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NOTES

Administrative Law: Primary Jurisdiction in *Stipe v. Theus*?

The Oklahoma Supreme Court in *Stipe v. Theus*¹ held that a pooled mineral owner was entitled to a stay of district court proceedings until the Corporation Commission disposed of the owner's application to determine proper cost of a well.² The stayed proceeding was an action brought on an open account by an oil and gas unit operator against a pooled mineral owner. The pooled owner had elected to participate by paying his proportionate share of drilling cost but later refused to pay the cost as invoiced.³

The justices in *Stipe* found that both the Corporation Commission and the district court had authority "to determine the disputed issue, i.e., what are [sic] the reasonable and proper cost?"⁴ The court considered this to be, however, "[a]n intolerable conflict of jurisdiction . . . and only one tribunal should make the determination."⁵ The Commission, the justices held, should be that tribunal.⁶ In support of its conclusion, the court noted that the Commission had retained jurisdiction of the issue of cost in its pooling order.⁷ However, the conclusion reached in *Stipe* appears to have been based on an analogy to the concept of priority,⁸ even though the parties were requested to provide supplemental briefs on the issue of primary jurisdiction.⁹ The purpose of this note is to explore the reasoning of this decision and its relation to the concept of primary jurisdiction.

The Doctrine of Primary Jurisdiction

Primary jurisdiction was conceived in the federal courts¹⁰ in an effort to give effect to congressional legislation creating administrative agencies,

¹ 603 P.2d 347 (Okla. 1979).

² *Id.* at 349.

³ *Id.* at 347.

⁴ *Id.* The Corporation Commission has jurisdiction under 52 OKLA. STAT. § 87.1(e) (Supp. 1980), and the district court's jurisdiction is from OKLA. CONST. art. 7 § 7.

⁵ *Stipe v. Theus*, 603 P.2d 347, 349 (Okla. 1979).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 349. The concept of priority is the procedure to determine which tribunal will decide matters brought in multiple tribunals with concurrent jurisdiction. 20 AM. JUR. 2d *Courts* § 138 (1965).

⁹ Respondents' Briefs on Primary Jurisdiction; Response Brief, made available to author for inspection.

¹⁰ *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956); *Far East Conference v. United States*, 342 U.S. 570 (1952); *Thompson v. Texas Mex. Ry.*, 328 U.S. 134 (1946); *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

and some scholars would add, to protect the jurisdiction of the then budding Interstate Commerce Commission.¹¹ Although primary jurisdiction has been defined and explained in a number of ways,¹² the United States Supreme Court has succinctly stated the doctrine's central idea:

[Primary jurisdiction] 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.¹³

There are two predominant reasons for the doctrine of primary jurisdiction: to take advantage of administrative expertise and to attain uniformity and efficiency in regulation.¹⁴ Other reasons for applying primary jurisdiction in-

¹¹ Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 RUTGERS L. REV. 867, 879 (1976) [hereinafter cited as Botein].

¹² K. DAVIS, ADMINISTRATIVE LAW TREATISE ch.19 (1958) [hereinafter cited as DAVIS]; 2 F. COOPER, STATE ADMINISTRATIVE LAW 561-70 (1965) [hereinafter cited as COOPER]; Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964) [hereinafter cited as Jaffe]; Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 GEO. L.J. 812 (1967); Davis, *Primary Jurisdiction: Effect of Administrative Remedies in the Jurisdiction of Courts*, 51 HARV. L. REV. 1251 (1937) [hereinafter cited as Davis]. Although these and many more articles discuss primary jurisdiction, little uniformity as to its nature and extent seems to exist. For a discussion of the doctrine in Oklahoma, see Merrill, *Compulsory Unitization and Individual Interest: Judicial or Administrative Jurisdiction?* 8 OKLA. L. REV. 389 (1955) [hereinafter cited as Merrill].

¹³ *United States v. Western Pac. Ry.*, 352 U.S. 59, 64 (1956). For a unique analysis of primary jurisdiction, see Botein, *supra* note 11. To understand primary jurisdiction fully a suggestion has been made that the doctrine be divided into categories. Two of the categories, the ones relevant to the analysis of this paper, are true primary jurisdiction and exclusive primary jurisdiction. Exclusive primary jurisdiction exists where the legislature has placed the initial determination of the particular issue or aspect of law exclusively in the hands of a particular agency. See DAVIS, *supra* note 12, at § 19.09, and COOPER, *supra* note 12, at 569. True primary jurisdiction exists where the court and the agency have concurrent jurisdiction, but certain factors make it more desirable for the agency to make the initial determination of the issue. This analysis is taken from Botein, *supra* note 11, where primary jurisdiction is broken down into four doctrines: exclusive primary jurisdiction, true primary jurisdiction, statutory exemption, and agency immunization. Some scholars decline to categorize primary jurisdiction in this manner, instead regarding primary jurisdiction as essentially applying where exclusive jurisdiction rests with the agency and true primary jurisdiction as only an aberration. Jaffe, *supra* note 12, at 1059. Professor Merrill designates primary jurisdiction as primary administrative jurisdiction and limits it to issues "committed" to the agency. Merrill, *supra* note 12, at 393. He alludes, however, to the possibility of true primary jurisdiction: "There might exist machinery by which the administrative process could be brought to bear to the solution of these controversies and yet the matter might lie outside the primary administrative jurisdiction." *Id.* at 404.

True primary jurisdiction and exclusive primary jurisdiction are closely related to the doctrine of exhaustion of administrative remedies. They differ from the exhaustion doctrine in that they apply to determine which tribunal will make the initial determination, and the exhaustion doctrine applies where the agency has already been found to be the correct tribunal to determine the issue initially if not exclusively. See also Merrill, *supra*, at 393.

¹⁴ COOPER, *supra* note 12, at 563; Merrill, *supra* note 12, at 404. See also *Chicago R. I. & P. Ry. v. Brown*, 232 P. 43 (Okla. 1924).

clude (1) the elimination of conflict between branches of government; (2) the speedier action of administrative agencies; (3) overcrowded court dockets; (4) the responsiveness of the agency to public will; (5) more competent relief available through the agency; and (6) the intolerance of the legal system to different results from different forums.¹⁵ These justifications explain the need for the application of the doctrine.¹⁶

In *Central States Power & Light Corp. v. Thompson*,¹⁷ for example, the issue of whether a purchaser of natural gas was to be charged under the industrial or domestic rate was found to be for the *sole* determination of the district court. The determination was held to be outside the jurisdiction of the Corporation Commission (*i.e.*, the court refused to find any jurisdiction in the Commission) because a private dispute, not a matter of public concern, was involved.¹⁸ Kenneth Culp Davis has criticized the private-public distinction as "probably not susceptible of development into a workable guide, for nearly all problems affected by the doctrine of primary jurisdiction have both public and private aspects in varying proportions."¹⁹ Another criticism of this rationale is that a series of private disputes may upset uniformity of regulation, as individual courts would make decisions without the technical background of the agency.²⁰ The advisability of the distinction applied in *Central States* is particularly questionable with regard to cases before the Corporation Commission concerning regulation of the oil and gas industry. A great deal of this regulation involves relationships between private parties arising out of pooling and unitization orders.²¹ In this area, the Commission has statutory authority to proceed;²² however, a dispute between such private parties arguably could be classified as a "private dispute" within the meaning of the term as used by the court in *Central States*. As the Commission is a body with limited jurisdiction,²³ the extent of its jurisdiction (as well as its relation to the jurisdiction of the

¹⁵ Botein, *supra* note 11, at 879-83. These reasons apply to both true primary jurisdiction and exclusive primary jurisdiction. The difference in the two concepts is that exclusive primary jurisdiction requires that the agency have exclusive jurisdiction.

¹⁶ These justifications have been criticized but the criticism does not apply to the facts here. Botein, *supra* note 11, at 878-84.

¹⁷ 58 P.2d 868 (Okla. 1936).

¹⁸ *Id.*

¹⁹ DAVIS, *supra* note 12, at § 19.08. See also Merrill, *supra* note 12, at 405-406, in which Merrill doubts that *Central States* reflects the true doctrine in Oklahoma. He refers to *Western Union Tel. Co. v. Carter*, 93 Okla. 269, 220 P. 635 (1923). This conclusion is supported by later cases, especially those arising under 52 OKLA. STAT. §§ 87.1(e) and 287 (Supp. 1980), dealing with pooling and unitization orders of the Corporation Commission which affect the rights of private parties. *Continental Tel. Co. of Oklahoma, Inc. v. Hunter*, 590 P.2d 667 (Okla. 1979); *Lear Pet. Corp. v. Seneca Oil Co.*, 590 P.2d 670 (Okla. 1979).

²⁰ Davis, *supra* note 12, at 1259-60.

²¹ 52 OKLA. STAT. § 87.1(e) (Supp. 1980), and § 287 (1971).

²² *Id.* See also Merrill, *supra* note 12.

²³ *Lear Pet. Corp. v. Seneca Oil Co.*, 590 P.2d 670 (Okla. 1979); *Burmah Oil & Gas Co. v. Corporation Comm'n*, 541 P.2d 835 (Okla. 1975); *Southern Union Prod. Co. v. Corporation Comm'n*, 465 P.2d 454 (Okla. 1970); *Gulf Oil Corp. v. State*, 360 P.2d 933 (Okla. 1961).

district court) would seem appropriate for application of the doctrine of primary jurisdiction.

A Closer Look at Stipe

The original action was brought in district court on an open account concerning the invoicing of cost by Davis, the operator of an oil and gas unit. Davis, the plaintiff, sued Stipe, a pooled mineral owner, to collect Stipe's proportionate share of cost. The operator did not seek the lien allowed by statute against Stipe's mineral interest because the well was allegedly marginal, and such relief would not allow the operator to recover his cost.²⁴ The defendant sought to dismiss the action, contending that the Commission had exclusive jurisdiction to determine reasonable cost. The motion to dismiss was overruled. The defendant then filed an application with the Commission (in the same cause in which the pooling order had been issued setting forth the well cost) to determine the reasonableness of the invoiced cost. The Commission had retained jurisdiction of the issue of cost, as is its normal procedure in pooling orders establishing units and determining the relationships between parties. The defendant also filed a motion in district court to stay its proceedings. The stay was overruled. An original action was then brought by defendant in the Supreme Court of Oklahoma seeking a writ of prohibition against the district court. The supreme court denied the writ but stayed the district court proceeding until a determination of the reasonable cost had been made by the Commission pursuant to the defendant's application.²⁵ The basis of the decision was not stated to be primary jurisdiction but rather a variation of the concept of priority.

In Oklahoma, the Corporation Commission has the exclusive authority to regulate not only the conservation of oil and gas but also the drilling and operation of oil and gas wells.²⁶ Special knowledge and familiarity with the regulated area, terminology, and practices of the industry have been developed by the Commission. Standards have been developed to decide issues frequently considered. One such issue is well cost; the Commission is required to make provision for the payment of well cost and has authority to determine proper cost in the event of a dispute.²⁷ The cost of a well involves matters of a technical nature. Although district courts must determine issues involving technical matters, these tribunals do not handle disputes involving the cost of a well as frequently as does the Commission. One can argue, therefore, that the Commission has the expertise in this particular area—the first reason for the application of primary jurisdiction.

The second reason underlying the concept is raised by the facts of the *Stipe* case. Uniformity and efficiency of administrative regulation of the oil

²⁴ *Stipe v. Theus*, 603 P.2d 347 (Okla. 1979).

²⁵ *Id.*

²⁶ 17 OKLA. STAT. § 52 (1971).

²⁷ 52 OKLA. STAT. § 87.1(e) (Supp. 1980).

and gas industry can be better maintained if consistent standards are applied to determine proper well cost. Application of varying standards by different forums would multiply disputes and encourage forum shopping by litigants seeking "their standards." This concern also directs attention to another basis of primary jurisdiction, that is, "the intolerance of the legal system for different results from different forums."²⁸ The Commission, by determining proper cost on a regular basis,²⁹ has developed standards as to what costs are necessary and proper. Speedier and more competent relief³⁰ would seem, therefore, to result and to provide an argument for favoring the application of primary jurisdiction to this area of Corporation Commission regulation.

Overcrowded court dockets generally are not the problem in Oklahoma courts that they are in federal courts. Any savings in time, however, resulting from not requiring an agency determination but only a "judicial" presentation of evidence and instructions would be lost in the necessity of instructing the judge and jury in the terminology and practice of the industry sufficient for them to decide the issue of proper cost.³¹ The responsiveness of the agency to the public will, another reason for primary jurisdiction, is evident in the possible danger of an agency being "captured" by the industry. This potential in administrative regulation is a positive rather than a negative consideration for applying primary jurisdiction to the issue of well cost. The Commission is more likely than a district court to see the practicality and overall effect of its decision. Also, both parties are in the industry or are familiar with it, and the public interest in the determination of well cost is minimal.

In addition, the same relief need not be available from the agency as from the court for primary jurisdiction to be applied so as to place the issue before the agency. The doctrine only states that the agency is a better forum to decide the particular issue. Other issues, as well as any relief sought, may be left to a competent court. The court in *Stipe*, notwithstanding, declined to use primary jurisdiction, and chose to decide the jurisdictional dispute by using a kind of "priority" rationale. Under a strict application of the concept of priority, however, the same relief must be sought in both forums.³² As the Commission could not grant the relief sought by the plaintiff in *Stipe*, a literal application of the concept of priority was not possible.³³

²⁸ See text accompanying note 15, *infra*.

²⁹ 52 OKLA. STAT. § 87.1(e) (Supp. 1980).

³⁰ "More competent relief" as used herein refers to a more thorough understanding of the dispute and not to the types of remedies available.

³¹ A criticism of primary jurisdiction is that it denies a party his constitutional right to a trial by jury. This would be an arguable criticism of exclusive jurisdiction but it would not apply with as much weight to true primary jurisdiction. See *Atlas Roof Co. v. OSHA*, 43 U.S. 442 (1977).

³² The concept of priority also requires concurrent jurisdiction, the same parties, and the same subject matter. Because agencies and courts rarely have the same power to grant relief, the concept is rarely applicable when the dispute concerns the question of jurisdiction between a court and an agency. 20 AM. JUR. 2d *Courts* § 128 (1965).

³³ Priority is generally not applied to a jurisdictional conflict between a court and an agency. The exception has been where the issue was jurisdiction. See *Scott v. Industrial Accid.*

What then is the basis of the decision in *Stipe*? The court held that as the Corporation Commission had retained jurisdiction of the issue of cost, the defendant mineral owner had acquired a right to a determination of this issue by the Commission. The justices do not seem to rely on any designated concept for this holding and merely state that the petitioner has certain rights, citing *Autry v. District Court*.³⁴ In that case the concept of priority was not applied because different relief was sought in the two courts involved. In one court a wife sought separate maintenance and in a second court the husband sought a divorce. The holding in *Autry* was that the second court could not prevent the wife from enforcing the rights that might have accrued from the first court's decision.³⁵ In *Stipe* the court also held that the petitioner had certain rights, "and one of these is the right for the Commission to determine proper cost in the event of a dispute. Sec. 87.1(e) grants this right and the pooling order specifically followed the statute."³⁶ The right of a party to have an agency determine an issue peculiarly within its competence has been cited by one scholar as an aspect of primary jurisdiction.³⁷

As demonstrated, an argument can be made that the court in *Stipe* was actually applying the concept of primary jurisdiction. Even though the opinion suggests that the decision is based on the retained jurisdiction of the Commission, this rationale is not convincing because the Commission may not give complete relief. The doctrine of primary jurisdiction provides a better explanation for the result in the case. It requires a determination of an issue by an agency before the court proceeding continues in order to allow the judiciary and parties to take full advantage of the expertise and experience of the agency,³⁸ and to maintain the efficiency and uniformity of the administrative regulation.

Effect of the Adoption of Primary Jurisdiction

The court in *Stipe* declined to discuss the doctrine of primary jurisdiction or to analyze the case by the principles of the concept. This should not, however, prevent the use of this case as persuasive authority for the application of the concept to similar conflicts between the jurisdiction of the Commission and the jurisdiction of the district court because the case, in effect, applied the doctrine.

The adoption of a broader concept of primary jurisdiction would benefit the courts by allowing them to take advantage of a body having ex-

Comm'n, 46 Cal. 2d 76, 293 P.2d 18 (1956) and *Proffitt v. J.G. Watts Constr. Co.*, 370 P.2d 878, 883 (Mont. 1962), which distinguishes *Scott*.

³⁴ 459 P.2d 865 (Okla. 1969).

³⁵ *Id.*

³⁶ *Stipe v. Theus*, 603 P.2d 347, 349 (Okla. 1979).

³⁷ Jaffe, *supra* note 12, at 1039.

³⁸ Davis considers the taking of full advantage of an agency's experience and skill a primary purpose of primary jurisdiction. DAVIS, *supra* note 12, at §§ 19.01 & 19.06.

perience and knowledge of the matters involved. The Corporation Commission, in this instance, would be benefited by maintaining consistent standards and efficient regulation of the industry. The oil and gas industry would be greatly aided as regulated persons would know which decision maker is to make the initial determination of the issue. A decision by the Corporation Commission would in many cases deter any further action in the courts.

In cases like *Stipe*, where a well is marginal, a subsequent action might have to be brought in district court to effect a remedy, *i.e.*, the Commission may not award a money judgment;³⁹ however, the Commission would already have determined proper cost. Although under the doctrine of primary jurisdiction, a court would not have to give the finding of the agency the same weight afforded a judgment of another court,⁴⁰ under statute the order of the Corporation Commission in settling a dispute to determine proper cost is appealable to the state supreme court,⁴¹ and therefore, not reviewable by the district court. The Corporation Commission's findings would be upheld if supported by substantial evidence.⁴² In addition, parties bringing cases in district court without a prior determination of the issue of cost by the Commission would know that the issue would be referred to the Commission. Forum shopping would thus be eliminated.

Conclusion

Considering the discussion above, one has to inquire, "Why did the Oklahoma Supreme Court not use the concept of primary jurisdiction?" At least two explanations are possible. The court may have been concerned that an application of the concept would imply that the Corporation Commission had exclusive jurisdiction to determine proper cost. This implication, however, was explicitly disallowed by the court. Moreover, it is not consistent with the doctrine of primary jurisdiction.⁴³ A second explanation may be a hesitancy to change the law if another rationale suffices. As indicated,

³⁹ *Southern Union Prod. Co. v. Corporation Comm'n*, 465 P.2d 454 (Okla. 1970).

⁴⁰ Botein, *supra* note 11, at 889; DAVIS, *supra* note 12, at § 19.07.

⁴¹ 603 P.2d 347, 348 (Okla. 1979).

⁴² *Lear Pet. Corp. v. Seneca Oil Co.*, 590 P.2d 670 (Okla. 1979).

⁴³ *Stipe v. Theus*, 603 P.2d 347, 348 n.4 (Okla. 1979). It is arguable that the Corporation Commission was given exclusive jurisdiction to determine well cost by 52 OKLA. STAT. § 87.1(e) (Supp. 1980). The constitutional provisions creating the Commission, OKLA. CONST. art 9, §§ 19, 35, and granting the legislature power to increase the authority of the Commission, and the enactment of 17 OKLA. STAT. § 52 (1971), granting the Commission exclusive jurisdiction to regulate the conservation and production of oil and gas pursuant to art. 9 § 35 of the OKLA. CONST. were an explicit grant of exclusive jurisdiction which, with the enactment of 52 OKLA. STAT. § 87.1(e) (Supp. 1980), gave the Commission exclusive authority to determine well cost. The Court in *Stipe* held this not to be a grant of exclusive jurisdiction as to limit the unlimited original jurisdiction of the district court created by OKLA. CONST. art. 7, § 7. See also *Oklahoma Gas & Elec. Co. v. Corporation Comm'n*, 543 P.2d 546 (Okla. 1975). Therefore, only concurrent jurisdiction exists. Merrill points out that the court has indicated in another case that such a grant of exclusive jurisdiction would be unconstitutional, but goes on to say that the constitutional theory of the case so holding is vague. Merrill, *supra* note 12, at 405 n.85.