 218 F. Supp. 618, 18 Oil & Gas Rev. 1083 (S.D. Tex. 1963), aff’d 330 F.2d 5, 20 Oil & Gas Rev. 631 (5th Cir. 1964).
63 Gregg v. Delhi-Taylor Oil Corp., 162 Tex. 26, 344 S.W.2d 411, 14 Oil & Gas Rev. 106 (Tex. 1961); Biskamp v. General Crude Oil Co, 452 S.W.2d 515, 36 Oil & Gas Rev. 279 (Tex. Civ. App. 1970), writ ref’d n.r.e.
and court nor need for agency expertise, a court may decline to invoke
the doctrine of primary jurisdiction. With the increased regulation in the
environmental area that has taken place in recent years, one suspects that
we will see more frequent reference to the primary jurisdiction doctrine.
There seems to be a greater willingness in recent years for the courts to
apply primary jurisdiction, but the record is somewhat spotty. The trend
seems to be that the courts will readily apply primary jurisdiction to a
question of correlative rights but are more reluctant to do so when it comes
to a question of environmental damage.

We can see the trend in recent cases out of Louisiana and Oklahoma.
The Louisiana Supreme Court decision in Magnolia Coal Terminal v.
Phillips Oil Co., laid the basis for greater recognition of the primary
jurisdiction doctrine in Louisiana. The case was based on a claim by
Magnolia for damages arising from a well alleged to be leaking. It went
forward in the district court despite an assertion by the defendant that the
Commissioner of Conservation had exclusive jurisdiction over leaking
wells. The court found that the well had not been plugged properly and
awarded damages for plugging the well and for remediation of the property.
At the same time, a proceeding initiated by the defendant Phillips was
going on before the Commissioner of Conservation, and the Commissioner
concluded that the well was not leaking. The trial court and the
Commissioner of Conservation thus made findings of fact that were in
direct contradiction of one another. The court of appeal reversed the district
court’s damage award in its entirety, holding that the judgment of the trial
court was based on factual issues that fell within the exclusive province
of the Commissioner of Conservation. The Louisiana Supreme Court,

Greyhound Leasing & Financial Corporation v. Joiner City Unit, 444 F.2d 439, 40 Oil &
Gas Rev. 60 (10th Cir. 1971).
66 Magnolia Coal Terminal v. Phillips Oil Co., 576 So. 2d 475, 111 Oil & Gas Rev. 506
(La. 1991).
67 See Phillips Petroleum Co. v. Batchelor, 560 So. 2d 461 (La. App. 1st Cir. 1990); the
well operator sought a review of the Commissioner’s determination, but the court of
appeal dismissed the case since it was clear that Phillips was seeking to confirm the
order, not challenge it, and thus the case presented no justiciable controversy.
68 561 So. 2d 732 (La. App. 4th Cir. 1990).
in an opinion signed by two justices with five other justices writing concurring or dissenting opinions, affirmed in part, reversed in part and rendered. The supreme court affirmed the court of appeal insofar as it held that Magnolia had no cause of action to force proper plugging and abandonment of the oil well until the matter had been reconsidered by the Commissioner of Conservation but reversed on the question of damages. A *per curiam* opinion that accompanied the supreme court’s denial of rehearing stated that the trial court in deciding the issue of remediation of the property did not abuse its discretion by refusing to defer to the Commissioner of Conservation as a matter of primary jurisdiction. In 1990 the Louisiana legislature enacted a statute expressly providing that the Commissioner of Conservation has jurisdiction over well site remediation. 69

It may be observed that while the court of appeals decision was grounded on exhaustion of administrative remedies as to well plugging and essentially on the doctrine of primary jurisdiction as to seeking the expertise of the Commissioner of Conservation regarding whether the well was leaking and remediation, the supreme court in its per curiam neither accepted nor rejected the existence of the primary jurisdiction doctrine in Louisiana law. 70

The court stated the following which seems to contain the premise that a court could well apply the doctrine of primary jurisdiction in an appropriate exercise of discretion and that in some circumstances it would be an abuse of discretion not to apply it:

The deference to administrative agencies for an initial decision on matters within the expertise of the agency, which is contemplated by the doctrine of primary jurisdiction, is a matter within the sound discretion of the trial court. In the present case the trial court, in deciding the remediation issue, did not abuse its discretion by refusing to defer to the Commissioner of Conservation as a matter of primary jurisdiction. 71

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69 Act 192 of 1990 amended La. R.S. 30:4(C)(1) and (16)(a) and 4.1(B)(1) relative to the authority of the Commissioner of Conservation regarding dry and abandoned wells. It provides for closure of pits, removal of equipment, structures, and trash, and general site cleanup of dry or abandoned wells and provides for a bond to secure such cleanup. 70 See O’Meara v. Union Oil Co. of California, 212 La. 745, 33 So. 2d 506 (1947). 71 576 So. 2d at 489.
Based on this decision in Magnolia Coal Terminal v. Phillips Oil Co., the United States Court of Appeals for the Fifth Circuit ruled in Mills v. Davis Oil Co.\textsuperscript{72} that the doctrine of primary jurisdiction is followed in Louisiana as a matter of substantive law that the federal courts are bound to follow. The case grew out of a sheriff’s sale of a tract of land that had the effect of extinguishing a lease, a portion of which tract had been included in a unit. The former lessee had to pay for the value of the production it had obtained less the costs of production. There was controversy over the proper costs and the district court declined to exercise jurisdiction over Mills’ well cost dispute, and instead deferred the matter to the Commissioner of Conservation. Under Louisiana law, such deference was a matter within the sound discretion of the trial court. The court held “that Louisiana’s doctrine of primary jurisdiction is substantive and it required the lower court to exercise its discretion as if it were a Louisiana state court.”\textsuperscript{73}

But the reluctance of the courts to apply primary jurisdiction in matters of pollution is seen again in Sanders v. Gary.\textsuperscript{74} The court here ruled that the district court can issue injunctions regarding injection wells despite a lessee’s claims that the trial court was barred from such injunctions by the Commissioner of Conservation’s authority over mineral production and that exclusive jurisdiction to regulate remediation of state waters was in the Louisiana Department of Environmental Quality. The court relied on Magnolia Coal Terminal v. Phillips Oil Co. for the proposition that damages from soil pollution are in the conventional knowledge and expertise of the trier of fact, as contrasted with the knowledge and expertise of the Commissioner of Conservation.\textsuperscript{75}

A similar pattern is seen in cases out of Oklahoma. In Marshall v. El Paso Natural Gas Co.,\textsuperscript{76} the federal district court declined to apply the primary jurisdiction doctrine to a claim of a leaking oil well that was

\textsuperscript{72} Mills v. Davis Oil Co., 11 F.3d 1298 (5th Cir. 1994).
\textsuperscript{73} Id. at 1304.
\textsuperscript{74} Sanders v. Gary, 657 So. 2d 1085 (La. App. Cir. 1995).
\textsuperscript{75} See also Greater New Orleans Expressway Comm’n v. Traver Oil Co., 494 So. 2d 1204 (La. App. 5th Cir. 1986). It, too, stands for the proposition that the trial court has jurisdiction to issue injunctions, when warranted, despite a claim that the case involves mineral production regulated by the Commissioner of Conservation.
\textsuperscript{76} Marshall v. El Paso Natural Gas Co., 874 F.2d 1373 (10th Cir. 1989).
asserted to be a “ticking time bomb.” The plaintiffs won a judgment. This was upheld, along with a punitive damage award of five million dollars.

The defendants were more successful in getting deference to the authority of the Corporation Commission in *Brumark Corp. v. Samson Resources Corp.* 77 Here, an order of the Corporation Commission had established a special allocated pool covering eight sections of land. The order established detailed field rules governing production; under the rules the Commission would set monthly production levels for each well in the pool based upon an annual flow test, market demand, and ownership in the pool. Brumark and others brought a suit against the defendants claiming that they were violating the rules and seeking damages for conversion. Applying the primary jurisdiction doctrine, the federal district court dismissed the suit, ruling that the Corporation Commission had jurisdiction over matters pertaining to violation of its own orders. The Tenth Circuit affirmed. The correlative rights issues in the plaintiffs’ claims were matters of public rights, not private rights. 78 While there is no bright line test applicable in the determination of jurisdiction, here each of the plaintiffs’ contentions dealt with the compliance and/or construction, adjustment or modification of the Corporation Commission’s order. Thus the Corporation Commission was the proper forum to decide the construction of its own order. There was no abuse by the district court of its discretion to apply the doctrine of primary jurisdiction.

As discussed already, in *Wagner & Brown v. Ward Petroleum Corp.*, 79 a federal district court stayed its proceedings on a claim of negligent well drilling brought against the unit operator while a well cost dispute was ongoing before the Corporation Commission. After the Commission found that the costs incurred were all reasonable and prudent the federal court reopened the suit filed therein and gave preclusive effect to the Commission’s factual findings and cost determination. This case appears to be an entirely proper way of applying the primary jurisdiction doctrine.

77 Brumark Corp. v. Samson Resources Corp., 57 F.3d 941 (10th Cir. 1995).
§ 17.06. Deference to Agency Determinations.  

A problem increasingly raised as more state courts become concerned about procedural due process in administrative law is whether the form of the order or decision meets statutory criteria and judicial standards. The statute may be the conservation statute or the state administrative procedure act. The source of the judicial standards may be constitutional concern for due process, or it may be a view that detailed findings are required of the agency to facilitate judicial review and are implicit in the fact that judicial review is provided for by statute.

The form of the order, particularly in the specificity of its findings and conclusions, is significant for a reviewing court to determine if the agency has acted within the statutory authority it has been granted and if the agency has fulfilled its statutory duties. A distinction may be made between findings of fact and conclusions of law. A distinction may also be made between basic facts and ultimate facts (sometimes spoken of as mixed questions of law and fact).

Some courts demand a greater degree of specificity than others. Geology is an inexact science, and agencies must make decisions with limited data. When expert witnesses disagree, as for example over the placement of a fault or the location of a water level, the fairest solution may well be to take a compromise approach that does not exactly correspond to the data of either expert witness. But a candid statement of finding that the agency is splitting a difference between experts might well prove unacceptable as a rationale to a court. Perhaps like statutes and sausages, it is better not to examine too closely the manner in which the result is reached, so long as the result is acceptable. Perhaps, too, this is why other courts will not demand a high degree of specificity and will instead emphasize that the agency must work with limited data and exercise discretion.

The Mississippi Supreme Court has recently given close scrutiny to the administrative procedures of the Mississippi Oil and Gas Board in McGowan v. Mississippi State Oil & Gas Board. The court has concluded that the Board must give more specific reasons justifying its orders. In

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80 McGowan v. Mississippi State Oil & Gas Board, 604 So. 2d 312 (Miss. 1992).
this case McGowan had applied for permission to operate salt water disposal wells without “packers” that are generally required in the oil and gas industry as a means of protecting drinking water formations from contamination. When the Board refused to grant the application, McGowan sought judicial review. The Mississippi court held that the agency had to explain how it arrived at its decisions. For the court to determine if the agency had acted arbitrarily or capriciously or if it had substantial evidence to support its decision, the agency had to provide more than “mere conclusory findings” on each of the issues, together with a summary of the grounds for the findings. The decision seems to indicate that the same must be provided for rulemaking.

A similar issue as to the adequacy of the agency’s decision in a rulemaking context was addressed in a Texas case, Railroad Commission v. ARCO Oil and Gas Co. After a successful court challenge to the manner in which the Railroad Commission set a market demand factor for allowables in two fields in 1990, the Railroad Commission re-adopted the same restrictions on oil production, as Rule 90, using the rulemaking procedures set forth in the Administrative Procedure Act. An appeals court in this case set aside the Commission attempt at rulemaking on the ground that the Commission lacked rulemaking authority for the purpose of protecting correlative rights; even though it had such authority to make rules to prevent waste, the Commission did not substantially comply with the APA's requirements to state a reasoned justification of the rule and to state the rule’s factual basis for the Commission’s conclusion that the rule was necessary to prevent waste.

Several recent cases from other jurisdictions have found the specificity requirements satisfied. In ANR Production Co. v. Wyoming Oil and Gas Conservation Commission, the Wyoming Commission’s findings of basic facts and rationale were found adequate. Here, the Commission in 1983 had approved the formation of a pressure maintenance unit with Woods as operator. ANR had a well that produced from a formation beneath

82 ANR Production Co. v. Wyoming Oil and Gas Conservation Comm’n, 800 P.2d 492, 111 Oil & Gas Rev. 392 (Wyo. 1990).
the pressure maintenance unit, and Woods filed an application with the Commission to stop an ANR fracture treatment of its well that Woods claimed was causing communication between the Woods unit and the ANR well’s producing formation. The Commission agreed with Woods, ordering the ANR well to be shut in to protect the correlative rights of Woods and to prevent waste by protecting the secondary recovery operations on the pressure maintenance unit. ANR sought review of the Commission’s order, asserting several deficiencies in the form of the order, but the Wyoming court affirmed. One basis for appeal was that the agency determination did not reflect the reasons why one expert’s view was chosen over the other expert’s view; that is, that the Commission has not explained why it had exercised its discretion in the manner it did. The court examined the findings of fact of the Commission and concluded that the Commission articulated both the basic facts and their underlying rationale to establish objective criteria — such as permeability, pressure, reservoir pressure, production, and area drained by a well — that supported the decision. Therefore, the Commission had complied with the requirements set forth in prior cases.83 ANR also asserted that the Commission’s determination was arbitrary, capricious and contrary to law for failure to contain adequate findings of basic facts on material issues to support the ultimate facts and conclusions. The court treated this as an issue of the sufficiency of the evidence and found substantial evidence in the record.84

Related to the “findings” controversies is the issue that may arise as to the power of the agency to take “judicial notice” or “official notice” of facts. A statute may authorize the agency to take such notice, provided that the agency states it is taking notice and allows an opportunity for a

84 See also Hanson v. Industrial Comm’n of North Dakota, 466 N.W.2d 587, 116 Oil & Gas Rev. 294 (N.D. 1991) holding that a Commission decision consistent with an operational norm does not require findings as specific as necessary to explain a deviation from the operational norm. Findings are adequate when they enable a reviewing court to understand the basis of the agency’s decision.
party to contradict the appropriateness of taking judicial notice. An older case that we might note explicitly states the concerns of a court about “official notice.” In the Oklahoma case of *C. F. Braun & Co. v. Corporation Commission*,85 the Oklahoma Supreme Court reversed the Corporation Commission’s action as to a cost formula it had employed in an order establishing a participation election because of the manner in which the commission had taken judicial notice: it had not relied on any specific evidence. The court observed that an agency can take judicial notice but indicated that the agency must make the basis for its actions clear for the parties in order to comply with due process. The court queried: “How is it possible for this Court to review the law and facts and intelligently decide that the findings and conclusions of the Commission are supported by substantial evidence when the evidence upon which the findings and conclusions are based are [sic] not in the record and unknown.”86 Without the Commission stating the basis for the formula, the order was not supported by substantial evidence.

Evidence from a prior hearing before the agency was the concern in *Louisiana Land and Exploration Co. v. Wyoming Oil and Gas Conservation Commission*.87 The litigation resulted from the 1983 establishment of the Powell Pressure Maintenance Unit (PPMU), which produced from the First Bench formation. ANR Production Co. and Louisiana Land and Exploration (LL&E) produced wells from the Second Bench. The LL&E well in controversy, the Devex 32-11, was drilled in the summer of 1984 in the border area surrounding the PPMU. In the summer of 1988 unusual production characteristics were noted. Woods Petroleum Corporation, as a PPMU unit operator, was notified. Hearings were then also underway for the well discussed in the *ANR Production Co.* case cited above. On May 18, 1989, Woods Petroleum filed an application to shut down the Devex 32-11 well on allegations that the

86  609 P.2d at 1272.
87  *Louisiana Land and Exploration Co. v. Wyoming Oil and Gas Conservation Comm’n*, 809 P.2d 775 (Wyo. 1991). The case was closely related factually to ANR Production Co. v. Wyoming Oil and Gas Conservation Comm’n, discussed *supra.*
Devex 32-11 well was in communication with the oil production sand being pressurized into secondary recovery through the PPMU. The application was served on LL&E on May 30, 1989 and a hearing was held less than two weeks later on June 13, 1989. The Commission, immediately after the hearing, entered an interim order shutting down the Devex 32-11 well. After the hearing, LL&E undertook a study of the evidence and discovered flaws. They immediately asked the Commission for a rehearing based on this new evidence but the Commission denied rehearing. LL&E sought judicial review of the denial. Woods and the Commission asserted that LL&E had knowledge of the evidence from the related hearing involving ANR (in which LL&E took part). But, said the court in reversing, the Commission had not taken judicial notice of the material. The court ruled that application of judicial notice for the purpose of the later related hearing “requires written notice of what matters are considered as judicially noticed with notice to be seasonably furnished to the litigants before hearing application and thereafter an appropriate record of any notice to evidence would be included in this record for appellate review.”

The court recognized that the efficient and expeditious processes used by the Commission are appropriate, if not indispensable, to the proper performance of the administrative agency activities. But a litigant should have some realistic opportunity to pursue discovery or should have flexibility in hearing proceedings provided when unnoticed and unexpected technical information is presented where validity factors may determine the result of the hearing. The court noted that inflexibility of supplementation processes would require extended pre-hearing discovery and this would introduce delay and decisional deterrents inappropriate for administrative agency review.


The final area we shall consider is the limited review given by the courts for agency action; this is done under the subject of standard of review or scope of review. Simply stated, the scope of review is the degree of deference the court will pay to an agency determination under review. Scope or standard of review is both statutory and judicial in origin. In

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88 Louisiana Land and Exploration, 809 P.2d at 778.
most of the producing states, the statute for review will state that there is a presumption of validity to be given to the agency determination. The same statute will also specify the treatment to be given by the court to matters decided by the agency.

The statutes and court decisions often make a distinction between issues of fact and issues of law decided by an agency. There is usually greater deference given as to matters of fact than as to law, but the line between fact and law issues becomes indistinct when there are mixed questions of law and fact and when there are matters of policy that the legislature has given to the agency to establish. Even when the agency is construing a statute, its construction is entitled to great weight. The scope of review will, however, tend to be broader when there is an assertion of a deprivation of a constitutional right.

As to fact determinations under review, the courts of nearly all producing states follow the “substantial evidence” test. Looking to the record as a whole, the court will not overturn an agency determination if it is supported by substantial evidence, even though the court might have come to a different conclusion had it heard the evidence.

91 Dunn v. Sutton, 378 So. 2d 485, 66 Oil & Gas Rev. 201 (La. App. 1979), writ granted, and case remanded, 381 So. 2d 1221 (La. 1980). The substantial evidence test is required in Oklahoma by the Oklahoma Constitution unless an asserted violation of a state or federal constitutional principle is to be reviewed. The Oklahoma Constitution, Article IX, Section 20, provides that in appeals of Corporation Commission orders “involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts . . . .”
92 A recent statement of the standard of review is found in Schlachter v. Railroad Comm’n of Texas, 825 S.W.2d 737, 739, 119 Oil & Gas Rev. 541 (Tex. App. 3 Dist. 1992) error denied: “Where there is substantial evidence which would support either affirmative or negative findings, the order will be upheld, even though the Commission might have arrived at a decision contrary to that which the court might have reached. The correct test
The Kansas Supreme Court has recently reviewed at considerable length a major proceeding of the Kansas Corporation Commission (KCC). After discussing in great detail the setting of allowables by the Commission, the court concluded that there was substantial evidence on the record to uphold the Commission’s new basic proration order for the Hugoton Field. This was in the case of *Mobil Exploration & Producing U.S. Inc. v. Corporation Commission.*

The Hugoton Field has been going through a regulatory change for some years now. First it was infill drilling. Now the Commission has taken the additional step of raising the acreage factor for the allowables for each unit that has an infill well. Three factors were taken into account for the setting of allowables by the Corporation Commission: surface acreage, deliverability and market demand. Oxy sought to have a full unit allowable for each well on the unit, or a 1 + 1 formula. Mobil and other companies opposed this. The Commission compromised among the proposals and came up with a .65 + .65 allowable. The Commission also changed the effect of the deliverability factor on the assignment of allowables. The KCC determined that no well would receive an allowable in excess of its demonstrated capacity to produce, defined as the average of the highest three months’ production in the preceding 12 months. The Commission further changed the periods for making up underages, and provided that underages could be made up from either well on a unit. Mobil sought judicial review, but the Kansas Supreme Court affirmed the order of the Corporation Commission. The hearings took place during a year’s time with 29 qualified expert witnesses on behalf of 26 parties. The scope of review of the Commission’s order is from K.S.A. 77-621(c).

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95 The Commission provided a 10-year period in which all existing reinstated or canceled underage must be produced or be permanently canceled; any new canceled underage must be produced within 1 year of the time that it is canceled or be permanently canceled.
96 A party seeking relief from an action of the Kansas Corporation Commission has the burden of showing that an agency’s order is invalid for one of the following reasons:
The substantial evidence rule was stated by the Kansas Supreme Court as follows:

Neither the district court nor this court may substitute its judgment for that of the administrative agency. As long as the record contains substantial competent evidence supporting the agency decision, the decision is reasonable and must be upheld by this court. . . . This is true even though there may be conflicting evidence which would support a contrary result. The KCC is vested with wide discretion and its findings have a presumption of validity on review. . . . The court may not set aside an agency order merely because the court would have reached a different conclusion if it had been the trier of fact. Only in those cases where the evidence shows the KCC’s determination is so wide of the mark as to be outside the realm of fair debate may factual finding be set aside.97

The court found that the record was replete with evidence that the 0.5-0.5 acreage factor was causing a loss of allowable for those drilling infill wells, even though the wells were resulting in the discovery of new reserves. There was a large body of testimony which tended to show that infill wells were necessary to drain properly the Hugoton Field without waste and that the 0.5-0.5 acreage factor was inhibiting the drilling of infill wells. As long as the record contained substantial competent evidence

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(1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied; (2) the agency has acted beyond the jurisdiction conferred by any provision of law; (3) the agency has not decided an issue requiring resolution; (4) the agency has erroneously interpreted or applied the law; (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure; (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification; (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or (8) the agency action is otherwise unreasonable, arbitrary or capricious.

97 Mobil Exploration, 908 P.2d at 1288 (citations omitted).
in support of the decision of the KCC, its decision was reasonable and had to be upheld by the court. The court found that the evidence supported a conclusion that “a change in the acreage factor was necessary in order to prevent discrimination against infill wells and to encourage the drilling of infill wells, where necessary, to completely recover the gas underlying each lease.” The agency could adopt its own alternative to the proposals before it; the KCC has the expertise through its staff to sift and evaluate conflicting testimony. The .65-.65 acreage factor adopted by the KCC fell within the range of reasonableness and was supported by the evidence presented. It was not so wide of the mark as to be outside the realm of fair debate. Therefore, it could not be disturbed on appeal.

The Louisiana Supreme Court has reinforced the preference for in kind balancing among producers by upholding an order of the Commissioner of Conservation providing for this. In *Hunt Oil Co., NWM/H-1982 v. Batchelor*, the litigation arose from revisions of units in the South Lake Arthur Field that changed the ownership interests in the units; new acreage was brought in and some acreage was taken out. The hearings were concluded on October 18, 1989, but the order was not issued until January 22, 1990. The order was effective as of October 18, 1989, but substantial production of natural gas took place between that date and the January 22, 1990 issuance of the order (the “critical period”). A dispute arose over how the new owners were to be accounted for the production that took place in this period. The overproduced parties contended there should be balancing in kind, allowing the underproduced parties to take a disproportionate share of the gas and sell it themselves to make up for the period for which they were underproduced. The underproduced parties sought a cash accounting based on what the overproduced parties actually realized from the sale of the gas during the critical period. The Commissioner ruled that in kind balancing should be effected. Applying

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98 *Id.*
the criteria of prior cases, the district court and the court of appeals found that cash balancing was necessary where the underproduced party could not have taken the gas at the time of production and an inordinate amount of time would have been required for balancing in kind to have been effected; this was based on a conclusion that balancing in kind would be unfair and unjust in this case because plaintiffs would further lose the time value of money. The Louisiana Supreme Court reversed and reinstated the order of the Commissioner of Conservation. The court stated:

We agree . . . that balancing in kind is the preferred method of correcting any imbalances which may arise between owners in a compulsorily unitized lease. It has long been the custom of the industry for the owners to correct any imbalances which may arise through balancing in kind, and absent any contractual arrangement to the contrary among the owners, there is no reason to alter this established practice.

Here, the lower courts had substituted their judgment for that of the Commissioner. There was substantial evidence to support the Commissioner’s findings of fact, and his decision was not arbitrary or capricious. A rule that favors balancing in kind is likely to be more fair overall than a rule that favors underproduced parties or one that favors overproduced parties.

We see again the deference to be given on questions of fact and discretion in Louisiana in another recent case, but as to law we see it is for the court to determine. A complex issue of well costs was resolved in Tex/Con Oil & Gas Co. v. Batchelor. The controversy concerned whether under the then applicable wording of the statute a “dollar-for-dollar” method of depreciation or a unit of production depreciated well cost method of accounting should be applied to adjust costs among new

102 644 So. 2d at 198.
103 Tex/Con Oil & Gas Co. v. Batchelor, 634 So. 2d 902 (La. App. 1993), writ denied, 635 So. 2d 1102 (1994).
and old owners of interests in a revised unit.\textsuperscript{104} The Commissioner had used the former and the trial court concluded that the latter should be applied. The appeals court reinstated the decision of the Commissioner not out of deference but because the court agreed with the Commissioner’s interpretation of the statute. The standard of review was set forth by the court: “The manifest error standard of review is used in reviewing the facts found by the Commissioner, as opposed to the arbitrariness test used in reviewing conclusions and exercises of agency discretion. . . . However, questions of law are to be determined upon judicial review with little or no deference to the decision of the administrative body.”\textsuperscript{105} As an alternative ruling, the court held that if the statute did not mandate the “dollar-for-dollar” method, then the Commissioner’s exercise of discretion was involved and the Commissioner had not acted arbitrarily or capriciously; the trial court should not have substituted its judgment for the Commissioner’s.

Ohio provides for both voluntary and compulsory pooling. Force pooling may be done upon application to the Division of Oil and Gas by the owner of a tract of insufficient size or shape to satisfy applicable spacing requirements.\textsuperscript{106} Under the statute, two conditions precedent must be met before an owner may make an application for a mandatory pooling order: the owner’s tract of land must be of insufficient size or shape to meet the requirements for drilling a well thereon, and the owner must have been unable to form a drilling unit under a voluntary agreement on a just and equitable basis. Ohio is a risk penalty state by virtue of Ohio R.C. 1509.27 (F), which allows the participating owners to recover up to double the costs (exclusive of certain royalty amounts) as determined by the chief of the Division of Oil and Gas.

Factors affecting whether an offer of voluntary pooling is just and equitable for purposes of compulsory pooling were discussed and applied by an Ohio appellate court in \textit{Johnson v. Kell}.\textsuperscript{107} Under the Ohio spacing

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\textsuperscript{105} 635 So. 2d at 907.
\textsuperscript{106} Ohio R.C. 1509.27.
\textsuperscript{107} Johnson v. Kell, 89 Ohio App.3d 623, 626 N.E.2d 1002 (1993). A motion to certify the record to the Supreme Court of Ohio was overruled, 68 Ohio St.3d 1410, 623 N.E.2d 567 (1993).
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and acreage standards for a unit, Kleese needed to pool 1.4 acres to add to his 13 acres to meet the minimum required. The Technical Advisory Council met and recommended against the forced pooling. But the Chief of the Division of Oil and Gas granted the application and ordered pooling. The pooled owner appealed to the Oil and Gas Board of Review, which vacated the Chief’s order, finding that the applicant’s efforts to pool voluntarily were not just and equitable. The applicant appealed, and the trial court reinstated the Chief’s pooling order but on further appeal the Appeals Court reversed. The issue on judicial review was whether the Board’s order was reasonable and lawful. Even though this was the same standard the Board was to follow in reviewing the Chief’s order, the focus on judicial review was the Board’s order, not the Chief’s order. The Board is empowered to make new factual determinations by conducting de novo hearings, and the trial court is bound to give proper deference to these. The Board has wide latitude in reviewing the Chief’s determinations. The court concluded that the Board properly determined that the offer to pool was not just and equitable; the offer limited the offeree’s share of the royalties to a small percentage and the offer did not adequately compensate the offeree for the likely adverse impact on his existing well. The offeree’s correlative rights were not adequately protected or compensated.

Turning now to cases from Oklahoma, we will find perhaps a greater readiness to overturn the agency than in some other producing states. In Marathon Oil Co. v. Corporation Commission, Arco filed an application with the Corporation Commission to classify the Wilburton-Arbuckle common source of supply as a special allocated gas pool and to establish field rules setting production rates for the spacing units. Although the court concluded that the conservation statute gives the Commission jurisdiction to establish field rules for the protection of correlative rights, the allowable order was not supported by substantial evidence. The Commission adopted a formula based on 50 percent deliverability and 50 percent gross rock; each unit’s allowable was determined by multiplying the pool allowable times the portion of the unit’s gross rock and its wells’ deliverability. The order assumed that the gross rock under each unit was

109 52 O.S. 86.4.
equal to the gas in place. The testimony was to the effect that porosity in the field was not uniform and was generally better in the upper portion of the reservoir than in the lower. Since the order was based on an assumption that the porosity was uniform, the order was not supported by the substantial evidence. The Corporation Commission should have treated the upper portion differently from the lower, the court held.

The substantial evidence standard was recently reiterated in another Oklahoma case and applied to overturn a part of the Commission’s decision in Union Texas Petroleum Corp. v. Jackson. Here the Corporation Commission’s attorney filed a proceeding with the Corporation Commission to determine the source of contamination of ground water. Union and Mobil had operated in the relevant field but had sold out their interests to companies in the latter part of the 1980s. The Administrative Law Judge recommended holding Union and Mobil liable for ground water contamination but not the two successors. The Commission found Mobil’s successor in interest, who had actively operated the CIU, was responsible for the actions of its predecessors in interest. The court reversed on the basis that the decision was not supported by substantial evidence. The court made the following statement of the substantial evidence standard:

The determination of whether substantial evidences exists does not require that the evidence be weighed, only that there be evidence tending to support such order, i.e. the proof must be “more than mere scintilla”. . . . The “substantiality” of the evidence must take into account whatever in the record fairly detracts from its weight. Searching a record for substantial evidence “does not entail a comparison of the parties’ evidence to determine that which is most convincing but only that the evidence supportive of the order be considered to determine whether it implies a quality of proof inducing a conviction that the evidence furnished a substantial basis of facts from which the issue could be reasonably resolved.” . . . The Corporation Commission’s findings are presumed correct in

matters it frequently adjudicates and in which it possesses expertise.\footnote{909 P.2d at 137 (citations omitted).}

Although the Corporation Commission clearly had jurisdiction, the court concluded that there was not substantial evidence to support the Commission’s finding that the successor operator violated a Commission rule and thereby caused pollution; the predecessor operator had caused the pollution. The question, the court felt, was whether there was substantial evidence that the successor to Mobil conducted its operations in a manner which caused pollution; \textit{i.e.} whether it maintained the “nuisance” of other prior operators. The fact that the successor now operated the unit was insufficient to impose liability. Mobil and Union were jointly and severally liable.

Several other recent Oklahoma decisions have gone against the Corporation Commission because the orders in question were not supported by substantial evidence. In \textit{Anadarko Petroleum Corp. v. Corporation Commission},\footnote{Anadarko Petroleum Corp. v. Corporation Comm’n, 859 P.2d 535 (Okla Ct. App. 1993).} Anadarko applied to the Corporation Commission for authority to use an existing well for salt water disposal purposes. The Administrative Law Judge (ALJ) and Appellate ALJ recommended approval. The Commission denied the application. On Anadarko’s appeal to the court, the matter was remanded to the Commission. The Commission made a finding that the wells in the area had a history of poor cementing over ground water bearing strata. The only matter in the record relating to this was from the argument of a man named McCaull who appeared before the Commission. He had not appeared before the ALJ and was not allowed to testify as to facts not in the record already before the appellate ALJ nor before the Commission. The finding was not supported by substantial evidence unless McCaull’s argument could be considered testimony. But if testimony, then Anadarko should have had notice that McCaull would give evidence and be given an opportunity to cross examine McCaull. Thus the Commission based its decision on improper evidence and this denied due process. The matter was remanded to the Commission.
The court in *Anson Corp. v. Corporation Commission*\(^{113}\) also found a Commission order was not sustained by law or substantial evidence. In 1990 Anson filed to force-pool a 640-acre drilling/spacing unit. Roy Reed Trusts Partnership owned 11.25 mineral acres in the proposed unit. On the day of Anson’s application the Partnership executed a lease with a 20 percent royalty to the Poor Boy Oil Company. In June 1990 the Corporation Commission issued a pooling order giving the mineral owners an election to receive either (1) a $750.00 per acre cash bonus, plus an overriding or excess royalty of 1/16 of 8/8 in addition to the standard 1/8 royalty interest, or (2) an excess royalty of 1/8 of 8/8 in addition to the standard 1/8 royalty. If the first option was chosen, the mineral owner had to deliver an 81.25 percent net revenue interest to the operator. The option to elect a cash bonus was not available to Reed because its interest was burdened by the first lease to Poor Boy with a 20 percent royalty. Unknown to Anson, Reed executed a second lease to Poor Boy on July 6, 1990, which purported to remove the burden of Reed’s mineral interest by reducing Poor Boy’s interest from 1/5th to 3/16ths. The amendatory lease was not filed of record until October 31, 1990, after the well was determined to be dry. Reed then filed with the Corporation Commission to clarify and interpret the order and to establish its right to a cash election. The administrative law judge who heard the matter concluded that the Reed Partnership was “playing a shell game” to its own benefit and ruled that Anson could rely on the public records to determine rights of parties to options under the Commission order. The Corporation Commission reversed, but the Oklahoma court overturned the Commission, ruling that its decision was not supported by law or substantial evidence. The court commented on the game playing as follows:

Due to the inherently risky nature of oil and gas exploration, coupled with the great need for advance funding, incentives must be provided to investors and mineral owners. The interests of those individuals who play by the rules are detrimentally affected when other parties are allowed to manipulate the law to achieve a greater return with no risk.

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The long term effect could be a greater reluctance on the part of honest investors to participate in drilling funds and a larger number of lessors who always elect to take the bonus. The only remaining investors would be the “sophisticated” ones who find ways to circumvent the pooling order. The Commission’s Order thus has the long term effect of diminishing drilling funds for the entire industry.114

The substantial evidence has generally been applied to fact-finding by the agency but it has also been applied to rulemaking as was done recently by an Oklahoma court of appeals in Samson Resources Co. v. Corporation Commission.115 In this case, the court applied the substantial evidence rule to a Commission rule relating to horizontal well units that required an applicant to obtain consent of 50 percent of the working interest owners before the Commission would approve a horizontal well unit. Here the Commission was upheld.

The Corporation Commission was also upheld in Southern Resources, Inc. v. Conoco, Inc.116 The Corporation Commission modified an order to increase the disposal rate for a saltwater disposal well near a well operated by Southern Resources. The increase was from 1,600 b/d to 7,500 b/d. Southern Resources appealed and Conoco, which had sought a rate of 12,000 b/d, cross-appealed. The order was upheld. There was substantial evidence to support the Commission’s decision. Conoco’s evidence demonstrated that the modification would prevent “waste” and would not damage the fresh water strata and oil or gas bearing strata.

The deference shown to the Texas Railroad Commission determinations is well illustrated in a recent case in which the Supreme Court of Texas upheld conflicting spacing rules in same field. In Torch Operating Co. v. Railroad Commission117 Kilroy Oil drilled a well and sought to establish temporary field rules for the field. These were given by the Railroad Commission setting density and spacing requirements at

114 Id. at 680.
117 Torch Operating Co. v. Railroad Comm’n, 912 S.W.2d 790 (Tex. 1995) rev’g 894 S.W.2d 3 (Tex. App.-Austin, 1994).
one well per 640 acres, located not less than 1,867 feet from a lease line and not less than 3,735 feet from another well. Meanwhile, Goodrich had received a permit to drill in the same field under the “statewide” spacing requirements that authorized a much greater density of wells with lesser spacing minimums. After Goodrich completed its well, the Commission refused to approve the well and declined to assign it an allowable because its location violated the spacing and density requirements of the recently established temporary field rules. Torch, the successor to Kilroy, discovered a short time later that Goodrich was producing gas without an assigned allowable and initiated a contested case by complaining to the Commission. The Commission made the temporary rules permanent. The Commission, however, found that Goodrich had not been notified of the Kilroy application and the temporary field rules were void as to Goodrich. Because the Goodrich well was a legally drilled and located well it was entitled to an assignment of an allowable from the date its proper documentation was filed with the Commission. The result of this ruling was that two different sets of density and spacing requirements were applied to the same field. The prevention of waste and protection of correlative rights were not a consideration in the Commission’s decision. The final order discriminated on its face against Torch by allowing Goodrich a much greater well density and closer spacing of wells, said the appeals court. Finding the Commission’s order arbitrary and capricious, the court remanded to the Railroad Commission. The court gave its rationale for finding the order arbitrary and capricious as follows:

An agency decision is arbitrary when the final order fails to demonstrate a connection between the agency decision and the factors that are made relevant to that decision by the applicable statutes and regulations. . . . The Commission’s final order in the present case is arbitrary because it omits to demonstrate the required connection between the agency decision and the relevant statutory factors of drainage, economic waste, and physical waste. If those applicable factors require one well per 640-acres in the field, with minimum distances of 1,867 feet and 3,735 feet, it is difficult to comprehend how those factors also require, in the same
field, one well per forty acres, with minimum spacing distances of 467 feet and 1,200 feet.\footnote{894 S.W.2d at 6 (citations omitted).}

On appeal to the Texas Supreme Court that court reversed and rendered judgment upholding the Commission’s order. The Commission’s decision to exempt Goodrich from the temporary field rules based on lack of notice was well within the agency’s discretion in determining that under the facts of this case, Goodrich had not received adequate notice or a hearing. The substantial evidence standard “is a limited standard of review that gives significant deference to the agency in its field of expertise.”\footnote{912 S.W.2d at 792.} There was substantial evidence to support the Commission’s finding that Kilroy knew of Goodrich’s competitive position in the Bammel Field, and it was not unreasonable for the Commission to determine that Goodrich’s rights were materially affected by the proposed temporary field rules, and that Goodrich was therefore entitled to notice of the hearing. The Commission had the legal authority to base its decision to exempt Goodrich from the temporary field rules on a lack of notice, and this decision was supported by substantial evidence.