View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by Louisiana State University: DigitalCommons @ LSU Law Center

Louisiana Law Review
Volume 61 | Number 1
Fall 2000

The Better Part of Wisdom is Deference: Judicial Review of an Office of Conservation Order in Yuma Petroleum Co. v. Thompson

James H. Dupuis Jr.

Repository Citation
James H. Dupuis Jr., *The Better Part of Wisdom is Deference: Judicial Review of an Office of Conservation Order in Yuma Petroleum Co. v. Thompson*, 61 La. L. Rev. (2000)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol61/iss1/11

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

NOTES

The Better Part of Wisdom is Deference: Judicial Review of an Office of Conservation Order in *Yuma Petroleum Co. v. Thompson*

I. INTRODUCTION

In *Yuma Petroleum Co. v. Thompson*,[1] the Louisiana Supreme Court was called upon to review an order of the Commissioner of Conservation (the "Commissioner").[2] The court deferred to the Commissioner, and wisely affirmed a long-standing policy of the Department of Conservation, namely the "operator of record" doctrine[3] which allows the Commissioner to carry out his statutory duties to protect the environment. This paper will first discuss the *Yuma* case itself. A discussion of the court's reasoning will be followed by a look at the operator of record doctrine, which was the basis for the Commissioner's decision. Next, the court's decision will be discussed in the context of judicial deference to administrative decisions in general, focusing on the United States Supreme Court's reasoning in the landmark administrative law cases *National Labor Relations Board v. Hearst Publications*[4] and *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[5] Finally, other administrative law doctrines based on judicial deference to agency decisions will be discussed, including primary jurisdiction, exhaustion of administrative remedies, and the prohibition against collateral attacks.

II. FACTS AND HOLDING OF *YUMA PETROLEUM CO. V. THOMPSON*

On November 1, 1990, Yuma Petroleum Company ("Yuma") acquired an oil, gas, and mineral lease from Oil Lift, Inc. ("Oil Lift"). One week later, the Louisiana Department of Environmental Quality ("DEQ") inspected the site and found unauthorized discharges of oilfield waste caused by an improperly closed

---

Copyright 2000, by LOUISIANA LAW REVIEW.

1. 731 So. 2d 190 (La. 1999).

2. The Commissioner heads the Department of Conservation, a department within the Louisiana Department of Natural Resources, which is charged with the task of regulating all natural resources not specifically under the jurisdiction of another state agency. La. R.S. 36:359(D) (1989 and Supp. 2000) and La. R.S. 30:1(C) (1989). Virtually all authority to regulate the oil and gas industry is held by the office of the Commissioner of Conservation. La. R.S. 30:1 - 101.10 (1989 and Supp. 2000); Hunt Oil Co. v. Batchelor, 644 So. 2d 191, 197 (La. 1994).

3. The "operator of record" doctrine was not defined by Louisiana courts until *Yuma*. Under the doctrine, the Commissioner is not required to pursue all previous operators of a well and apportion responsibility among them for remediation of the area. Rather, the Commissioner can simply hold the current record operator of a lease liable for the cleanup. *Yuma Petroleum Co.*, 731 So. 2d at 195.

4. 322 U.S. 111, 64 S. Ct. 851 (1944).

5. 467 U.S. 837, 104 S. Ct. 2778 (1984).

well pit. DEQ subsequently issued a compliance order requiring Yuma to cease all discharges, clean up all contaminated materials, prepare and implement a spill prevention and control plan, and close all pits. While conducting the remedial operations as directed by DEQ, Yuma requested a public hearing before the Commissioner[6] to determine what portion of the cost of the restoration and remediation effort could be recovered by Yuma from the past operators of the well, including Oil Lift. The Commissioner issued a compliance order directing Yuma to submit a plan to remediate the area, and subsequently advised Yuma that he was without authority to apportion the costs among the previous lease holders, but, nonetheless, would grant Yuma a hearing. At the hearing, the Commissioner affirmed his previous compliance order, noting that the order was not intended to affect any contractual claims Yuma may have against any previous lease holders. Yuma sought judicial review of the Commissioner's order.

The district court affirmed the Commissioner's order. However, the first circuit reversed, stating that the Commissioner erred as a matter of law by not designating former lease holders, including Oil Lift, as "owners" as defined in Louisiana Revised Statutes 30:3(8)[7] and by not holding them responsible for the clean-up with Yuma.[8] The supreme court reversed the first circuit decision and reinstated the Commissioner's compliance order, stating that the legislature had intended to grant to the Commissioner the discretion to order either the current or past operators to clean up the well. The court further ruled that holding Yuma primarily liable for the clean-up effort was not an abuse of discretion because the operator of record doctrine allows the Commissioner to hold the current operator of record liable.[9]

III. THE LOUISIANA SUPREME COURT'S ANALYSIS

A. Judicial Review

Judicial review of the Commissioner's rules, regulations and orders is governed by Louisiana Revised Statutes 30:12.[10] To fully understand the role that courts play

6. The legislature by Acts 1990, No. 192, § 1 amended La. R.S. 30:4(C)(16)(a) (Supp. 2000) and gave the Commissioner the authority to "require the plugging of each abandoned well or each well which is of no further use .... Only an owner as defined in R.S. 30:3(8) shall be held or deemed responsible for the performance of any actions required by the commissioner." Thus, although DEQ issued the initial compliance order, the matter subsequently came within the jurisdiction of the Commissioner.

7. La. R.S. 30:3(8) (Supp. 2000) provides: "'Owner' means the person, including operators and producers acting on behalf of the person, who has or had the right to drill into and to produce from a pool and to appropriate the production for himself or for others."

8. Yuma Petroleum Co. v. Thompson, 709 So. 2d 824, 828 (La. App. 1st Cir. 1998).

9. Yuma Petroleum Co. v. Thompson, 731 So. 2d 190, 193-95 (La. 1999).

10. The scope of review of the Commissioner in La. R.S. 30:12 (1989) is similar to that provided for in the Louisiana Administrative Procedure Act and the Federal Administrative Procedure Act. *Compare* La. R.S. 30:12 (1989) *with* La. R.S. 49:964 (Supp. 2000) *and* 5 U.S.C. § 706 (1996). La. R.S.

in reviewing agency actions under this statute, agency actions must be separated into findings of fact, interpretations of law, and mixed questions of fact and law.[11] It is well settled that the manifestly erroneous test is used to review the Commissioner's findings of fact.[12] A court will not substitute its judgment for that of the Commissioner absent a showing that his finding was manifestly erroneous. Reasons for such a narrow scope of review of findings of fact include a legislative and judicial acknowledgment of the Commissioner's expertise in oil and gas conservation matters, and that as the trier of fact, the Commissioner is in a better position to evaluate the credibility of witnesses.

In contrast to findings of fact, the Commissioner's interpretations of law are typically afforded little or no deference on judicial review.[13] The primary justification for this broad scope of review is the general belief that when it comes to interpreting the law the courts are the experts, not the Commissioner. However, many agency actions do not fit easily within either the fact or law category, often involiving what are known as mixed questions of fact and law.[14] In fact, application of law to a set of facts is itself a mixed question of fact and law and yet it is still committed to agency discretion.[15] Consequently, these acts are reviewed by the courts soley for abuse of discretion or arbitrary or capricious action.[16]

30:12 (1989) provides in pertinent part that:

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (f) Manifestly erroneous in view of the reliable, probative, and, substantial evidence on the whole record. In the application of the rule, where the [Commissioner] has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the [Commissioner's] determination on credibility issues.

11. This is a common and accepted method of classifying agency actions to determine appropriate standards of judicial review. *See* Bernard Schwartz, Administrative Law 527-30 (3d ed. 1991); Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 463 (1993); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 10-11 (1985).

12. La. R.S. 30:12(B)(5)(f) (1989). Hunt Oil Co. v. Batchelor, 644 So. 2d 191, 200 (La. 1994); Amoco Prod. Co. v. Thompson, 566 So. 2d 138, 145 (La. App. 1st Cir.), *writ denied*, 511 So. 2d 627, 628 (1990); Summers v. Sutton, 428 So. 2d 1121, 1129 (La. App. 1st Cir. 1983); Mobil Oil Corp. v. Gill, 194 So. 2d 351, 354 (La. App. 1st Cir. 1966).

13. La. R.S. 30:12(B)(5)(a)-(d) (1989) provide the court with authority to review agency actions for errors of law. *See* Tex/Con Oil and Gas Co. v. Batchelor, 634 So. 2d 902, 907 (La. App. 1st Cir 1994).

14. *See* Schwartz, *supra* note 11, at 689; Aman & Mayton, *supra* note 11, at 463; Levin, *supra* note 11, at 10-11.

15. Levin, *supra* note 11, at 12.

16. La. R.S. 30:12(B)(5)(e) (1989); *Tex/Con Oil*, 634 So. 2d at 907; *Amoco Prod.*, 566 So. 2d at 146; *See also* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152, 1159 (La. 1984).

In *Yuma*, the court employed a two-step test to review the Commissioner's decision. First, the court considered whether the Commissioner's interpretation of law was correct. The legislative intent behind the definition of "owner"[17] was reviewed de novo, with no deference paid to the Commissioner's interpretation. The court concluded that the interpretation offered by the Commissioner was correct because the legislature granted him the discretion to pursue either the current "owner" or previous ones.[18] Second, the court had to decide whether the Commissioner had abused his discretion by holding Yuma liable for the clean-up effort.[19] The court concluded that under the "operator of record" doctrine, the decision was not an abuse of discretion for the Commissioner.[20]

B. Step One of the Analysis: Statutory Interpretation of "Owner"

The first step in the analysis concerned the scope of the Commissioner's authority granted to him by the legislature. To resolve this question, the court in *Yuma* conducted a statutory analysis of the provisions authorizing the Commissioner to require an operator to remediate the area specifically under Louisiana Revised Statutes 30:4(C)(16)(a).[21] However, only an "owner" defined in Louisiana Revised Statutes 30:3(8) must answer to the Commissioner.[22]

The definition of "owner" in Louisiana Revised Statutes 30:3(8) was amended in 1993. Prior to the 1993 amendment, "owner" was defined as, "the person who has the right to drill into and to produce from a pool and to appropriate the production either for himself or for others." Following the 1993 amendment, Louisiana Revised Statutes 30:3(8) defined "owner" as "the person, including operator and producers acting on behalf of the person, who has *or had* the right to

17. La. R.S. 30:3(8) (Supp. 2000).

18. Yuma Petroleum Co. v. Thompson, 731 So. 2d 190, 193-94 (La. 1999).

19. As will be discussed later, even though the Commissioner held Yuma liable, this did not preclude Yuma from seeking indemnification from former operators or any other third party, based on any contractual provisions between them.

20. *Yuma Petroleum Co.*, 731 So. 2d at 195.

21. La. R.S. 30:4(16)(a) (Supp. 2000) authorizes the Commissioner:

> [t]o regulate by rules, the drilling, casing, cementing, disposal interval, monitoring, plugging and permitting of disposal wells which are used to inject waste products in the subsurface and to regulate all surface and storage waste facilities incidental to oil and gas exploration and production, in such a manner as to prevent the escape of such waste product into a fresh groundwater aquifer or into oil and gas strata; may require the plugging of each abandoned well or each well which is of no further use and the closure of associated pits, the removal of equipment, structures, and trash, and other general site cleanup of such abandoned or unused well sites; and may require reasonable bond with security for the performance of the duty to plug each abandoned well or each well which is of no further use and to perform the site cleanup required by this Subparagraph. *Only an owner as defined in R.S. 30:3(8) shall be held or deemed responsible for the performance of any actions required by the Commissioner.*

(emphasis added).

22. *Id.*

drill into and produce from a pool and to appropriate the production either for himself or for other."[23]

Yuma argued that the addition of the words "or had" required that the Commissioner proceed against both the present and former lease holders. Further, Yuma argued that the Commissioner must hold a hearing to decide whether Oil Lift, the previous operator, had caused the damage, and thereafter apportion responsibility for the cleanup accordingly.[24] The Commissioner maintained that the amendment did not mandate that he proceed against former lease holders, but rather that it gave him the discretion to proceed against either the current or any past operators, whichever he decided was more appropriate in the performance of his statutory duties.[25] Finally, the Commissioner invoked the operator of record doctrine as justification for holding only Yuma responsible for the clean-up because it was the current operator of record. Therefore, it was of no consequence that another company might have caused any of the damage.[26]

The legislative intent behind the 1993 amendment to "owner"[27] was reviewed de novo in accordance with Louisiana Revised Statutes 30:12.[28] In concluding that the amendment gave the Commissioner discretion to decide who he would hold responsible for the well clean up, the court noted that the amendment was a "Commissioner's bill." As such, it was designed to afford the Commissioner more discretion, not an amendment designed to encumber the Commissioner.[29]

Even without referring to the legislative history, the court could have come to the same conclusion about the amendment to Louisiana Revised Statutes 30:3(8) for at least two other reasons. First, the court could have conducted a purely textual interpretation of the amendment. The pertinent part of the 1993 amendment is phrased as "has *or* had the right . . . ."[30] If the legislature had intended to require that the Commissioner pursue all previous owners in addition to the current owner, it could have phrased the amendment as "has *and* had the right . . . ." Use of a disjunctive instead of a conjunctive term is strong evidence that the legislative intent was for the Commissioner to have the discretion to choose among both present and past operators in requiring well site remediation.

A second tack the court could have taken to reach the same result would have been to determine whether the logical consequences of Yuma's argument would be

23. (Emphasis added). The Commissioner issued his compliance order before La. R.S. 30:3(8) (Supp. 2000) was amended. Neither party raised the issue of whether the pre-amendment definition should apply to these facts, nor did the Supreme Court discuss the issue.

24. *Yuma Petroleum Co.*, 731 So. 2d at 191.

25. *Id.* at 194.

26. *Id.* at 192.

27. La. R.S. 30:3(8) (Supp. 2000).

28. La. R.S. 30:12(B)(5)(a)-(d) (1989) provide the court with authority to review agency actions for errors of law. *See* Tex/Con Oil and Gas Co. v. Batchelor, 634 So. 2d 902, 907 (La. App. 1st Cir. 1994).

29. *Yuma Petroleum Co.*, 731 So. 2d at 193-94. *See also* Chevron v. Traillour Oil Co., 987 F.2d 1138 (5th Cir. 1993) (stating that the Commissioner may be able to hold a previous lessee liable as an "owner" to clean and close a well even before the 1993 amendment).

30. La. R.S. 30:3(8) (Supp. 2000) (emphasis added).

consistent with the legislature's intent. This approach illustrates some important aspects of administrative law and the powers of governmental agencies. If Yuma's argument was correct, the Commissioner should have pursued not only Yuma, but all previous lease holders as well. Depending on the well in question, there might be dozens of past operators, some of which may not even be in business anymore at the time of the hearing. Yuma would have the Commissioner hold a hearing at which the parties would argue about who caused the damage resulting from the improper closing of the pit. Then the Commissioner would have to apportion the liability for the cleanup among the parties. However, contracts between successive lease holders often contain indemnity and assumption of liability clauses.[31] To apportion liability properly, as Yuma suggested, the Commissioner would have had to interpret these private contractual rights among the parties.

The Office of Conservation, just like other administrative agencies, is a body with limited jurisdiction and authority that derives its power from the legislature.[32] Nowhere in the statutes governing the office has the legislature granted the Commissioner the authority to adjudicate contractual rights between private parties. In fact, the Louisiana Supreme Court has explicitly stated that "this is . . . a contract dispute pure and simple which the Commissioner cannot resolve. . . ."[33] Contract disputes "can only be resolved on the application of legal precepts and principles governing the interpretation of contracts, after a trial on the merits . . . ."[34] In *Yuma*, the Commissioner was aware of the limits of his power and made it a point to say that he did not intend "to affect any contractual rights [that] Yuma may have against third parties."[35] The court in *Yuma* also recognized the limits of the Commissioner's authority and stated that apportioning the costs among previous operators "was a matter of contract law which is beyond the jurisdiction of the Commissioner."[36] Yuma's claim against third parties could be satisfied in a judicial forum, and the availability of this remedy was not precluded by the Commissioner's decision.

Because of the lack of legislative authority for the Commissioner to adjudicate private contractual rights, Yuma's argument that the Commissioner must hold a hearing between present and past lease holders to apportion responsibility rightly failed. In order to succeed, Yuma would have had to convince the court that the legislature, by enacting the 1993 amendment to Louisiana Revised Statutes 30:3(8), intended to grant the Commissioner the power to determine contractual rights between private parties. This argument is tenuous at best. Presumably, if the legislature wished to make such a significant change in the power of the Commissioner, it would have been more explicit.

31. *See, e.g.*, Chevron v. Traillour Oil Co., 987 F.2d 1138 (5th Cir. 1993).

32. La. R.S. 30:1-28 (1989 and Supp. 2000).

33. Superior Oil Co. v. Humble Oil & Refining Co., 257 La. 207, 211, 241 So. 2d 911, 912 (1970).

34. *Id.* at 211, 241 So. 2d at 912.

35. Yuma Petroleum Co. v. Thompson, 731 So. 2d 190, 192 (La. 1999).

36. *Id.* at 197.

Another consequence of Yuma's argument that the Commissioner is empowered to determine private contractual rights would be a significant loss of administrative efficiency. Each year, the Commissioner issues about 350 compliance orders.[37] If, after each issuance, the Commissioner were required to conduct a hearing with all past operators to determine their percentage interests in each lease and to apportion fault for environmental damage, the Office of Conservation would not have the resources to carry out this burdensome task. Such a situation would lead to tremendous delays and could prevent the Commissioner from effectively carrying out his duty to protect the environment.

The Commissioner has not only a statutory duty to protect the environment but also a constitutional one.[38] The Louisiana Constitution of 1974 provides that "[t]he natural resources of the state . . . shall be protected, conserved, and replenished insofar as possible . . . [and] the legislature shall enact laws to implement this policy."[39] The Louisiana Supreme Court has stated that this provision, referred to as the "public trust" doctrine, imposes on all state agencies a duty to protect the environment, and mandates that the legislature "enact laws to implement fully this policy."[40] If the legislature had intended the Commissioner to do as Yuma argued but did not provide the Office of Conservation with the resources to carry out such a burdensome task, such a provision would arguably be unconstitutional because it would be inconsistent with the public trust doctrine.

Therefore, based on the above considerations, the court in *Yuma* came to the correct conclusion: the legislature did not intend to mandate that the Commissioner proceed against both current and past operators. Rather, the legislature intended to grant the Commissioner the discretion to decide who to pursue to enforce his compliance orders.

C. Step Two of the Analysis: Did the Commissioner abuse his discretion?

After the court concluded that the statute gave the Commissioner discretion to proceed either against the current owner or any previous owners, it next sought to determine the appropriate scope of review applicable to the Commissioner's decision. Because the Commissioner's action was an application of law to fact, or a mixed question of law and fact, it would be reviewed under the "abuse of discretion standard."[41] Since the Commissioner had invoked the operator of record doctrine in holding Yuma liable, the court held that the Commissioner did not act arbitrarily or capriciously and did not abuse his discretion.[42]

---

37. Brief for Commissioner at 9.

38. Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152 (La. 1984).

39. La. Const. art. IX, § 1.

40. *Save Ourselves Inc.*, 452 So. 2d at 1156.

41. La. R.S. 30:12(B)(5)(e) (1989); Tex/Con Oil and Gas Co. v. Batchelor, 634 So. 2d 902, 909 (La. App. 1st Cir. 1994); Amoco Prod. Co. v. Thompson, 566 So. 2d 138 (La. App. 1st Cir. 1990); *see also* Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152 (La. 1984).

42. Yuma Petroleum Co. v. Thompson, 731 So. 2d 190, 197 (La. 1999).

Although the operator of record doctrine was a long-standing policy of the Office of Conservation, before *Yuma*, no Louisiana state court had discussed its application in Louisiana.[43] Federal jurisprudence has recognized a similar doctrine for almost twenty years.[44] The Louisiana and the federal doctrines are similar in that they both give the administrative agency discretion to hold a current operator accountable to the agency, even if other parties were involved in the problem that the agency seeks to resolve. Because of the absence of a discussion of the Louisiana operator of record doctrine in cases and commentary, a brief description of the federal operator liability doctrine is in order to illustrate other circumstances in which the doctrine has been used.

1. The Operator Liability Doctrine in the Federal Jurisprudence

The operator liability doctrine was first discussed in *Sauder v. Department of Energy*.[45] Sauder was a part owner and the operator of three contiguous oil leases, which were part of the same pool, but which were never unitized.[46] The absence of unitization is important because the regulations in place at the time limited the amount that could be charged for oil, but exempted stripper wells.[47] If the leases were unitized, they would have constituted a single property, and the oil from that property would have qualified as stripper well oil. The Department of Energy argued successfully that because the leases had not been formally unitized, the production must be computed separately for each lease.[48] That being the case, not all of the oil Sauder sold actually qualified as stripper well oil, and he overcharged the buyer for much of it. Sauder argued that because he owned only about a one-third interest in the leases—and therefore only received about one-third of the overcharge—he should have been required to pay back only his share of the overcharges.[49] The court agreed with the Department of Energy and held that even though Sauder received about one-third of the overcharge, he had to refund the full amount because he was the current operator.[50]

43. The doctrine was mentioned in one unpublished federal district court case. The Louisiana Land & Exploration Co. v. Unocal Corp, No. 93-1540, 1997 WL 756597 (E.D. La. Dec. 5, 1997). In this case, Unocal was the operator of a well, and settled with the Department of Energy because Unocal allegedly overcharged customers for oil. Unocal sued for reimbursement from another interest owner, the Louisiana Land & Exploration Co. The court stated that the federal operator liability doctrine gave Unocal a cause of action for reimbursement against the other interest owners but that the interest owners could then assert affirmative defenses such as breach of contract.

44. The doctrine is known in the federal jurisprudence as the operator liability doctrine. Although the federal doctrine and the Louisiana operator of record doctrine are not identical, the names will be used interchangeably in the present paper.

45. 648 F.2d 1341 (Temp. Emer. Ct. App. 1981).

46. A pool is an underground reservoir containing oil and gas. Unitization is the joint operation of all or some portion of a producing reservoir. Howard R. Williams & Charles J. Meyers, Manual of Oil and Gas Terms 820, 1175 (9th ed. 1994).

47. A stripper well is a property that produces fewer than ten barrels per day.

48. *Sauder*, 648 F.2d at 1345-46.

49. *Id.* at 1347.

50. *Id.* at 1347-48.

In addition to the fact that Sauder "caused the overcharges,"[51] another reason for the court's finding that Sauder was liable for the entire overcharge was that requiring the Department of Energy to seek refunds from each percentage owner would have placed an undue burden on the agency and hampered its ability to enforce its price control regulations.[52] Indeed, this rationale supports the Commissioner's decision in *Yuma*. If the Commissioner was required to apportion responsibility among all past operators, he would likewise be unable to enforce his statutory duties. Furthermore, even though Sauder was required to refund the total amount of the overcharge, he was not left without a remedy.[53] The proper forum for the cost of the rebate to be apportioned among the various interest owners is a court, which is well suited to adjudicate any private contractual matters dealing with contribution and indemnity that Sauder may have with other interest owners. Nothing in *Sauder* prejudiced Mr. Sauder's ability to enforce his rights in court.

The operator liability doctrine was again discussed in *United States v. Exxon Corp.*,[54] in which Exxon overcharged purchasers by incorrectly computing the maximum price under the existing price control regulations.[55] While in *Sauder*, Mr. Sauder was ordered to pay only about $342,000 in overcharges, Exxon, as the current operator of the well, was ordered to repay over $1.6 billion.[56] While it was important that Exxon caused the overcharges, the court also stressed the importance of administrative efficiency in enforcing regulations and recognized the limits of an agency's ability to adjudicate all the potential claims between Exxon and the other interest owners. The court stated that "[t]o require the Government to gather evidence and to bring multiple actions against more than 200 working interest owners, and 2,200 royalty interest owners in the Hawkins Field would 'plunge the agency into an 'administrative quagmire' which would effectively block enforcement of oil price controls . . . .'"[57] Exxon was not precluded from suing the other interest owners for contribution or indemnification based on the contracts between those parties.[58] Therefore, although Exxon was ordered to rebate some overcharge amounts which went to other interest owners, they were still afforded a remedy in court.

As illustrated in *Sauder v. Department of Energy* and *United States v. Exxon Corp.*, the federal jurisprudence on operator liability states that the discretion against whom to proceed belongs to the administrative agency charged with the task of regulating the matter in question. If agencies were not allowed to simply hold

51. *Id.* at 1347.

52. *Id.* at 1348.

53. *See* Davis Oil Co. v. TS, Inc., 145 F.3d 305 (5th Cir. 1998) (where a former lessee was assessed for the entire cost of cleaning up an oil and gas site, paid for the cleanup, and then successfully sued to enforce a contract stipulating that the assignee was liable to the former lessee for the cleanup costs).

54. 773 F.2d 1240 (Temp. Emer. Ct. App. 1985).

55. *Id.* at 1247-53.

56. *Id.* at 1246; Sauder v. Department of Energy, 648 F.2d 1341 (Temp. Emer. Ct. Ap. 1981).

57. *Exxon Corp.*, 773 F.2d at 1270 (quoting United States v. Exxon Corp., 561 F. Supp. 816, 850 (D.C. Cir. 1983)).

58. *Exxon Corp.*, 773 F.2d at 1271-72.

an operator liable and instead had to pursue all parties involved, they would face an unmanageable burden and would not be able to carry out their statutory duties. Importantly, even though an operator is held liable, the operator it is not prejudiced because the agency's actions do not affect any contractual rights that may exist between the operator and third parties.

2. *The Operator Doctrine in Louisiana*

Although the operator of record doctrine had not been discussed by Louisiana courts before *Yuma*, it was not a new policy of the Office of Conservation. The policy of holding the operator liable manifests itself in the regulations promulgated by the Commissioner as well as in recognized industry practice.

The Commissioner is authorized to promulgate, after notice and hearing, regulations and orders which are necessary to carry out his statutory duties.[59] The notion that the current operator is responsible for carrying out the Commissioner's orders permeates these regulations. The regulation most relevant to the present case is Statewide Order 29-B, which governs the construction, maintenance and closure of production and other pits. Regarding pit closure, it provides in pertinent part: "*Operators* may close pits utilizing onsite land treatment, burial, solidification or other techniques approved by the Office of Conservation .... Liability for pit closures shall not be transferred from an *operator* to the owner of the surface land(s) on which a pit is located."[60] This language clearly imposes liability on the operator for properly cleaning and closing the well pit.

In addition to being manifest in the regulations on closing and cleaning well pits, operator liability is also found in the regulations governing various aspects of oil and gas production. For example, operators of multiple completion wells are required to submit well tests to the Commissioner and are required to repair any intercommunication between the pools.[61] Operators of wells with commingled production are required to maintain and record daily checks of wellhead pressure.[62] After certain conditions are met, operators of wells within the same non-unitized pool are required to petition the Commissioner for a hearing to determine the correct spacing of the wells in the field.[63] Finally, operators are required to submit applications for tubingless completions[64] and substitute wells.[65] These regulations all look to the operator of record as the party responsible to the Commissioner.[66]

---

59. La. R.S. 30:4 (Supp. 2000).
60. La. Admin. Code 43:XIX.129.B.6a-b. (emphasis added).
61. Statewide Order 29-C-4, La. Admin. Code 43:XIX.1305.
62. Statewide Order 29-D-1, La. Admin. Code 43:XIX.1505.2.c.vi.
63. Statewide Order 29-E, La. Admin. Code 43:XIX.1905-1909.
64. Statewide Order 29-J, La. Admin. Code 43:XIX.2705.
65. Statewide Order 29-K, La. Admin. Code 43:XIX.2905.
66. The idea that an agency can look to a particular designated individual for liability is found not only in Louisiana, but also in federal regulations. The Minerals Management Service (MMS) of the Department of the Interior is a federal agency charged with the task of regulating all mineral production from the outer continental shelf. MMS's regulations focus on the "record title owner" as the responsible party. *See, e.g.*, 43 C.F.R. § 3100.0-5 (1999) and 30 C.F.R. §§ 210.55, 218.52, 250.108, 256.52

The policy of operator liability is found not only in the regulations promulgated by the Commissioner but is also explicitly described in a policy memorandum written by the Commissioner in 1990 entitled *Enforcement Policy—Abandoned Wells & Pits*. The memorandum acknowledges that the Policy of the Office of Conservation is to hold responsible the current operator to properly close pits, which may entail ordering remediation efforts like the order directed at Yuma.[67] It also states that if the current operator no longer exists, the Commissioner will "pursue a line of succession" beginning with the current operator and working backwards in time. The suggestion of agency discretion is implicit in this policy. Indeed, this discretion is a necessity for the Office of Conservation because it provides the Commissioner with the ability to hold someone liable; this allows him to successfully carry out his statutory duties. It also serves as a sound environmental policy because the Commissioner will always have a responsible party to pursue to make sure wells are properly cleaned and closed. Under the facts of *Yuma*, the Commissioner can simply hold Yuma liable for the clean-up effort, and then Yuma may pursue previous operators for contribution. On the other hand, if Yuma was unavailable because they were no longer in business, the Commissioner could exercise his discretion and look to Yuma's predecessor(s) to close the well.[68] Without discretion to pursue either the current operator or past operators, the Commissioner would be less able to conserve oil and gas resources and to protect the environment.

Because the policy of holding the operator of record liable to the Commissioner permeates the Commissioner's regulations and is explicitly stated in a promulgated policy memorandum, it is common knowledge in the oil and gas community that the Commissioner's orders are to be directed at the operator of record.[69] With this knowledge, parties can factor their potential liability into negotiations before becoming operators of wells. Of course, parties are free to negotiate various contractual indemnity agreements and apportion liability between themselves. However, these agreements, whether between successive operators or between operators and working interest owners, affect neither the Commissioner nor his authority to impose liability. Conversely, the Commissioner's imposition of operator liability does not affect those contractual arrangements between the parties.[70] The proper

(1999).

67. The Louisiana Supreme Court stated that operator of record doctrine was a "pre-existing" policy at the time the memorandum was written, which is several months before Yuma acquired the lease from Oil Lift. Yuma Petroleum Co. v. Thompson, 731 So. 2d 190, 195 (La. 1999).

68. If a previous operator who has agreed to indemnify the current operator is no longer in business, the current operator can still be held liable to the Commissioner. This is simply a risk that an oil company takes when it chooses to become the operator on a particular piece of property. Before such an action is taken, the company has the opportunity to inspect the piece of property and determine whether it wishes to assume that risk.

69. *Yuma Petroleum Co.*, 731 So. 2d at 194-95, 197. *See also* Bruce M. Kramer & Patrick H. Martin, The Law of Pooling and Unitization §13 (3d ed. 1989).

70. In Office of Conservation Order 170-6, the Commissioner stated, "This order is not intended to affect any contractual or other rights which Yuma Operating Company may have against any third

forum for settling disputes between successive operators over cleanup costs is the court.

Davis Oil Co. v. TS, Inc. is a good example of a case where the court adjudicated just this kind of dispute.[71] In *Davis*, Davis Oil Company ("Davis") sold its interest in an oil and gas lease. The purchase agreement contained a provision whereby the buyer "consents to be responsible for Davis Oil's obligations under the lease."[72] Davis and the subsequent operators of the well were summoned to a hearing to determine who should pay for the cleanup. Only Davis appeared, and it was assessed for the entire cost of cleaning up the well site.[73] After paying for the cleanup, Davis sued its buyer's successor in interest based on the contractual provisions providing for indemnification. The court decided that Davis should be indemnified.[74] *Davis* demonstrates not only that an agency order does not prejudice the rights of a party imposed with initial liability, but also that contracts between successive lessees often involve highly complex legal problems that are much more suited for a court to handle. For instance, in *Davis*, the court faced the following issues: (1) a choice of law issue involving a determination of which law should govern a contract clause, (2) an issue under Louisiana law of obligations where the court had to determine whether a third-party was an intended or incidental beneficiary, and (3) the interpretation of contractual language.[75]

IV. COMPARISON OF *YUMA* WITH FEDERAL ADMINISTRATIVE LAW

The Louisiana Supreme Court's reasoning in *Yuma* is reminiscent of several landmark administrative law cases decided by the United States Supreme Court: *National Labor Relations Board v. Hearst Publications, Inc.*[76] and *Chevron v. Natural Resources Defense Council.*[77] These cases are similar to *Yuma* in that the important question facing the court was the appropriate scope of judicial review of an administrative action giving content to a statutory term. Although neither *Hearst* nor *Chevron* was mentioned by the Louisiana Supreme Court in *Yuma*, in those two cases the United States Supreme Court employed the same two-step test as did the *Yuma* Court.

In *Hearst*, several newspaper publishers refused to collectively bargain with a union representing newspaper carriers. The National Labor Relations Board (the "Board"), after conducting a hearing, found that the newspaper carriers met the definition of "employee" under the National Labor Relations Act (the "Act"), which

---

party and is not intended to affect any contractual rights any third party may have against Yuma Operating Company."

71. 145 F.3d 305 (5th Cir. 1998).

72. *Id.* at 307.

73. *Id.* The subsequent operator who failed to clean up the site did not show up at the hearing.

74. *Id.* at 317.

75. *Id.* at 309-17.

76. 322 U.S. 111, 64 S. Ct. 851 (1944).

77. 467 U.S. 837, 104 S. Ct. 2778 (1984).

allowed the carriers to unionize and demand collective bargaining with the publishers. The publishers disagreed, arguing that the newspaper carriers did not fit within the definition of "employees," and that the carriers were not allowed to unionize and require collective bargaining.

In deciding *Hearst*, the United States Supreme Court employed a two-step analysis. The first step involved a de novo review of the congressional intent behind the Act. Noting that Congress did not explicitly define "employee,"[78] the Court concluded that defining "employee" was "assigned primarily to the agency created by Congress to administer the Act."[79] The Court, in the second step of the analysis, deferred to the Board's decision in the adjudicatory proceeding, which gave content to the term "employee." The court stated that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."[80]

As in *Hearst*, the Louisiana Supreme Court in *Yuma* found that the legislature did not specifically define "owner," but rather gave the Commissioner the "discretion to proceed . . . against prior owners in certain circumstances."[81] The court deferred to the Commissioner's interpretation of "owner" in accordance with the Office of Conservation policy, the operator of record doctrine and affirmed Yuma's liability for the cleanup.[82]

Both the United States Supreme Court in *Hearst*, and the Louisiana Supreme Court in *Yuma,* recognized the importance of deference to an administrative agency's decision about how to apply a statutory term to a set of facts based on the agency's expertise in the matter in question. It is important to note that the initial step of the analysis in both *Hearst* and *Yuma* does not require deference to the agency's interpretation of the extent of its authority delegated to it by the legislature. Both the United States and the Louisiana Supreme Courts properly conducted a de novo review of the statute to determine whether Congress or the legislature intended a specific meaning for the terms in question. Only after deciding that both statutes left it to the agency to give a meaning to the terms in the context of specific circumstances did the courts defer to the agencies' application of the law to a particular set of facts. Although there is still some debate in the area, many commentators consider the application of law to a set of facts by an administrative agency a mixed question of law and fact where a court should not substitute its judgment for that of the agency.[83] In both *Hearst* and *Yuma,* the

78. After *Hearst,* Congress defined "employee" in 29 U.S.C. § 152(3) (1998). Although this definition is inconsistent with the Board's, the Court's analysis of the Board's discretion to define "employee" was not affected by this legislation.

79. *Hearst Publications, Inc.*, 322 U.S. at 130, 64 S.Ct. 851, 860.

80. *Id.* at 131, 64 S. Ct. at 860.

81. Yuma Petroleum Co. v. Thompson, 731 So. 2d 190, 193-94 (La. 1999).

82. *Id.* at 194-97.

83. Levin, *supra* note 11, at 12. *See* Schwartz, *supra* note 11, at 689-701 and Aman & Mayton, *supra* note 11, at 463-66 for a discussion of various approaches to reviewing mixed questions of law and fact.

agency orders were held not to be abuses of the discretion afforded to the agency by the statutes.

Administrative agencies give content to ambiguous statutory terms not only through adjudicatory proceedings as in *Hearst* and *Yuma*, but also through their rule-making authority to promulgate regulations defining statutory terms.[84] In *Chevron v. Natural Resources Defense Council* the Environmental Protection Agency (EPA), pursuant to its authority to regulate pollution emitting sites, promulgated a regulation that permitted the States to define a "stationary source" as an entire industrial plant as opposed to one particular pollution-emitting device in an industrial plant.[85] This regulation was challenged as an impermissible interpretation of the term "stationary source."[86] The United States Supreme Court again employed the two-step approach in reviewing the agency action. First, in order to determine whether the EPA had the authority to promulgate a regulation defining "stationary source," the Court asked "whether Congress has directly spoken to the precise question at issue."[87] Concluding that Congress did not have a particular meaning in mind and that the statute was ambiguous as to the meaning of "stationary source," the Court stated that the proper role of the judiciary was to decide whether the agency's interpretation was "based on a permissible construction of the statute."[88] The Court affirmed the EPA's regulation because their definition of the term was not "arbitrary, capricious, or manifestly contrary to the statute."[89]

Even though *Chevron* involved an agency's administration of a statute in the form of a regulation instead of via an adjudication, the Court took a similar approach to reviewing the agency decision as did the *Hearst* and *Yuma* courts. The gist of all of these decisions is that once a court answers questions of law, its proper role is to defer to agency discretion in carrying out its statutory duties, regardless of whether the agency exercises its discretion by adjudication or rule-making. If the legislature intended to grant the agency discretion to give content to an ambiguous statutory term, then the proper role of the judiciary is to defer to the exercise of agency discretion and reverse agency decisions only if they are characterized as an abuse of that discretion.

V. JUDICIAL DEFERENCE AND OTHER ADMINISTRATIVE LAW DOCTRINES

Judicial deference to administrative agency decisions is not found only in the limited scope of judicial review of agency discretion, but it is also a theme that is

84. La. R.S. 30:4 (Supp. 2000) grants this authority to the Office of Conservation. *See* 5 U.S.C. §§ 553-54 (1996) for the law governing adjudication and rule making authority of federal agencies.

85. 467 U.S. 837, 840, 104 S. Ct. 2778, 2780 (1984). Only four years after it was decided, Justice Scalia called *Chevron* "a highly important decision--perhaps the most important in the field of administrative law since Vermont Yankee. . . ." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1989).

86. *Chevron*, 467 U.S. at 842 n.7, 104 S. Ct. at 2781 n.7.

87. *Id.* at 842, 104 S. Ct. at 2781.

88. *Id.* at 851, 104 S. Ct. at 2786.

89. *Id.* at 844, 104 S. Ct. at 2782.

manifested in several administrative law doctrines. The doctrines of primary jurisdiction, exhaustion of administrative remedies, and the prohibition of collateral attacks on an agency rulings and orders all recognize that for reasons such as administrative expertise and efficiency, it is wise to allow agencies as much latitude as possible in carrying out their prescribed tasks.

A. Primary Jurisdiction

The doctrine of primary jurisdiction was created by courts to solve the problem of overlapping jurisdiction of courts with that of an administrative agency.[90] The doctrine permits courts to defer to an agency to make an initial determination on a matter. The court will not consider the issue unless the agency's decision is appealed. The Louisiana Supreme Court, in *Magnolia Coal Terminal v. Phillips Oil Co.*, stated that, "[t]he 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."[91] However, the doctrine was not applied in *Magnolia* to defer to the agency because the petitioner was seeking monetary damages as a result of an improperly closed well on his property and a court is the proper forum for awarding monetary damages.[92] Several years later, the Fifth Circuit, in *Mills v. Davis Oil Co.*,[93] explicitly recognized the doctrine of primary jurisdiction as part of the substantive law of Louisiana which federal courts are bound to follow. In *Mills*, the court held that it was not an abuse of discretion to defer to the Commissioner's jurisdiction to determine a dispute about the proper amount of costs to be charged against Mills' production revenues.

There are two significant reasons why courts should have the discretion to defer to an agency on matters that are within that agency's competency.[94] First, it is important that there be uniformity in the application of laws and regulations in an industry regulated by a governmental agency. This goal is more easily accomplished if the agency is allowed to make initial determinations within its jurisdiction. A second consideration is the recognition of agency expertise in certain areas. Agencies work more closely and regularly with the laws and regulations with which they are charged to administer than do the courts. Moreover, agency regulations are often highly complex and technical. A governmental agency more familiar with the regulations and the policies behind them will presumably make more proper and consistent decisions in applying those regulations than would a court.

90. *See* Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S. Ct. 350 (1907) (the first case to recognize the doctrine of primary jurisdiction).

91. 576 So. 2d 475, 489 (La. 1991).

92. *Id.* at 483.

93. 11 F.3d 1298 (5th Cir. 1994).

94. *See* South-West Utils., Inc. v. South Cent. Bell Tel. Co., 339 So. 2d 425 (La. App. 1st Cir. 1976) and Central La. Elec. Co. v. Louisiana Pub. Serv. Comm'n, 601 So. 2d 1383 (La. 1992) (Lemmon, J., concurring).

B. Exhaustion of Administrative Remedies

In Louisiana, the doctrine of exhaustion of administrative remedies is a statutory requirement.[95] Louisiana Revised Statutes 30:12(A)(1) provides that a person who is aggrieved by a law pertaining to oil and gas conservation or by an action of the Commissioner may obtain judicial review only after he has "exhausted his administrative remedy." The purpose of this doctrine is to avoid premature interruption of the administrative process and to permit the administrative agency to apply its expertise and the discretion delegated to it by the legislature in solving a problem within its jurisdiction.[96] The doctrine of exhaustion is different from primary jurisdiction where the agency and the court both have jurisdiction over a particular matter and the court merely defers to the agency's initial determination. When a court refuses to hear a case because a petitioner has not exhausted his administrative remedies, the court does not have jurisdiction over the matter until the petitioner pursues all administrative avenues in seeking a remedy.

C. Prohibition Against Collateral Attacks

If an aggrieved party wishes to challenge an order of the Commissioner, he must follow the procedures provided by the legislature in Louisiana Revised Statutes 30:12.[97] Any direct or indirect challenge to an order of the Commissioner in a court not specified in the statute, or at a time later than provided in the statute is a collateral attack and is not permitted.[98]

The prohibition is not limited to those cases where the judgment of a court would affect enforcement of or compliance with an order, but also includes cases where the Commissioner is not a party and his order is an "operative fact upon which the determination of the parties' respective rights directly depends."[99] An illustrative case is *Simmons v. Pure Oil Co.*[100] where the Commissioner issued a unitization order which included only a portion of Simmons' land in the production. He issued the order after finding as a fact that the well operated by Pure Oil was producing from a pool separate and distinct from another pool located elsewhere on Simmons' land.[101] Simmons alleged that Pure Oil breached its duty to Simmons, as Simmons' lessee, in procuring the order, and requested dissolution of the lease. The Louisiana Supreme Court affirmed the dismissal on the pleadings, stating that Simmons' allegations were contrary to the Commissioner's unitization order, and

---

95. *See* 5 U.S.C. § 704 (1994) for the federal counterpart.

96. *See* Kramer & Martin, *supra* note 69, at §25.04, and Kenneth C. Davis, Administrative Law Treatise §15.2 (3d ed. 1994).

97. La. R.S. 30:12 (1989) provides, inter alia, that the venue for such suits is the district court where the Commissioner's office is located, that the action must be brought within sixty days of the administrative action that is the subject of the suit, and that the petitioner need not apply for a rehearing before seeking judicial review.

98. Kramer & Martin, *supra* note 69, at §25.03.

99. Trahan v. Superior Oil Co., 700 F.2d 1004, 1015 (5th Cir. 1983).

100. 129 So. 2d 786 (La. 1961).

101. *Id.* at 789.

that Simmons' suit was "nothing more than a collateral attack on the findings of the Commissioner, which cannot be countenanced."[102]

The Louisiana Supreme Court refused to entertain Simmons' suit because that would have required litigation over whether the Commissioner's finding of fact that there were separate and distinct pools was correct. The Louisiana legislature, by enacting Louisiana Revised Statutes 30:12 has prohibited such a collateral attack on an order of the Commissioner. If Simmons wanted to challenge the unitization order, he had to follow the procedures for judicial review provided by the legislature.[103]

VI. CONCLUSION

Judicial deference is an important concept in administrative law. The judiciary's role in reviewing agency actions involves determining whether the agency is acting within the bounds that the legislature provided. Courts perform this role with no deference to an agency's understanding of the extent of its power because determining the bounds of agency power involves statutory interpretation, this is clearly the province of the judiciary. Once the court decides that an agency is exercising its discretion within legislative bounds, the agency's action should be reviewed only to determine whether the agency acted arbitrarily or capriciously, or abused the discretion committed to it by the legislature. The Louisiana Supreme Court in *Yuma* acted wisely in recognizing the principle of judicial deference and correctly deferred to the Commissioner's decision to proceed against Yuma as the operator of record to clean up and properly close the well.

The importance of judicial deference is also seen in several administrative law doctrines. The doctrine of primary jurisdiction, exhaustion of administrative remedies, and the prohibition on collateral attacks all recognize agency expertise and serve to allow agencies to effectively administer complex statutes and regulations in highly technical areas. Agency action in the form of adjudication and rule-making necessarily involves setting policy. If courts have a broad scope of review over agency decisions, they would thwart agency policy implementation, and agencies would be relegated to implementing the policies of the judiciary.

James H. Dupuis, Jr.

---

102. *Id.* at 791.

103. Whereas *Simmons* involved a collateral attack on a factual finding, *Pierce v. Goldking Properties, Inc.*, 396 So. 2d 528 (La. App. 3d Cir. 1981) concerned a challenge to the Commissioner's discretion in setting the effective date of a unitization order. Pierce alleged that his lessee breached its duty to Pierce by failing to request that the Commissioner make the effective date earlier rather than later. That act had the effect of denying Pierce a share of production until the effective date of the unit. The court stated that this allegation was a collateral attack on the Commissioner's order and affirmed the lower court's judgment in favor of the lessee.