# **2 The Law of Pooling and Unitization, 3rd Edition § 24.02**

***The Law of Pooling and Unitization, 3rd Edition* > *CHAPTER 24 Role of Conservation Agencies***

**§ 24.02 Delegation of Powers by the Legislature to an Agency**

1. **Self-Executing vs. Regulatory Statutes**

If one follows the *Palmer* ***Oil*** approach to judicial review of police power enactments, one has in most cases eliminated the question of whether the legislature has the power or authority to engage in a certain type of regulatory program. In the context of ***oil*** and gas conservation statutes, the cases discussed in the prior section clearly show that the prevention of waste, conservation of ***oil*** and gas, and protection of correlative rights are all valid objectives of the state’s police power. Therefore, regulatory programs designed to achieve those objectives will not fall under a substantive due process challenge.

The next question that arises is who must administer or implement the regulatory program? A useful distinction that can be made is between self-executing and regulatory statutes. A self-executing statute is one in which the legislature directly prohibits or demands that a certain act be done. The prohibition against the flaring of gas in *Ohio* ***Oil*** or the prohibition against the use of gas in flambeau lights in *Townsend* are two examples of self-executing statutes. There is no role for an administrative agency, except as a possible source of investigatory powers to determine whether a violation has occurred. Self-executing statutes create few administrative law problems.

But the vast majority of modern statutes are of the regulatory variety. These might involve prohibitions, such as a prohibition against committing acts of waste, but they leave to an administrative agency the problems of implementing the general prohibition through a delegation of power that might include the power to make rules and regulations as well as the power to enforce both the statute and the promulgated rules or regulations. Regulatory statutes raise the issue of whether the legislature is capable of delegating authority to administrative agencies.

In general, the legislature may delegate three types of governmental power to agencies:

1. Legislative or rulemaking;
2. Judicial or adjudicatory, designed to resolve disputes and issue individual orders; and
3. Enforcement, designed to see that the rules or orders are being properly implemented by the private sector.

1. **The Non-Delegation Doctrine**

1. **Separation of Powers**

The hard-to-define concept of separation of powers is a continuing source of conceptual and practical problems for administrative agencies. The basic notion of the concept is that there are three separate branches of government—executive, legislative, and judicial—and that no one branch can exercise any powers not contained within that branch. As noted above, administrative agencies usually exercise all three types of powers. In addition to this problem, there is another fundamental idea within the concept of separation of powers. That idea is that the legislature is the repository of all of the legislative powers of the government. The federal constitution, for example, provides, “[a]ll legislative powers shall be vested in a Congress of the United States.”[[1]](#footnote-2)1 Most state constitutions have similar provisions. The result of the vesting of exclusive legislative authority in the elected legislature is that when the legislature attempts to delegate that authority to make general rules or regulations it may violate the principle that legislatures are incapable of delegating legislative authority under the separation of powers principle.

The role of the separation of powers doctrine in the application of the non-delegation doctrine was evident in *Old Abe Co. v. New Mexico Mining Commission.*[[2]](#footnote-3)2 The company asserted that the delegation by the Commission to the Director of the Commission of extensive rulemaking authority violated the non-delegation doctrine. The court found that the Director was an employee of the Commission so that the executive agency, the Commission, was giving to its employee, the Director, the power to adopt statutorily mandated rules. The non-delegation doctrine simply does not apply to that type of delegation. If anything, the issue was whether the Commission was authorized to sub-delegate its authority from the legislature to the Director, but the court had concluded that it lacked jurisdiction to determine the constitutionality of the statute. Likewise, it did not comment on whether the legislative grant of power to the Commission violated the non-delegation doctrine.[[3]](#footnote-4)3 Similar results to *Old Abe Mining* were reached in Oklahoma when there were challenges to the Corporation Commission’s delegation of certain powers to administrative law judges.[[4]](#footnote-5)4

For many years the non-delegation doctrine held sway to limit the growth of administrative agencies. However, even in the heyday of non-delegation, courts upheld delegations of powers to non-legislative bodies if they were accompanied by sufficiently detailed standards.[[5]](#footnote-6)5

One of the leading cases at the federal level that invalidated legislation based on the non-delegation doctrine was *Panama Refining Co. v. Ryan,*[[6]](#footnote-7)6 a case involving federal support of state ***oil*** conservation regulation. *Panama Refining* was a challenge to Section 9(c) of the National Industrial Recovery Act (NIRA) that authorized the President to prohibit the transportation in interstate commerce of “hot ***oil***,” or ***oil*** that was produced in excess of that allowed by state law or regulation. The United States defended the constitutionality of the NIRA on the basis that the policy statement contained in the NIRA provided sufficient standards that would govern the actions of the President.[[7]](#footnote-8)7 The majority disagreed and found that there was a lack of standards since the policy statements were merely surplusage and not binding on the President. There were no standards set by Congress because there were no limits on when the President could prohibit the transportation of hot ***oil***. Although there was a standard of what ***oil*** could be regulated, namely that which was illegally produced under state law, there was nothing in the NIRA that would specify under what circumstances or what conditions the President could act.

*Panama Refining* is probably the high point in the modern era for the non-delegation doctrine at the federal level. By 1944, in *Yakus v. United States,*[[8]](#footnote-9)8 the Supreme Court had so liberalized the standards needed to avoid the application of the non-delegation doctrine so as to render the doctrine meaningless. In *Yakus,* a delegation of power to the administrative agency to set prices that were “fair and equitable” and that “so far as practicable” mirrored existing prices, was held to be sufficiently clear so as to avoid the non-delegation doctrine. Under the *Panama Refining* approach the standards in *Yakus* would be too vague, but *Yakus* ushered in a new era whereby federal courts would not invalidate delegation of powers to agencies or the executive branch, even where the standards were almost non-existent. Prior to 1999, the federal courts had essentially abandoned the non-delegation doctrine, while many state courts had retained it as part of their state constitutional jurisprudence.[[9]](#footnote-10)9 The Supreme Court reaffirmed its commitment to keeping the non-delegation doctrine moribund in *Whitman v. American Trucking Ass’n*.[[10]](#footnote-11)10 The District of Columbia Court of Appeals had invalidated on non-delegation grounds portions of the Clean Air Act requiring the EPA Administrator to set National Ambient Air Quality Standards that are “requisite to protect the public health” with an adequate margin of safety. It found that neither Congress nor the EPA had articulated any intelligible principle to guide the EPA’s exercise of discretion. The Supreme Court, however, found that there was an intelligible principle stated. Requiring the EPA to protect the public health is “well within the outer limits of our nondelegation precedents.”[[11]](#footnote-12)11 While what constitutes an intelligible principle may change depending on the broad or narrow scope of the powers granted, even where the powers granted are broad and sweeping, a congressional direction to protect the public health or the public interest is valid.[[12]](#footnote-13)12

The longstanding view that the non-delegation doctrine does not apply in the federal courts—even as a matter of applying deference to agency interpretations of statutes or their own regulations, or as a matter of defining the limits of the power that may be delegated by Congress to an agency—has recently been challenged in a series of U.S. Supreme Court decisions.[[13]](#footnote-14)13 As stated by the Supreme Court:

As for the major questions doctrine “label” [ ],” … it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.[[14]](#footnote-15)13.1

The major question doctrine essentially creates a strong, but rebuttable presumption that Congress would not have intended an agency to resolve any “major questions” without a clear and express indication of such an intent.[[15]](#footnote-16)13.2 Thus, where an agency attempts to exert power pursuant to a statute that is national in scope and/or the effect is different from the types of powers that the agency has historically exercised, the major questions doctrine will apply so that a “plausible textual basis” for finding that such a power exists will be insufficient.[[16]](#footnote-17)13.3

Even without the formal recognition that the major question doctrine will determine how a court should interpret a Congressional grant of power, two cases by the same district court judge, reflected the “hard look” that courts would now have to apply should the major question doctrine be found applicable. The first is *Wyoming v. United States Department of the Interior*.[[17]](#footnote-18)13.4 There, the court granted a preliminary injunction preventing DOI from implementing its hydraulic fracturing rule, in part because DOI acted in an ultra vires manner as to portions of the rule. DOI had argued that it had authority to regulate under a number of different federal statutory provisions dealing with the regulation of public and Indian lands. In both the opinion on the motion for a preliminary injunction and the opinion issuing the order setting aside the BLM rules, the court took a very “hard look” at the delegation issue consistent with the approach required under the major question doctrine. The second is also styled *Wyoming v. United States Department of the Interior*[[18]](#footnote-19)13.5 and involved a revised BLM rule on the venting and flaring of natural gas from federal and Indian ***oil*** and gas leases. In the venting rule case, BLM relied on some different federal statutes delegating generic power to the BLM to deal with royalty and operational matters on federal and Indian ***oil*** and gas leases. The court engaged in the same “hard look” at the statutory delegation language and preliminarily determined that the power to regulate venting and flaring had been delegated to DOI,[[19]](#footnote-20)13.6 but upon further reflection the court invalidated the venting rule.[[20]](#footnote-21)13.7

A number of state courts have retained the non-delegation doctrine as part of their state constitutional jurisprudence.[[21]](#footnote-22)13.8 Since state conservation statutes invariably delegate substantial rule-making and adjudicatory authority to the state conservation agency, it is not surprising to find that many of the challenges to the validity of these statutes incorporated a non-delegation argument therein. The following cases are illustrative of how the courts rejected those arguments and upheld the validity of the delegation.

In the first tier of decisions are those that applied the traditional non-delegation doctrine to a transfer of power from the legislative body to an administrative agency. *Hunter Co. v. McHugh*[[22]](#footnote-23)14 is a good example of how the courts have reacted to non-delegation challenges to compulsory pooling statutes. Louisiana had enacted a statute that authorized the Commissioner of Conservation to force-pool separately owned interests within drilling units that were to be established in order to prevent waste. The commissioner held several public hearings and promulgated a 320-acre drilling unit rule that applied to the plaintiff’s properties. The trial court had found that the statute and the challenged orders were unconstitutional.[[23]](#footnote-24)15 On the non-delegation doctrine, the trial court had found that

the Legislature has attempted to delegate to the Commissioner of Conservation the legislative power to adopt rules and regulations pertaining to drilling units, without a definite pattern or plan being first adopted and established by the Legislature.[[24]](#footnote-25)16

The Supreme Court responded to the non-delegation doctrine argument on several different levels. It first argued that the state constitution virtually requires a delegation of legislative power to the commissioner, who was constitutionally charged with the responsibility of conserving the natural resources of the state. Thus, the state constitution did not call for brick walls between the legislative and administrative sectors of state government. It then found that there is no violation of the non-delegation doctrine where the legislature merely authorizes the administrative agency to determine the facts under which the conservation laws are to be applied. Finally, it concluded that if standards are contained within the statutory delegation there is no violation of the non-delegation doctrine. In this case, the prevention of waste and the drilling of unnecessary wells provided intelligent principles that would limit the discretion of the agency and make it conform to the wishes of the legislative body.[[25]](#footnote-26)17

A similar approach was taken in Texas, starting with *Brown v. Humble* ***Oil*** *& Refining Co.*[[26]](#footnote-27)18 *Brown* involved a challenge to the issuance of a Rule 37 exception well permit by the Railroad Commission to a small tract owner. Part of the challenge was based on the non-delegation doctrine that was allegedly violated by giving the commission no standards to apply to the granting of Rule 37 exception permits. The court acknowledged the general validity of the non-delegation doctrine in Texas, but found that the statutes provided the Railroad Commission sufficient standards under which it could promulgate Rule 37. The court stated:

The Legislature in the exercise of its power has passed regulatory measures to prohibit the waste of ***oil*** and gas … . The fundamental standards prescribed in the statutes will control. Certain acts were passed which … established primary standards relating to such policy, and placed the duty upon the Railroad Commission to carry out the details under the general provisions of the statutes. That his is a valid exercise of power is now definitely settled … .

In the absence of a well-defined standard or rule in the statutes defining the public policy of the state with respect to the mineral interest, the Railroad Commission would be without authority to promulgate rules, regulations or orders … . The power to pass laws rests with the Legislature, and cannot be delegated to some commission or other tribunal.[[27]](#footnote-28)19

The Texas Supreme Court has continued to uphold the delegation of general rulemaking authority to the Railroad Commission. In *Railroad Commission v. Lone Star Gas Co.,*[[28]](#footnote-29)20 several natural gas pipelines challenged the enactment of several rules that regulated the operation of pipeline affiliates under special marketing programs. The supreme court reaffirmed its earlier position that there must be “reasonable” standards to accompany the delegation of legislative authority, but that rather broad delegations with general standards have been found to be sufficient.[[29]](#footnote-30)21 In this case, the statutory standards that were sufficient to uphold this delegation included the power to prevent discriminatory production and taking of natural gas, the prevention of waste, and the promotion of conservation.[[30]](#footnote-31)22 Even though the standards were quite broad, they were sufficient given the complexity of the problems that the Commission was directed to regulate. When the issues facing the legislature are difficult and complex, making legislative investigation and solution difficult, the standards that accompany the delegation of power are, by necessity, general in nature.

Texas has an unusual constitutional separation-of-powers clause that has not only affected the non-delegation doctrine but has also colored the issue of the proper scope of judicial review of administrative decisions.[[31]](#footnote-32)23 The Texas Constitution provides:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one, those which are Executive to another, and those which are Judicial to another, and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.[[32]](#footnote-33)24

If the court applied that provision literally, there could be no delegation of legislative power to any administrative agency, even if there were standards or procedural safeguards. But the Texas Supreme Court in *Trapp v. Shell* ***Oil*** *Co.,*[[33]](#footnote-34)25 laid the literal test to rest in once again dealing with a review of a Rule 37 exception well permit issued by the Railroad Commission. While the bulk of *Trapp* discusses the substantial evidence test for judicial review of administrative agency orders, the court did add the following about the non-delegation doctrine and the Texas Constitution:

One of the complaints urged against the majority opinion is that our holding violates Section 1 of Article 2 of the Texas Constitution, … which requires a separation of powers between the three departments of government … . The constitutional provision invoked did not prohibit the delegation to an administrative body of the power to find facts where the legislature cannot itself practically and efficiently exercise such power. The reason for the holding was grounded upon the law of necessity in that the constitution itself does not require the impractical or the impossible.[[34]](#footnote-35)26

Even though the language of the Texas Constitution provides more support for a strict separation of powers than the federal Constitution, the practical results have not differed substantially. *Trapp,* while placing limits on the delegation of legislative powers to administrative agencies, also faces the reality of modern government and the regulatory state. Thus, the invalidity of state statutes that delegate substantial powers and discretion to administrative agencies is not likely to occur, even with the rather literal language of Article 2, Section 1.[[35]](#footnote-36)27

Other states have also reached the same conclusion regarding various state conservation statutes. In most cases, the non-delegation doctrine challenge has been summarily dismissed relying on the earlier cases and concluding that the general standard of preventing waste has been sufficient to avoid an improper delegation charge. *Rutter & Wilbanks Corp. v.* ***Oil*** *Conservation Commission*[[36]](#footnote-37)28 is a good example of a more recent case, where the New Mexico Supreme Court dismissed a non-delegation doctrine challenge to New Mexico’s spacing and proration unit regulatory system. The statute authorized the commission to promulgate whatever rules or orders were needed to implement the statute in order to prevent waste and protect correlative rights. In rebuffing the plaintiff’s challenge the court merely stated:

We think it would be impracticable and unreasonable to require legislation setting out more precise standards than those provided above … . We hold these standards sufficient to allow the Commission’s power to prorate and create standard or non-standard spacing units to remain intact.[[37]](#footnote-38)29

Similar dismissals of non-delegation doctrine challenges were made in *Cities Service Gas Co. v. Corporation Commission*[[38]](#footnote-39)30 and *Amax Petroleum Corp. v. Corporation Commission.*[[39]](#footnote-40)31

There have been two instances where the non-delegation doctrine came close to being applied to invalidate a state conservation statute. In *State* ***Oil*** *& Gas Board v. Mississippi Mineral and Royalty Owners Association,*[[40]](#footnote-41)32 the plaintiffs were owners of royalty and mineral interests who challenged a decision of the Mississippi ***Oil*** and Gas Board that amended Statewide Rules 7 and 8, rules that widened and increased the spacing pattern for ***oil*** and gas wells drilled below 12,000 feet in the Pennsylvanian and older formations below a measured depth of 3,500 feet. The drilling unit for ***oil*** wells was expanded from 40 to 80 acres and for gas wells from 320 to 640 acres. The board had reasoned that it cost more to drill to greater depths and that greater problems were encountered with deep drilling. A single well was determined to be capable of draining the deeper reservoirs in an efficient manner. The majority opinion found substantial evidence in the record to support the board’s finding that the larger units would prevent waste. There was no mention of the non-delegation doctrine.

The non-delegation doctrine was raised by a four-judge dissenting opinion to a denial of the plaintiff’s motion for rehearing. In an opinion that the judge himself called “old timey,” the author inveighed against the loss of control of government to the hidden bureaucrats of the administrative agencies. He could find no standards, other than the most general and broad, that was to govern the board’s exercise of rule-making power to set spacing units.[[41]](#footnote-42)33 The heart of the dissenting opinion appears in the following passage:

The action of the … Board in adopting statewide rules pertaining to spacing of ***oil*** and gas wells, exceeds the most liberal interpretation of the standards announced above.

The reason for the prohibition against the delegation of legislative authority is to prohibit government by administrative agencies which are not directly responsible to the electors [as expressed in the Mississippi Constitution] … . All political power is vested in, and derived from, the people; all government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.[[42]](#footnote-43)34

This position, which may have had some followers at an early time in the history of the republic, is not one that has much support in today’s modern, complex world, where part-time legislators cannot hope to deal with the myriad of problems (often highly technical) that arise without warning and require immediate action.

The second near miss for the non-delegation doctrine arose out of Ohio’s well-plugging statutory provisions. In *State v. Wallace,*[[43]](#footnote-44)35 an Ohio trial court opinion, which was reported, concluded that the statute that required the owner of a well that had ceased production in commercial quantities to plug the well, was an improper delegation of legislative authority to the state conservation agency. The basis for the trial court’s decision was that the agency determined, without further legislative guidance, what the term “production” in commercial quantities means. The court’s analysis is conclusory in nature and suggests an ignorance of the ***oil*** and gas industry that has defined the term “production in commercial quantities” on many occasions. As with the dissenting opinion in *Mississippi Mineral,* the judge may be seeking to return to an era that has long since passed us by. He concluded:

The fourth branch of government, as political science writers often refer to administration agencies, are not legislators. They must have guidelines. [The well plugging statute] … clearly gives the Chief of the ***Oil*** and Gas Division unlimited powers which he has, by this complaint, exercised without guidelines. He has, by an unwarranted and unconstitutional delegation of powers from the legislature, exercised authority that was not his to accept nor the legislature to give.[[44]](#footnote-45)36

The Ohio Court of Appeals reversed the dismissal of the complaint, concluding that the statute vested little if any discretion with the administrative agency since there was a mandatory duty to plug all wells for which there was no production in commercial quantities. That standard could be given a definite meaning through its common usage in the industry. Thus, there was almost no delegation of legislative authority, and what delegation there was, contained sufficient standards to avoid the application of the non-delegation doctrine.[[45]](#footnote-46)37

The Ohio Supreme Court has had an opportunity to revisit the non-delegation doctrine as it affects ***oil*** and gas regulation in *Redman v. Ohio Department of Industrial Relations*.[[46]](#footnote-47)38 *Redman* involves the problem caused by multiple mineral development and multiple agency review.[[47]](#footnote-48)39 The Ohio conservation statute delegates to the Chief of the Division of ***Oil*** and Gas the power to issue an ***oil*** or gas well drilling permit.[[48]](#footnote-49)40 However, if the well is to be located in a coal-bearing township, the decision to grant the permit is transferred to the Chief of the Division of Mines.[[49]](#footnote-50)41 The Chief of the Division of Mines must notify the owner or lessee of any “affected mine” of the permit application. If a person objects and the Chief determines that the objection is well founded, the permit is to be denied.[[50]](#footnote-51)42

Redman had applied for a permit which was transferred to the Division of Mines. A coal company was notified and filed an objection. The Chief determined that the objections were “well founded” in that the drilling would interfere with a proposed mining plan and require that substantial coal reserves be left in the ground.[[51]](#footnote-52)43 The key issue for the court was whether the statute on its face was unconstitutional as an improper delegation of legislative power because the Chief of the Division of Mines had unlimited discretion to determine what was an “affected mine” and thus, who would have notice and an opportunity to object, and had similar unlimited discretion to determine what constitutes a “well founded objection.”

As articulated by the trial judge’s opinion in *Wallace*, there is strong support for applying the non-delegation doctrine in Ohio.[[52]](#footnote-53)44 The court tries to balance the delegation of unbridled discretion with the concern that a rigid application of the doctrine would unduly hamper the administration of the laws. In reviewing the development of the doctrine in the state, the court says that there are times when delineation of specific standards would not be necessary to sustain a delegation of power.[[53]](#footnote-54)45 If it would be impractical to define the standard in anything but a broad way, the delegation will be upheld. As long as there are intelligible principles that guide the exercise of discretion, no unconstitutional delegation of power has occurred.

The transfer of power to the Division of Mines from the Division of ***Oil*** and Gas represents a policy choice made by the Legislature to consider the impact of ***oil*** and gas development on the state’s coal resource. Other statutory provisions provide principles that govern the coal resource, including the safety of workers, the conservation of property, and the maximum utilization of coal in an environmentally and economically proficient manner. Likewise, the ***oil*** and gas statute, with its emphasis on protecting correlative rights and preventing physical and economic waste, offer sufficient guidelines to the Chief of the Division of Mines to pass muster under the non-delegation doctrine.[[54]](#footnote-55)46 The court concluded:

To require the establishment of precise standards to guide the Chief … would amount to an insistence on the impracticable. Moreover, it would tend to frustrate the flexibility required to accommodate the multifarious and unforeseen details arising from drilling an ***oil*** and gas well in the vicinity of a coal-mining operation in a coal-bearing township.[[55]](#footnote-56)47

A second tier of cases that involves an offshoot of the non-delegation doctrine does not concern delegation of legislative power from the legislature to an agency, but concerns the delegation of power from the legislature to a limited number or group of persons.[[56]](#footnote-57)48 The issue was first raised in the challenge to the Oklahoma compulsory unitization law that, when originally adopted, required the application to show that the working-interest owners of at least 50 percent of the area to be included in the unit consented to the unitization. The law also gave a veto power to working-interest owners who controlled more than 15 percent of the proposed unit area. These two features of the compulsory unitization law were challenged in *Palmer* ***Oil*** *Corp. v. Phillips Petroleum Co.*[[57]](#footnote-58)49 as violating the non-delegation doctrine. The Oklahoma Supreme Court struggled with the challenge, caused in part by the inconsistent U.S. Supreme Court decisions in the area. The court distinguished the two leading cases, finding an improper delegation of power to private individuals largely on the basis that the ultimate decision was still to be made by the Corporation Commission applying the guidelines and standards set out in the Compulsory Unitization Act.[[58]](#footnote-59)50 In both *Carter Coal* and the *Roberge* cases, the ultimate decisions were delegated to a group of individuals or corporations. In *Carter Coal,* the delegation of power to set maximum hour labor terms for coal miners was made to a group of the largest coal mine operators. In essence, competitors were allowed to set both maximum hours and minimum wages for all others, without further governmental approval. In *Roberge,* the decision to allow a nursing home to be built in a residential area was left entirely to the consent of the residents of the neighborhood, without further city council or planning commission review.

In *Palmer* ***Oil****,* while there was a minimum number of owners who had to be assembled prior to the commission’s decision, and there was another group of owners who could prevent a compulsory unitization, the ultimate decision to force-unitize was not made by the private parties but by the Corporation Commission. The court, quoting from an earlier U.S. Supreme Court decision, concluded:

While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.[[59]](#footnote-60)51

The court also analogized the consent requirements to special districts relating to water conservation and drainage that also require voter or landowner petitions to initiate the process by which the special districts are created. It is not an improper delegation of legislative authority to require that a minimum number of people agree to the creation of a substate governmental unit before that unit can be created. The legislature is still making the basic policy decision, whether it involves special districts or compulsory unitization. Before the state will decide to create new special districts or force-unitize owners of ***oil*** and gas, it can require that a certain percentage of the affected citizenry express its support for the decision. Likewise, giving a percentage of affected persons a veto power over the exercise of the police power, in the context of the compulsory unitization laws, is not an improper delegation of power. Ultimately, it will be the Corporation Commission deciding whether the compulsory unitization application will be granted if it attains the objectives spelled out in the statute by the legislature.

In *Samson Resources Co. v. Corporation Commission,*[[60]](#footnote-61)52 the court was faced with a challenge to a Commission rule relating to horizontal well units that required an applicant to get 50% of the working interest owners to consent to the unit before the Commission would approve. This consent requirement is similar to the consent requirement contained in most compulsory unitization statutes which requires the applicant to show that a minimum percentage, typically ranging from 60 to 90 percent, of working and/or royalty interest owners have consented to the unit agreement.[[61]](#footnote-62)53 Relying in large part upon *Palmer* ***Oil****,* the court found no improper delegation of legislative power to a small group of individuals. The court rejected the claim that *Palmer* ***Oil*** should be distinguished because there it was the legislature that had imposed the mandatory minimum consent requirement while in the horizontal drilling unit rule, it was the Commission that imposed such a requirement. There should be no difference for the purposes of the non-delegation doctrine if the legislature mandates a consent requirement of if the Commission is empowered by the Legislature to adopt a rule incorporating such a requirement.

A similar problem arose in *Parkin v. Corporation Commission,*[[62]](#footnote-63)54 a case involving the compulsory unitization statute in Kansas. The Kansas Corporation Commission had force-unitized a 5800-acre unit pursuant to statutory authority.[[63]](#footnote-64)55 The unit agreement, which was approved by the commission, authorized 65 percent of the working-interest owners to terminate the unit when they determined that unitized substances could no longer be produced in paying quantities or that unit operations were no longer feasible.[[64]](#footnote-65)56

After a disappointing enhanced recovery project was completed, all of the working-interest owners sold their interests to a single operator who ceased the enhanced recovery operation and who, at the time of trial, was producing a small amount of ***oil*** from approximately nine wells within the unit area. This suit was instituted by royalty and mineral owners as an action before the Corporation Commission to terminate the compulsory unitization order. The commission refused to terminate the unit because under the terms of the unit agreement, termination required the affirmative finding by the owners of 65 percent of the working interest that there was no production in paying quantities and there was no feasible operations ongoing within the unit area.

Initially, the court rejected the plaintiff’s claim that when the operator ceased the waterflood injection program the unitization order automatically terminated. The commission could have found that unit operations were still feasible even where there had been a cessation of the enhanced recovery operation, or that unitized substances were still being produced in paying quantities. Therefore, the unit did not dissolve merely upon the termination of the enhanced recovery project.

But the Kansas Supreme Court agreed with the plaintiffs that the unit agreement’s provision delegating termination decision responsibility to 65 percent of the working-interest owners was in violation of the non-delegation doctrine. It was clear that the statutes authorized the commission to modify, amend, or terminate unit operations.[[65]](#footnote-66)57 There were sufficient standards contained in the legislation so that there was no doubt that the commission had not received an improper delegation of legislative power.

Standing alone, the court’s analysis of the non-delegation doctrine leaves something to be desired. The commission had turned down the plaintiff’s petition to terminate with a simple response that they had not shown that 65 percent of the working-interest owners had made the requisite determinations under the commission-approved unit agreement.[[66]](#footnote-67)58 The court merely concluded:

This resolution by the Corporation Commission is not in the public interest, is not authorized by statute, and cannot be viewed in any sense as protective of the interests of those persons who are entitled to share in the production of this unit except one—the holder of the working interest. The Corporation Commission cannot delegate its statutory authority and responsibilities to the owner of the working interest. Voluntary termination by the working interest owner is but an alternative method of termination.[[67]](#footnote-68)59

Perhaps if the court had merely reversed the commission’s denial of the petition, because it had refused to exercise its statutory powers under the act to amend both the original order and the unitization agreement if circumstances so warranted a change, the ultimate decision would be more defensible. But the use of the non-delegation doctrine raises more questions than answers. It is particularly troublesome, when the court’s creation of an implied covenant on behalf of the unit operator is added in, to develop as a reasonable and prudent unit operator. The court, besides creating this new implied covenant, gave primary responsibility to the commission to determine if the prudent operator standard had been met. That is uniquely a judicial function and not within the normal powers granted to state conservation agencies. While the power to amend the unit order is a power that is reserved to the commission by the statute, that power does not extend to determining whether the unit operator is acting as a reasonable and prudent unit operator. The court suggests that if there was a breach of the implied covenant to develop, then the commission could terminate the unit, notwithstanding the consent requirements contained in the unit agreement.

The authors agree with the position of the *Parkin* court that the commission has the power to determine when its unitization order will terminate. That power is specifically provided for by statute, with both procedural and substantive limitations on its exercise. Therefore, the result in this case is proper. The commission cannot foreclose a possible amendment to the original order merely by stating that the unit agreement’s prerequisites for amendment or termination have not been complied with. The commissioners have a duty to review petitions from interested parties to amend the order, subject to the statutory limitations.

But to say that the result is proper is not to say that the court’s reasoning is proper. The non-delegation doctrine probably should not have been raised in this case, because of the statutory mandate to the commission to amend the order using the same standards that governed the initial decision to approve the unitization order. As far as the implied covenant is concerned, the commission should not be required by the court to review essentially private law issues, which are best reserved for the courts.[[68]](#footnote-69)60

In *Robinson Township v. Commonwealth of Pennsylvania*,[[69]](#footnote-70)61 the Pennsylvania Commonwealth Court revived the non-delegation doctrine as it applied to Act 13, a comprehensive attempt by the Legislature to balance state and local interests when it comes to the regulation of ***oil*** and gas operations.[[70]](#footnote-71)62 One portion of Act 13 gave to the Pennsylvania Department of Environmental Protection the power to “waive the distance restrictions” otherwise contained in the statute relating to setback requirements between ***oil*** and gas operations and certain designated uses.[[71]](#footnote-72)63 While a statute may delegate decision-making authority to an administrative/executive agency, the legislation must “contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.”[[72]](#footnote-73)64 The hortatory portions of Act 13 that require DEP to make decisions consistent with the optimal development of ***oil*** and gas resources are insufficient to restrain DEP’s discretion.[[73]](#footnote-74)65 The Pennsylvania Supreme Court, on somewhat different grounds, invalidated the waiver provision tying in the wide discretion to the plurality opinion’s reliance on the Environmental Rights Amendment mandating a trust responsibility to the people.[[74]](#footnote-75)66

The non-delegation doctrine is not a current threat to state conservation statutes and state conservation agencies. Even under the older and more stringent tests, state conservation statutes have provided sufficient standards to govern the exercise of legislative power by the conservation agency. It would be highly unlikely for a court to strike down a grant of power to a state conservation agency, even if that grant was no more specific than a general mandate to promulgate rules and regulations that prevent waste, promote conservation of ***oil*** and gas, and protect correlative rights.

1. **Delegation of Eminent Domain Power to Private Entities**

Either by an express state constitutional provision or by statute, many states delegate to private entities the right of eminent domain. For example, the Colorado Constitution contains the following provision:

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, domestic or sanitary purposes.[[75]](#footnote-76)67

While this type of delegation of eminent domain powers is restricted largely to the western states, most states by statute have delegated the power of eminent domain to public utilities or common carriers in order for them to provide such services as electricity, water, telephone, and natural gas to the public.[[76]](#footnote-77)68 Two aspects of this delegation of eminent domain powers have created legal issues. The first deals with the problem of how state agencies confer such powers on private entities and the second deals with the problem of how state constitutional and statutory authority delegating such powers should be interpreted.

The first problem area is exemplified by the Texas Supreme Court decision in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas*.[[77]](#footnote-78)69 A statute delegates to the Railroad Commission of Texas the power to declare a carbon dioxide pipeline operator as a common carrier which gives that pipeline operator the right of eminent domain.[[78]](#footnote-79)70 The Commission for many years had used a reasonably simple procedure to confer common carrier status on pipelines. It developed a Form T-4 where the applicant would check the box stating it would be operated as a “common carrier” rather than as a “private line.” In *Denbury Green*, the pipeline operator so indicated on the Form T-4 and further indicated it would transport carbon dioxide “owned by others but transported for a fee.”[[79]](#footnote-80)71 Denbury Green also sent a letter to the Commission noting that it would accept the provisions of Chapter 111 of the Natural Resources Code, which define the requirements to achieve common carrier status, as well as imposing requirements on the operations of a common carrier pipeline.[[80]](#footnote-81)72 Eight days after the application and letter filed, the Commission issued the permit for the transportation of carbon dioxide through a common carrier pipeline.[[81]](#footnote-82)73

The court of appeals had no difficulty in affirming the district court’s judgment in favor of giving Denbury Green the right to enter the surface for purposes of determining the eventual route for the pipeline because it treated the determination of whether a pipeline is a common carrier as a question of law and on that question, substantial deference is to be given to Railroad Commission decisions in areas of its expertise.[[82]](#footnote-83)74 The court of appeals essentially treated the Commission decision to confer common carrier status as precluding judicial review.[[83]](#footnote-84)75 The Texas Supreme Court, on the other hand, gave no deference to the Commission decision and upbraided the Commission for its longstanding and cavalier attitude toward private property rights.[[84]](#footnote-85)76 While recognizing that the Legislature had clearly delegated the power to give common carrier, and thus eminent domain, status to the Railroad Commission, because of the public use requirement that is constitutionally imposed,[[85]](#footnote-86)77 the courts not only do not give any deference to the Commission, but impose a heightened scrutiny scope of judicial review. This heightened scrutiny entails two related principles: (1) strict compliance with the statutory requirements is required; and (2) any doubt as to the scope of the grant of the power is to be strictly construed in favor of the landowner and against the private entity exercising the power of eminent domain.[[86]](#footnote-87)78 The constitutional requirement that the power of eminent domain be exercised only for a public and not a private use requires that the Commission do more than have a “check the box” review. Since there was no hearing and no notice given to the surface owners in the proposed path of the pipeline, the court finds that the procedures used were inadequate to protect those owners’ private property rights. Instead of giving the Commission the power to develop its own test to meet the court’s heightened scrutiny analysis the court imposes its own test on the Commission. That test requires the applicant to show that: “a reasonable probability … exist[s] that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.”[[87]](#footnote-88)79 Finally, the court suggested that Texas has restricted the definition of public use which must serve as the basis for the grant of the power of eminent domain to a greater extent than other jurisdictions.[[88]](#footnote-89)80 Because not every use is a public use, first the Commission and then the courts will have to make that determination. While the Commission’s decision is prima facie valid, the burden of proof is placed on the party asserting common carrier status at the judicial review level which is the opposite of the way courts review administrative decisions. The Texas Supreme Court reaffirmed the common carrier test and emphasized that a putative common carrier may show that there is a reasonable probability that it will carry third-party carbon dioxide through actual post-construction transportation contracts.[[89]](#footnote-90)81

Texas also provides a second source of condemnation authority for private entities that are common carriers that contains a broader list of products that can be transported than is provided under the Natural Resources Code that was involved in the *Denbury Green* cases.[[90]](#footnote-91)81.1 In *Hlavinka v. HSC Pipeline Partnership, LLC*,[[91]](#footnote-92)81.2 the Texas Supreme Court refused to interpret that second statutory provision as being subordinate to, or controlled by, the Natural Resources Code. Thus, where Tex. Bus. Org. Code § 2.105 includes “***oil*** products” as being a transportable product in a common carrier pipeline, the fact that the Natural Resources Code does not will not prevent a pipeline from attaining common carrier status with the concomitant power to condemn an easement.[[92]](#footnote-93)81.3 Refusing to give a narrow interpretation of what is an “***oil*** product” as urged by the landowners, and relying on Railroad Commission definitions, the supreme court concluded that the pipeline fell within the statutory definition and thus could condemn a pipeline easement.

In *Robinson Township v. Commonwealth*,[[93]](#footnote-94)82 a statute purported to delegate the power of eminent domain for gas storage purposes to “a corporation empowered to transport, sell or store natural gas or manufactured gas.”[[94]](#footnote-95)83 The Commonwealth tried to make a savings construction of the statute by saying that the definition was the functional equivalent of a public utility found in other Pennsylvania statutes. The Pennsylvania Supreme Court disagreed, however, noting that the delegation of the power of eminent domain to private entities must comply with constitutional limits, including the requirement that the power only be exercised for a public purpose.[[95]](#footnote-96)84 Without relying on a canon of strict construction for such delegations, the court does not read the challenged statute as limiting the corporations that are delegated the power of eminent domain to those which are public utilities.

Where an entity is a public utility under Pennsylvania law, that public utility—upon receipt of a certificate of public convenience—will be empowered to exercise the eminent domain power.[[96]](#footnote-97)85 In *In re Condemnation by Sunoco Pipeline, L.P.*,[[97]](#footnote-98)86 the Commonwealth Court found that a proposed pipeline, which would have both intrastate and interstate sales of petroleum products or natural gas liquids, was a public utility that was regulated by the Public Utility Commission and empowered to exercise the right of eminent domain. Under Pennsylvania law, the trial court cannot independently review the Commission’s determination that a public need or public use exists for a particular project. Instead, a direct appeal is required.[[98]](#footnote-99)87

In the federal arena, when the Federal Energy Regulatory Commission issues a certificate of public convenience and necessity, that decision satisfies the public use requirement for the exercise of the eminent domain power by a privately-owned public utility.[[99]](#footnote-100)88 Unlike the Texas Supreme Court, the federal courts appear to treat the FERC decision as presumptively valid on the issue of public use. This may be caused in large part by the fact that the FERC decision-making process for certificates of public convenience and necessity are much more rigorous than the “check the box” review used by the Railroad Commission.

Although the U.S. Constitution does not contain the term “eminent domain,” the courts since the early part of the 19th century have found that the federal government has such a power and can delegate such power to private entities.[[100]](#footnote-101)88.1 The U.S. Supreme Court has never imposed a canon of strict construction for statutes granting the eminent domain power to executive or administrative entities or to private entities.[[101]](#footnote-102)88.2

An example of the second problem area, namely the interpretation of constitutional and/or statutory grants of the power of eminent domain directly to private entities, is *Marion Energy, Inc. v. KFJ Ranch Partnership*.[[102]](#footnote-103)89 Marion was an ***oil*** and gas lessee of a state lease who wanted to build an access road across a surface estate owned by KFJ. At the time of the dispute, a statute gave the right of eminent domain to private parties for the construction of “roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines, quarries, coal mines or mineral deposits including minerals in solution.”[[103]](#footnote-104)90

The sole issue before the court was whether or not the terms “minerals” or “mineral deposits” as used in the statute included ***oil*** and gas.[[104]](#footnote-105)91 After reciting the usual litany of canons of statutory construction including the plain meaning canon and the *expressio unius* canon, the court applied the outcome-determinative canon that statutory grants of the power of eminent domain must be strictly construed in favor of the property owner and against the condemnor whether the condemnor is a public or private entity.[[105]](#footnote-106)92 What is troublesome about the majority opinion is its treatment of the terms “minerals” or “mineral deposits” as ambiguous so as to trigger the narrow construction canon. In order to justify its policy choice of protecting private property rights against condemnation, the court may be wreaking havoc on the conveyancing industry by throwing into question the near-universally accepted rule that a grant or reservation of “minerals” or “mineral rights” unambiguously includes ***oil*** and gas.

A second decision, *Larson v. Sinclair Transportation Co.*,[[106]](#footnote-107)93 by the Colorado Supreme Court, reaches a similar result. The statute provided: “Such telegraph, telephone, electric light power, gas, or pipeline company or such city or town is vested with the power of eminent domain, and authorized to proceed to obtain rights-of-way for poles, wires, pipes, regulator stations, substations, and systems for such purposes by means thereof.”[[107]](#footnote-108)94 The companies referred in the section mirror the same types of companies listed, namely, “gas, or pipeline compan[ies] authorized to do business under the laws of this state.”[[108]](#footnote-109)95 In this case, Sinclair wanted to condemn land to construct, maintain, and operate a petroleum pipeline. Relying on the canon of narrow construction of statutes granting the power of eminent domain, the court concludes that since neither petroleum nor ***oil*** are mentioned in the litany of uses, a pipeline company carrying petroleum or ***oil*** does not have the power of eminent domain.[[109]](#footnote-110)96 In a stinging dissent, Justice Hobbs believes that the clear meaning of the statutory section is to give pipeline companies the right of eminent domain because to interpret it otherwise would suggest that telephone pipeline companies or electric light power pipeline companies are the only pipeline companies who have been delegated the eminent domain power.[[110]](#footnote-111)97

While *Denbury Green* utilized a strict construction canon to deal with a delegation issue, and likewise imposed a strict compliance requirement with the procedures imposed upon private entitles possessing the power of eminent domain, in *Laird Hill Salt Water Disposal, Ltd. v. East Texas Salt Water Disposal, Inc.*,[[111]](#footnote-112)98 the court appeared to be somewhat more deferential in determining that an entity with the unquestioned power of eminent domain met all of the procedural requirements.[[112]](#footnote-113)99 The court was able to reject the condemnee’s claim that the condemnor had not followed various procedural hurdles in condemning the land including properly adopting a resolution authorizing the condemnation that had all of the statutory requirements.[[113]](#footnote-114)99.1

There is a paradox in Texas law whereby the courts have stated that determining whether a taking is for a public use is a judicial function but that the legislature is entitled to deference in making public use determinations. The Texas Supreme Court has said: “We decide whether the taking is for a public use, granting due deference to legislative declarations to that effect, and if so, we consider the landowner’s affirmative defense that the taking was nonetheless fraudulent, in bad faith, or arbitrary and capricious.”[[114]](#footnote-115)99.2

An ancillary issue raised in *Denbury Green* is how one defines “public use” or “public purpose” in supporting the delegation of the power of eminent domain to a private entity. The *Denbury Green* court noted that Texas has a reasonably narrow view of what constitutes a “public use.”[[115]](#footnote-116)100 This point was emphasized upon remand from the Texas Supreme Court where the Court of Appeals determined that a fact issue existed as to whether or not the proposed pipeline would serve a “substantial” public interest.[[116]](#footnote-117)101 The Texas Supreme Court, however, took issue with a very narrow view of what constitutes a public use by concluding that its common carrier test, if met, shows a substantial public interest.[[117]](#footnote-118)102 Unlike Louisiana, for example, which does not necessarily require that a pipeline make itself available to the public before exercising the power of eminent domain,[[118]](#footnote-119)103 Texas imposes such a requirement on non-***oil*** and gas pipelines.[[119]](#footnote-120)104 In *Denbury Green II*,[[120]](#footnote-121)104.1 the Supreme Court’s proffered test for public use was that all the pipeline need show to qualify as a common carrier is that there is a reasonable probability that a contract exists with an unaffiliated party. This test was reaffirmed by the Texas Supreme Court in *Hlavinka v. HSC Pipeline Partnership, LLC*, which also held that the public use determination is a matter of law for the court to decide.[[121]](#footnote-122)105

A somewhat different approach to what constitutes a public use for purposes of authorizing a private entity to exercise the power of eminent domain has arisen in the context of pipelines that do not necessarily have connections within a particular state. While a number of states have followed the approach taken by Justice O’Connor in her dissenting opinion in *Kelo*, which states that indirect economic benefits do not constitute a public use,[[122]](#footnote-123)105.1 other courts have taken a more nuanced approach and upheld findings of public use even where there are no, or limited, off- and on-ramps to the pipeline within a specific state.[[123]](#footnote-124)105.2

In Texas where the statute delegates to a private entity the power to condemn land without a specific requirement that the entity show the “necessity for the condemnation,” courts have viewed that delegation as requiring the private entity to prove that the condemnation is for a public purpose.[[124]](#footnote-125)106 Nonetheless, in *Boerschig v. Trans-Pecos Pipeline, LLC*,[[125]](#footnote-126)107 the court noted that the Texas Legislature has long delegated the eminent domain power to various private entities in a manner in which the private entity is given quick take or quick entry authority. Against that backdrop, the court rejected a claim by a landowner that the procedure by which commissioners authorize such an entry and engage in their valuation procedure violated the due process rights of the landowner to have his issues eventually redressed in a full judicial proceeding.[[126]](#footnote-127)108

A generic challenge to a statutory grant of the power of eminent domain power to private entities was made in a series of cases in Arkansas.[[127]](#footnote-128)109 The Arkansas Supreme Court rejects the claim that the statute authorizing a common carrier to condemn land for a pipeline easement violates the constitutional prohibition against the taking of land solely for private use.[[128]](#footnote-129)110 In all of the cases, an ***oil***, and gas lessee is seeking to install gathering lines to take natural gas from several different wells to a central gathering facility. While noting that such statutes are to be narrowly construed, the Arkansas Supreme Court took a “soft glance” review of the Legislature’s determination that pipeline companies are, in fact, common carriers.[[129]](#footnote-130)111

Another related problem that arises with the delegation of eminent domain power to a private entity is whether or not a private agreement can preempt or waive that statutory grant of authority. The majority of jurisdictions dealing with that issue have determined that private condemning entities cannot waive their statutory grant so that they are free to condemn interests in real property in excess of the interests that may have been contractually conveyed.[[130]](#footnote-131)111.1

Nearly every state provides by statute the privilege of entry to a pipeline or other entity delegated the power of eminent domain without needing the permission of the surface owner.[[131]](#footnote-132)112 The basis for this delegation of power is the longstanding common law recognition of a privilege of entry by governmental entities engaging in public activities.[[132]](#footnote-133)113 In a recent challenge to a Virginia statute authorizing a pipeline to enter onto the surface for the purposes of surveying prospective locations for a pipeline, the court had no difficulty finding that such a statute was facially constitutional.[[133]](#footnote-134)114

In *Cox v. State*,[[134]](#footnote-135)115 a landowner argued that the Ohio statutory scheme that allowed certain common carriers[[135]](#footnote-136)116 to condemn land for pipeline purposes without the need to get a state permit was an unconstitutional delegation of legislative power to a private entity. Plaintiffs argued that since no state-issued permit was required prior to the common carrier’s ability to exercise the power of eminent domain, the process amounted to an improper delegation of legislative authority to a private entity.[[136]](#footnote-137)117 The court found, however, that even though no permit is required, judicial review of the pipeline’s exercise of the power of eminent domain provides the necessary safeguard against misuse of the power of eminent domain. Unlike, the zoning cases where the residents made the final decision relating to public use, under the Ohio process, the courts would serve as a check to make sure that the statutory and constitutional requirements were complied with.[[137]](#footnote-138)118

A commonly found requirement before a public entity may utilize its delegated eminent domain power is that the condemnor needs to make a good faith offer to voluntarily purchase the interest in real property.[[138]](#footnote-139)118.1 One of the issues that may arise in determining whether or not there is a good faith offer deals with changes in the size of the area to be condemned when contrasted with the size of the area to be voluntarily conveyed. While some courts have found that variations between the original offer and that sought in the condemnation suit are not fatal, other courts have taken a hard look at such variations in concluding that the initial offer was not made in good faith.[[139]](#footnote-140)118.2

1. **The Ultra Vires Doctrine**

1. **Introduction**

While the non-delegation doctrine asks the question, can the legislature delegate certain powers to the agency?, the more important and relevant question is, has the legislature granted the power to the agency to act as it has? Agencies are creatures of state constitutions or state statutes. They possess no inherent powers to act. They must seek their powers from the language of the constitutional or statutory provisions that relate to that agency. If an agency acts beyond the power it has been granted, that action is ultra vires, not because the state could not exercise that power, but because it had chosen not to confer that power on that particular state agency.

It is often stated that state conservation agencies are agencies of limited powers. Even though they may be created by state constitutional provisions, as is the Oklahoma Corporation Commission, the following quotation is one that is generally followed in all states: “The [Oklahoma] Corporation Commission is a tribunal of limited jurisdiction and has only such jurisdiction and authority as is expressly or by necessary implication conferred upon it by the Constitution and the statutes of this state.”[[140]](#footnote-141)119 Another common way for the courts to express legislative supremacy over administrative agencies occurs when the court describes the agency as a creature of the legislature or a creature of the statutes enacted by the legislature.[[141]](#footnote-142)120

In Alaska, the courts have been solicitous to the notion that administrative agencies can have implied powers where such powers are necessary to the exercise of expressly granted powers.[[142]](#footnote-143)121

In Colorado, the Colorado Supreme Court has said that a grant of power to an administrative agency “may not be supported by implication but must be supported by language plainly and unambiguously granted such broad power … .”[[143]](#footnote-144)121.1

In Illinois it has been said that “[a]dministrative agencies exercise powers provided strictly by statute and possess no inherent or common law powers.”[[144]](#footnote-145)122 A New Mexico court stated that “an agency may not create a regulation that exceeds its statutory authority.”[[145]](#footnote-146)123

In Kentucky, a valid regulation must “be justified by an express grant of regulatory authority clearly embracing that regulation.”[[146]](#footnote-147)124

In Mississippi, while the ***Oil*** and Gas Board “is a creature of the legislature and, of course, has no authority other than that vested in it by statute,”[[147]](#footnote-148)124.1 the courts do not narrowly construe legislative grants of authority.[[148]](#footnote-149)124.2

In Missouri, administrative agencies have those powers that are: “conferred by statute, either expressly, or by clear implication, as necessary to carry out the powers specifically granted.”[[149]](#footnote-150)125

In New Mexico, a statutory grant of powers to the State Land Office regarding the “management, care, custody, control and disposition” of state lands was found to be only a limited grant of authority, notwithstanding the seemingly very broad language used.[[150]](#footnote-151)126 The Tenth Circuit concluded that both the State Land Office’s interpretations of the statutory language and its own rule were erroneous so that the Land Office’s attempt to require state ***oil*** and gas lessees to pay royalties on take-or-pay proceeds received was ultra vires.[[151]](#footnote-152)127 New Mexico law on deference to agency interpretations ranges from being deferential to engaging in de novo review.[[152]](#footnote-153)128

In North Dakota, the Industrial Commission has “extremely broad and comprehensive powers to regulate ***oil*** and gas development in the state.”[[153]](#footnote-154)128.1

In Ohio, the ***Oil*** and Gas Commission is a creature of state law so that “its powers and duties extend only so far as the statutes grant authority, while being constrained by whatever limits the statutes impose.”[[154]](#footnote-155)129

In Oklahoma, the Corporation Commission “is a tribunal of limited jurisdiction, having only such authority as is expressly or by necessary implication conferred upon it by the Oklahoma Constitution and statutes of the State.”[[155]](#footnote-156)129.1

In Pennsylvania, while an agency “may only exercise those powers vested in it by the General Assembly,” it also has power from “a strong and necessary implication from” the express statutory language.[[156]](#footnote-157)130 This approach would give greater leeway to administrative agencies than the traditional strict construction approach to the delegation of legislative authority. Courts have continued this bifurcated and contradictory approach to rulemaking authority by again noting that rulemaking is a widely-used administrative practice that may even be implied, but that the courts should give a hard look to rules which may exceed the statutory grant of authority.[[157]](#footnote-158)131 In *Marcellus Shale Coalition v. Department of Environmental Protection*,[[158]](#footnote-159)131.1 the Pennsylvania Supreme Court, in a highly splintered decision, repeated both the narrow interpretation language along with the more liberal interpretation language of earlier cases but ended up upholding a series of regulations designed to achieve broad environmental goals.

In Texas, “state administrative agencies have only those powers that the legislature expressly confers upon them and those implied powers that are reasonably necessary to carry out their express functions or duties.”[[159]](#footnote-160)131.2

In Washington, the courts have applied somewhat inconsistent approaches to the ultra vires issue. The courts have said:

Administrative “[r]ules must be written within the framework and policy of the applicable statutes,” and so long as the rule is “reasonably consistent with the controlling statute[s],” an agency does not exceed its statutory authority. … But “administrative rules or regulations cannot amend or change legislative enactments.” … “[R]ules that are inconsistent with the statutes they implement are invalid.”[[160]](#footnote-161)132

In Wyoming, the courts have said:

An administrative agency is limited in authority to powers legislatively delegated. Administrative agencies are creatures of statute and their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim.[[161]](#footnote-162)133[[162]](#footnote-163)134-136

This is the heart of the ultra vires doctrine. The courts must look to express enabling authority, much as they used to do for local governments prior to the advent of home rule, in order to justify agency action. The agency is but a creature of the language contained in the constitution or statutes that enable it to act.

Another form of ultra vires action occurs where an agency acts within the scope of the powers granted to it, but violates its own promulgated rules or regulations. Agencies are bound by their own internal rules and regulations, and if their actions are not in compliance with those rules, the actions taken may be overturned.

1. **Some General Rules**

There are some general rules that define the parameters of the ultra vires doctrine. One general rule is that conservation agencies are rarely given the power to deal with matters of solely private concern, as opposed to matters of public concern.[[163]](#footnote-164)137 Oklahoma, among other states, has had a particularly difficult time segregating issues into matters relating to public and private law concerns. For example, agencies generally cannot adjudicate private contractual rights.[[164]](#footnote-165)138 Agencies, likewise, have no authority to entertain actions for damages for alleged violations of state antitrust laws.[[165]](#footnote-166)139 The adjudication of tort claims also has no place in state conservation agencies.[[166]](#footnote-167)140 Since many agencies are not given the power to adjudicate private law issues, in many cases the characterization of the litigation as involving public or private law issues answers the ultra vires questions. The following cases illustrate the point that predicting the outcome of an ultra vires challenge is not as easy as some of the general rules would suggest.

Part of the problem is how courts classify what is a private law matter and what is a public law matter. Some of the problems that Oklahoma has had with resolving those issues will be reviewed in the next section.[[167]](#footnote-168)141 One problem that keeps arising is that many private law issues can be restructured to fit the mold of a public law issue relating to the protection of correlative rights.

In *Kingwood* ***Oil*** *Co. v. Hall-Jones* ***Oil*** *Corp.,*[[168]](#footnote-169)142 the defendants made such an argument, which was eventually rejected by the Oklahoma Supreme Court. Kingwood sought damages for the defendant’s drilling of a dry hole on land under lease to it. The acreage was within an existing drilling and spacing unit created by the Corporation Commission, but there had been no voluntary or compulsory pooling of the working interests. The defendants argued that the commission had exclusive jurisdiction to determine the rights and duties of the parties within a designated drilling and spacing unit. This would mean that the district court did have jurisdiction to hear this tort cause of action. The trial court agreed that the commission had exclusive jurisdiction to deal with unnecessary wells and the protection of the correlative rights of the separate working-interest owners within the drilling and spacing unit.

The Oklahoma Supreme Court reversed and found that there was nothing in the spacing unit statute that “grant[ed] to the Corporation Commission jurisdiction to hear and render judgment in an action for damages sounding in tort.”[[169]](#footnote-170)143

The term “correlative rights” embraces the relative rights of owners in a common source of supply to take ***oil*** or gas by legal operations that are limited by duties to the other owners (1) to not injure the common source of supply and (2) to not take an undue proportion of the ***oil*** and gas.[[170]](#footnote-171)144 There was no issue presented by the defendants as to these two points, and therefore it would have been ultra vires had the commission attempted to resolve the dispute between the parties. The court concluded: “It is well settled that the Corporation Commission is a tribunal of limited jurisdiction, and that it has only such jurisdiction and authority as is expressly conferred upon it by the constitution and statutes of this state.”[[171]](#footnote-172)145

Another case illustrating the public/private law problem is *State* ***Oil*** *& Gas Board v. Crane.*[[172]](#footnote-173)146 Getty was the lessee of Crane, who near the end the primary term applied to the ***Oil*** and Gas Board for a permit to drill a wildcat well on the drilling unit of 640 acres. The lease had a pooling clause and a savings provision allowing off-leasehold operations within a pooled area to continue the lease into the secondary term. The lessor and top lessee challenged the granting of the permit. The Mississippi Supreme Court found that the issue of whether the lessee had pooled in good faith was beyond the scope of the board’s powers. The only issue before the board was whether there was seismic or geological information to justify the location of the well where the permit allowed. The court found that there was substantial evidence in the record to support that decision. As to the last-minute decision to pool, that was essentially a private contractual issue, which the board could not consider because it had been given that power by the Legislature. The court concluded:

[The] Board is not the forum to decide any contest between Crane and Getty concerning Getty’s exercise of the pooling power. The question whether Getty dealt fairly with lessee [sic] Crane was not before the ***Oil*** and Gas Board because the Board could not determine that equitable question.[[173]](#footnote-174)147 The agency can exercise authority, which affects or even supervised private agreements, but it must have that authority delegated to it in its enabling statute.

A similar question was presented to the Kansas Supreme Court in *Cities Service Gas Co. v. Corporation Commission.*[[174]](#footnote-175)148 The Corporation Commission had authorized a waterflood project in a reservoir located above a gas storage reservoir operated by Cities Service. Cities Service, in appealing the order, did not directly challenge the permit but questioned whether parts of the order were ultra vires in that it dealt with some private contractual relationships between it and third parties. The court restated the general rule as follows:

The power is regulatory in nature, representative of the public interest, and is not intended to settle private controversy apart from the public interest. The corporation commission provides no forum for the litigation of purely private rights and liabilities.[[175]](#footnote-176)149

The court did not resolve the particular claims of *Cities Service* regarding these private rights because the controversies were of an undisclosed and future nature.

The public/private law distinction is not always easy to apply. In *Amarillo* ***Oil*** *Co. v. Energy Agri-Products, Inc.,*[[176]](#footnote-177)150 this difficulty was exemplified in a case involving phased ownership of ***oil*** and natural gas and how that ownership related to state statutes and Railroad Commission rules and orders. Amarillo ***Oil*** owned the gas rights to certain lands where Energy Agri-Products owned the ***oil*** rights. Amarillo ***Oil*** was producing natural gas from the Brown Dolomite formation. Energy drilled a well into the Granite Wash formation which the Commission classified as an ***oil*** well. The Energy well was then re-completed into the Brown Dolomite formation with the knowledge of the Commission.

Amarillo’s primary contention was that Energy was converting its gas because it was producing gas it owned from the Brown Dolomite formation. Amarillo sought both injunctive relief to prevent future production of Brown Dolomite gas, damages and a quiet title judgment stating that it owned all gas produced from that formation. The jury returned a verdict in favor of Energy and the Court of Appeals dismissed the cause on the theory that the trial court lacked jurisdiction because it was an impermissible collateral attack on Railroad Commission orders and permits.[[177]](#footnote-178)151

The Supreme Court correctly treated the basic issue as one involving private rights, namely the ownership of the ***oil*** and gas. The commission’s well determination process was not being attacked. The court concluded that the definitions of ***oil***, gas and casinghead gas would not depend on the particular well classification but on statutory definitions which tied the ownership to stratum and horizons and not well classifications.[[178]](#footnote-179)152 The court noted:

The cause is properly within the jurisdiction of the courts because the Railroad Commission has no authority to determine title to land or property rights.[[179]](#footnote-180)153

While the court is correct in concluding that the commission has no jurisdiction to resolve property rights disputes, that argument is an ultra vires claim and not a primary jurisdiction issue. Primary jurisdiction is properly invoked where both the agency and the courts have jurisdiction to resolve the dispute, but the court will retain jurisdiction over the matter pending a resolution of some aspect of the case that falls within the special competence of the agency. Therefore the court’s reference to the commission’s primary jurisdiction “ousting” the court from jurisdiction is mistaken.[[180]](#footnote-181)154 If the dispute is about private rights then the courts have exclusive jurisdiction in Texas because the Commission has not been delegated the authority to resolve private disputes.[[181]](#footnote-182)155

In *Arco* ***Oil*** *& Gas Co. v. Marshall*,[[182]](#footnote-183)156 Arco asserted that the Railroad Commission had primary and exclusive jurisdiction to resolve issues relating to its measurement of gas from the plaintiff’s leases. Relying on *Amarillo* ***Oil****,* the court focused on the private causes of action asserted by the plaintiff. The Commission would have no jurisdiction to resolve the breach of contract and fraud allegations. While the Commission would have concurrent jurisdiction to resolve some of the factual issues relating to the measurement requirements, the nature of the actions were inherently judicial in nature, allowing the trial court to exercise jurisdiction over the matter. Since the legislature had not given the Commission exclusive jurisdiction to resolve all gas measurement disputes, the trial court was within its broad discretion to hear the matter without sending it to the Commission for fact finding.

The rule that the Railroad Commission does not have the power to adjudicate private property rights was critical in two Texas Supreme Court opinions. In *FPL Farming, Ltd. v. Environmental Processing Systems, LC,*[[183]](#footnote-184)157 the court used the rule to conclude that a person injecting non-oilfield wastes into the ground pursuant to a government-issue permit was not insulated from common law liability for trespass or other causes of action brought by a neighboring owner who was claiming that the injected fluids crossed over the boundary line. In *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*,[[184]](#footnote-185)158 the court relied on the rule to overturn the Commission’s longstanding practice of issuing pipeline common carrier permits through the ministerial filling out of a perfunctory form. The court relied in part on *Amarillo* ***Oil*** to support its conclusion that the Commission permit decision clearly was not exclusive so that it may be reviewed by a court because of its impact on private property rights of those parties whose lands were going to be condemned by the pipeline.

Conservation agencies are sometimes placed in a conundrum because determinations necessary to assert jurisdiction over a particular project may require them to make findings based on “property” rules, even though the adjudication of title disputes is clearly beyond the authority of the agency. In *Southern Indiana Gas & Electric Co. (SIGECO) v. Indiana Farm Gas Production Co., Inc. (IFG)*,[[185]](#footnote-186)159 the Indiana Utility Regulatory Commission was faced with a challenge to a petition ordering a public utility to transport gas on behalf of IFG. Under the applicable statutory and regulatory provisions, IFG had to prove that it was the owner of an ***oil*** and gas lease, the leasehold estate was in Indiana, and the well was located on the lease.[[186]](#footnote-187)160 SIGECO challenged the pre-filed testimony, in large part because it felt that IFG’s well was producing gas from an adjacent SIGECO licensed gas storage facility. The Commission allegedly created a rebuttable presumption that gas obtained from a lease located in Indiana is Indiana-produced natural gas owned by the producer. Here, SIGECO argued that IFG did not own the gas it was producing.

The commission has no authority to adjudicate title disputes.[[187]](#footnote-188)161 The Commission’s use of a rebuttable presumption to resolve a question of private law was inappropriate and outside the “scope of delegated authority and expertise of the Commission.”[[188]](#footnote-189)162 Even though the statute required the Commission to determine that the applicant was the owner of a lease and the natural gas produced therefrom, it lacked authority to resolve disputes regarding ownership. Apparently, once a challenge is made to the applicant’s title or ownership of the gas to be transported, the Commission must step aside and allow the title dispute to be resolved in the court system. While this case did not involve merely a simple title dispute, it can certainly lead to substantial delays in the regulatory process any time a party can make something more than a frivolous attack on the applicant’s ownership interest.

The problem of determining whether an issue involves “property rights” can sometimes involve multiple mineral development. In *Simpson v. Ohio Division of Mines & Reclamation*,[[189]](#footnote-190)163 the owner of the ***oil*** and gas rights challenged a decision to issue a mining permit to the owner of the coal rights. The ***oil*** and gas owner argued that under the relevant statutes, the Division had failed to properly consider the impact of the coal development on his ability to develop the ***oil*** and gas. The mining permit statutes, however, did not specifically refer to the impact that the permit would have on other mineral development. Instead, it spoke to issues relating to reclamation and public health concerns. The court concluded that the ***oil*** and gas owner was making a property rights claim regarding the scope and extent of his ownership interest and how it might be affected by the mining operation. Those issues are outside the authority granted the Division in issuing coal mining permits.

In *CBC Holdings, LLC v. Dynatec Corp., USA*,[[190]](#footnote-191)164 a dispute as to who owned the right to produce coalbed methane was determined to be a matter subject to judicial, not administrative, determination. While West Virginia enacted a comprehensive statute dealing with the extraction of coalbed methane,[[191]](#footnote-192)165 it specifically eschewed giving the Division of ***Oil*** and Gas any power to resolve the ownership issue when there are competing claims. Because the Division lacked authority to resolve the ownership issue, the trial court should not have dismissed the declaratory judgment action seeking a finding as to the ownership or title issue.

In *Edwin Smith, LLC v. Clark*,[[192]](#footnote-193)166 the court noted that the New Mexico ***Oil*** Conservation Division and ***Oil*** Conservation Commission could look at title issues before issuing a permit to drill or pooling order to satisfy itself that the applicant had a bona fide claim to a property interest. The contestants then brought this quiet title action to determine the ownership interests in district court, which was the appropriate forum. On the issue of whether or not the trial court could order the suspension of proceeds, the court said that the OCD and OCC had that issue before it and because the contestant did not follow the administrative appeals process, the court lacked subject matter jurisdiction to deal with the suspension issue.[[193]](#footnote-194)167

Because the ownership of the right to produce ***oil*** or gas is typically a condition precedent to seeking a statutory pooling or unitization order, conservation agencies must at least determine whether or not the applicant has made a prima facie case as to the ownership of such an interest. In Virginia, due to issues relating to the ownership of coalbed methane, the Legislature has allowed the ***Oil*** and Gas Board to pool mineral interests while title issues are resolved in an appropriate judicial proceeding with the money being placed into escrow.[[194]](#footnote-195)168 Where parties are made subject to the statutory pooling order and elect to become a “deemed non-participating owner” that status will not be changed upon a judicial determination of ownership. Once the party makes an election choice that choice will be binding upon it for the duration of pooled unit production.[[195]](#footnote-196)169

Michigan follows the general rule that state agencies only derive their authority from express statutory grants and possess no common-law authority.[[196]](#footnote-197)170 Under the terms of the Michigan ***oil*** and gas conservation statute, however, the Public Service Commission was delegated broad authority to prevent waste and conserve natural gas.[[197]](#footnote-198)171 Such a broad delegation of power includes within it the power to regulate the use of artificial devices, such as compressors, in order to enhance production.[[198]](#footnote-199)172

Sometimes two different agencies are given somewhat overlapping powers. In other circumstances, one agency is empowered to act while another is not, even though the second agency may have an interest in the exercise of delegated power by the first. In *Merritt v. Corporation Commission,*[[199]](#footnote-200)173 the Corporation Commission entered an order authorizing the unit operator to have “free use of surface or subsurface water from the Unit area for Unit operations, including the right to drill water supply wells … .” The surface owners sought clarification of the order. The Corporation Commission said it included all water they could find and use. The Corporation Commission was not delegated the power to regulate the appropriation of fresh water in Oklahoma. That power had been delegated to the Oklahoma Water Resources Board.[[200]](#footnote-201)174 Without the statutory delegation, any action relating to the appropriation of fresh water was ultra vires.

Another excellent example of the potential for overlapping jurisdictional authority of two administrative agencies is illustrated in *Kerr-McGee Corp. v. Wyoming* ***Oil*** *& Gas Conservation Commission*.[[201]](#footnote-202)175 Under Wyoming law, hydrocarbon production resulting from the application of a tertiary production process is exempt from the 2% excise tax for a period of five years.[[202]](#footnote-203)176 Kerr-McGee, as operator of the North Buck Draw Dakota Unit, applied for the tax exemption in 1988 because it was planning to use a miscible gas injection process to increase the production of ***oil*** from the unit. The Commission issued the certification, triggering the tax exemption through the end of 1993.

In 1994, Kerr-McGee filed a second application to cover a different tertiary production process which would increase unit production by an additional 1.8 million barrels of ***oil***. This process would alternate injections of gas and water in what is called the WAG process. The Department of Revenue objected to the certification application, contending that the proposed change in process was not the initiation of a new process that would justify the granting of a tax exemption. After initially voting to certify the WAG process as a valid tertiary recovery process, the Commission changed its mind, based on its view that the excise tax exemption was a one-time five-year exemption that covered all production from tertiary recovery processes whether they were new and/or different from other processes applied to the field.

Here, the issue was straightforward. Since agencies only have those powers that are legislatively delegated to them,[[203]](#footnote-204)177 did the Commission or the Department of Revenue, acting through the State Board of Equalization, have the power to grant or deny the tax exemption? The court interpreted the grant of power to the Commission to entail the prevention of waste in the production of ***oil*** and gas. It likewise saw in the ***Oil*** and Gas Conservation Act no grant of power dealing with taxation or revenue matters, except for the millage tax that pays for the expenses of the Commission. The Department or Board, on the other hand, is given the general responsibility for dealing with taxation and revenue matters, including the valuation of ***oil*** and gas production. A specific statute gives the Board the authority to construe any statute relating to the assessment, levy, and collection of taxes.[[204]](#footnote-205)178

In denying the certification on revenue grounds, the Commission was acting ultra vires. The Commission’s decision to certify the process as a tertiary recovery process should have been based on whether it promoted conservation or prevented waste. Whether or not having been so certified, Kerr-McGee was entitled to the tax exemption, would be a matter that had to be resolved by the Department, when it attempted to collect the excise tax without the exemption.

In West Virginia jurisdiction to regulate ***oil*** and gas drilling operations depends on whether the operations involve a “shallow well” or a “deep well.”[[205]](#footnote-206)179 The Shallow Gas Review Board oversees shallow wells while the ***Oil*** and Gas Conservation Commission oversees deep wells.[[206]](#footnote-207)180 *In State of West Virginia ex rel. Blue Eagle Land, LLC v. West Virginia* ***Oil*** *and Gas Conservation Commission*,[[207]](#footnote-208)181 plaintiffs sought a discretionary and extraordinary writ of prohibition directly with the Supreme Court of Appeals challenging the Commission’s promulgation of rule relating to Marcellus Shale wells arguing that it was ultra vires because those wells were shallow wells for which the Commission had been given no power to regulate. The court did not resolve the ulra vires issues because it found that the writ of prohibition should not be granted since the plaintiffs could make the ultra vires argument in a direct appeal of the Commission’s rules.

In *Brumark Corp. v. Corporation Commission,*[[208]](#footnote-209)182 the petitioner was seeking to reverse a Commission order authorizing commingled production combined with the granting of a retroactive allowable. The Commission had waived its own rules which require that the commingling order precede the physical commingling. The court concluded that the Commission may waive its procedural rules, but it has no authority to waive its substantive rules which have the force and effect of law. The court interpreted the commingling rules as being substantive and not procedural and therefore the Commission’s order was ultra vires.[[209]](#footnote-210)183

Finally, the ultra vires doctrine may require the agency and the court to interpret statutory grants of authority. In addition, the agency is bound to follow both the statutory procedures and its own procedures in promulgating its rules or issuing its orders. Both issues were involved in *Larsen v.* ***Oil*** *and Gas Conservation Commission,*[[210]](#footnote-211)184 where the commission had issued an order for an 80-acre spacing unit. The commission, however, had failed to make certain administrative findings required of it by the statute relating to spacing units. Furthermore, the order was invalid because the agency considered economic waste as relevant to its decision to establish the unit. The Wyoming statute, however, only allowed physical waste to be considered by the agency, and therefore the agency’s actions relating to economic waste were ultra vires. The agency could not utilize criteria in its decision-making process that had not been authorized by legislative action.

An issue that arises at the federal level is when must an action be brought to review a federal rule. In *Legal Environmental Assistance Foundation, Inc. v. U.S. Environmental Protection Agency,*[[211]](#footnote-212)185 the EPA argued that the court lacked jurisdiction to hear a challenge to a rule which exempted from regulation under the Safe Drinking Water Act injection wells used in secondary or tertiary recovery projects because it was filed more than 45 days after the rule’s promulgation.[[212]](#footnote-213)186 While statutory time periods for review of agency rules are “jurisdictional in nature, and may not be enlarged or altered by the courts,”[[213]](#footnote-214)187 that ruling does not apply to ultra vires challenges to agency rules. If the agency has adopted an ultra vires rule, it is void ab initio and may be challenged outside of the limitations period that otherwise controls the filing of petitions seeking to review agency rules or regulations. Since the petitioners claimed that the agency’s exemption was in conflict with the clear language of the statute, the forty-five day limitations period would not control.

1. **Compulsory Pooling and Unitization by Agency Action**

In the years before compulsory unitization statutes were widely adopted, there were several cases that applied the ultra vires doctrine to invalidate state conservation agency efforts to compel unitization of ***oil*** and gas fields. A leading case that illustrates the doctrine is *Union Pacific Railroad v.* ***Oil*** *and Gas Conservation Commission.*[[214]](#footnote-215)188 The commission had issued an order that required almost all of the wells in the Rangeley Field to re-inject gas into the reservoir. The only other use of gas that was allowed was lease or plant use, or domestic or municipal use within the general area of the field. The entire area covered some 20,000 acres with about 478 producing wells located thereon. Daily production of 60,000 barrels of ***oil*** was quite common, although it was estimated that 20 mmcf of gas was being flared off daily. The commission alleged that its order was taken to prevent dissipation of reservoir energy under its general power to prevent underground waste.

The court rejected that argument, claiming that the true purpose of the no-flare order was to compel the unitization of the six major operators in the field, even though there was no compulsory unitization statute in Colorado at that time. While the commission was authorized to limit the flaring of gas in order to prevent waste, it could not completely prohibit flaring, which would go beyond the statutory authority delegated to the commission. Although one might argue that the no-flare orders were not ultra vires under the general delegation of power to promulgate rules to prevent waste, the court treated the order as an attempt to force-unitize the field for the purpose of compelling secondary recovery operations. In Texas, for example, the use of no-flare orders was generally perceived to accomplish the same goal as compulsory unitization, which is one reason why Texas has never had a compulsory unitization law.[[215]](#footnote-216)189

The *Union Pacific* rationale has been followed in Arkansas,[[216]](#footnote-217)190 California,[[217]](#footnote-218)191 and Texas.[[218]](#footnote-219)192

In New Mexico, the court allowed the ***Oil*** Conservation Commission to “encourage” voluntary unitization where the statute clearly did not provide authority to compel unitization. In *Santa Fe Exploration Co. v.* ***Oil*** *Conservation Commission,*[[219]](#footnote-220)193 the Commission held a hearing on a request for an unorthodox location for a well. It thereafter limited production from the reservoir and from each well, with a further penalty imposed on the well at the unorthodox location. The appellants claimed that the Commission was, in essence, forcing the parties to unitize the field for primary production purposes. Under the terms of the New Mexico Statutory Unitization Act,[[220]](#footnote-221)194 the Commission can only force unitize for secondary or tertiary recovery purposes. The court found that the actual orders fell within the broad grant of power to protect correlative rights and prevent waste. The Commission’s production penalty and the setting of allowables protected correlative rights. Even though the impact of the order might lead to a unitization of the field, the actual orders were not ultra vires.

The ultra vires doctrine has also been used to frustrate innovative or new techniques that are sometimes employed by state conservation agencies in order to achieve an important goal. In *Helmerich and Payne, Inc. v. Corporation Commission,*[[221]](#footnote-222)195 the Oklahoma Corporation Commission attempted to bring about a fieldwide compulsory unitization by simultaneously pooling nine 640-acre spacing units. The commission’s purpose in using this innovative method of unitization was to overcome “the practice of many owners of substantial lease blocks to refuse to join in a wildcat or exploratory well; but if the first well proves successful, then to come forward to participate actively in development wells offering much less risk.”[[222]](#footnote-223)196

The commission’s ostensible authority for this order was the compulsory pooling statute. But the court concluded that the statute merely authorized the commission to pool no more than individual 640-acre drilling units. The repeated use of the term “spacing unit” or “unit,” rather than “units” or “spacing units,” led the court to believe that the legislature only intended to give the commission authority to pool a single spacing unit comprised of no more than 640 acres. The court opined: “Not because the orders and findings of the regulatory body are innovative and fresh do we disapprove, but because we feel the regulatory statute is restrictive.”[[223]](#footnote-224)197

In other words, the attempt to pool and compel a drilling plan covering more than one spacing unit was ultra vires.

The basic ultra vires rule was stated to be:

This court has sustained the authority of the corporation commission to enforce the statutes of Oklahoma, … but this court cannot sustain the action of the corporation commission when it exercises authority not granted to it by those statutes.[[224]](#footnote-225)198

Professor Kuntz, in a thoughtful discussion of the case, noted:

A careful reading of 52 Okla. Stat. (1971) 87.1 leads to the conclusion that it was not enacted to solve the type of problem which LVO [the applicant for the order] faced. It was enacted to provide for the drilling of a well in a single unit when ownership is divided. The broad powers of the Commission to prevent waste and to protect correlative rights could conceivably authorize such an order, but the need for the order to achieve those objectives was not made clear.[[225]](#footnote-226)199

Since most state conservation statutes provide at some point that the agency has the power to adopt rules and regulations or issue orders in order to achieve the purposes of preventing waste, protecting correlative rights, and conserving ***oil*** and gas, some of the sting of the ultra vires doctrine may have been lost. Nonetheless, it is incumbent on state agencies to ensure that the underlying statutes provide some authority to engage in the actions they are pursuing and that the order or rule makes clear that source of statutory authority.

In ***Oil*** *Corp. v. Corporation Commission,*[[226]](#footnote-227)200 the Corporation Commission concluded that it did not have the power to include a 4/7 undivided interest in a unit because this would amount to a compulsory unitization of the remaining 3/7. The Kansas Supreme Court interpreted the conservation statutes as authorizing the inclusion of less than a full interest within the unitized area.

Similarly, in *Osborn v. Texas* ***Oil*** *& Gas Corp.,*[[227]](#footnote-228)201 a court reversed an agency decision denying that it had the power to act. In *Osborn,* a six-section fieldwide unit had been formed, and ***oil*** was being produced from the reservoir by a combination of reservoir gas pressure and water injection. TXO then drilled a new well outside the unit and began producing gas from the same reservoir. The unit operator went to the Corporation Commission to limit TXO’s production so as not to dissipate the reservoir energy needed for the enhanced ***oil*** production program. The Corporation Commission declined the invitation, claiming it did not have the power to limit production. The court found that within the context of the unitization statute, once the Corporation Commission found that waste was occurring, either inside or outside the unit, it could take such measures as were necessary to prevent the waste from continuing.

Some pre-1960 orders of the Commissioner of Conservation of Louisiana were found to be ultra vires by the court in *Eads Operating Co. v. Thompson.*[[228]](#footnote-229)202 The court was reviewing several orders that were issued prior to 1960 which purported to unitize on a reservoir-wide basis. At that time the relevant statute, Act 156 of 1940, limited the Commissioner to pooling acreage sufficient to constitute a drilling unit. Thus, the reservoir-wide orders had no legal effect and the affected royalty owners were entitled to leasehold, not unitized, royalties.

The one area where the courts have allowed a state conservation agency apparently to go beyond its statutory authority in the area of compulsory unitization, has been the equitable or judicial pooling doctrine in Mississippi.[[229]](#footnote-230)203 These cases recognized that where a state conservation agency used its spacing rules to accomplish pooling, the court would enforce the compulsory pooling even though the statute did not authorize the agency to compel interests to be pooled within a spacing unit.[[230]](#footnote-231)204

Where a state conservation agency issues a compulsory pooling order, the agency will normally have the power to require the unit operator to subject itself to an audit so that nonconsenting working interest owners can determine when payout and the risk penalty have been triggered.[[231]](#footnote-232)205

1. **Oklahoma’s Private/Public Law Distinction**

A problem that has plagued Oklahoma is a corollary to the ultra vires doctrine. Most state conservation agencies, such as the Oklahoma Corporation Commission, have not been delegated any power to adjudicate private disputes between parties that may in some way affect or be affected by a governmental rule, regulation, or order.[[232]](#footnote-233)206 The genesis of the problem in Oklahoma is seen in *Southern Union Production Co. v. Corporation Commission.*[[233]](#footnote-234)207 The commission had, upon the request of a party to a prior pooling order, terminated all rights of development created by the prior order because of the drilling of a dry hole. The commission had merely claimed that it was “interpreting” its prior order. The Oklahoma Supreme Court, in the first of several cryptic opinions, held that the commission’s second order was ultra vires because it was an attempt by the commission to ascertain the legal effect of a prior order. Those issues were only resolvable by the judiciary, since the commission had been given no power to adjudicate legal rights.

This somewhat simple proposition has led to a substantial amount of confusion. While few would argue that the commission has any jurisdiction over private legal matters, disputes arise as to what are purely private matters and what are public matters.[[234]](#footnote-235)208

The public rights-private rights distinction is discussed in *FourPoint Energy, LLC v. BCE-Mach II, LLC*.[[235]](#footnote-236)208.1 Here, the appeals court upheld a district court dismissal of a petition to change the operator of certain wells, ruling that the OCC had jurisdiction to determine the operator of wells; even if the petitioner had a claim of breach of a joint operating agreement, it was the OCC’s exclusive authority to name the operator. “Though JOAs, including ones with ‘successor operator provisions’ (like those at issue here), are used to supplement forced pooling orders … private contract provisions that purport to transfer Commission-conferred power cannot alter a unit operator’s legal status. Only an order of the Commission can.”[[236]](#footnote-237)208.2

In *Burmah* ***Oil*** *& Gas Co. v. Corporation Commission,*[[237]](#footnote-238)209 a landowner, across whose land a gas pipeline was located, sought an order from the commission requiring the pipeline to connect a gas line to his property. The commission clearly had the power to require pipelines to allow connections. Nonetheless, the court treated the issue as involving the enforcement of the statutory requirements. Enforcement powers, as opposed to rule-making and order-issuing powers, were not given to the commission. Therefore, the action was simply an attempt to enforce private rights, which was outside the grant of statutory authority to the commission.

Another case that illustrates the difficulty in applying the private/public law distinction is *Samson Resources Co. v. Corporation Commission.*[[238]](#footnote-239)210 Samson had received a farmout from Tenneco of a working interest that was later voluntarily pooled with other working-interest owners within a 640-acre drilling and spacing unit created by the commission. Tenneco then questioned Samson’s actions as the unit operator, in part due to the fact that Samson was also involved as an operator of a well that was an offset well to the unit where Tenneco had its interest. Tenneco sought an order from the commission designating Tenneco as the unit operator in order to protect its correlative rights. The commission agreed and issued its order naming Tenneco as the unit operator.

The Supreme Court, however, viewed the transaction as involving purely private rights. The commission had no jurisdiction to resolve issues relating to either the farmout agreement between Tenneco and Samson or the voluntary pooling agreement between working-interest owners. Those issues solely related to contractual claims between private litigants, with only a minor impact on the correlative rights of Tenneco. In denying the commission the power to protect correlative rights, the court concluded:

The recognized power and responsibility of the Commission to act to protect correlative rights must be interpreted in light of our holding in *Tenneco,* to be confined to situations in which a conflict exists which actually affects such rights within a common source of supply and thus affects the public interest in the protection of production from that source as a whole.[[239]](#footnote-240)211

The court interpreted the power granted to protect correlative rights in a narrow way, treating it as a power that could only be exercised when the predominate effect of the order would be to protect some identifiable public, not private interest. The court treated Tenneco’s petition as merely involving a claim that Samson was not operating in good faith and thus violating a private duty to operate the unit that was owed Tenneco, as the farmoutor, and the other working-interest owners. As such, Tenneco was not without a remedy, as the district court could hear Tenneco’s claim that Samson had breached a duty that was owed to Tenneco.[[240]](#footnote-241)212

In *Union Texas Petroleum Corp. v. Jackson*,[[241]](#footnote-242)213 several plaintiffs argued that the Commission had no jurisdiction to investigate the pollution of a municipality’s underground drinking water supply by saltwater intrusion from a unit’s secondary recovery operations. Plaintiffs’ assertion was that a common law nuisance action was alleged which is properly filed with the district court as a private law matter, not with the Commission.[[242]](#footnote-243)214 While saltwater pollution from a secondary recovery project may constitute a nuisance for which damages and injunctive relief may be available,[[243]](#footnote-244)215 it is also a violation of Corporation Commission rules which may be enforced by the Commission through appropriate fines and remediation orders. The causing of pollution, even if it is merely the failure to stop pollution from continuing, can serve as the basis for a Commission order.[[244]](#footnote-245)216

A particularly difficult question that may arise in the context of agency proceedings is whether an individual applicant or party before the agency is the owner of the interest that gives him or her standing to appear before the agency. As a general matter, conservation agencies do not have the power to determine title or ownership issues. Nonetheless, agencies must be able to ascertain whether a particular applicant is entitled to an order or permit.

In *Samson Resources Co. v. Corporation Commission,*[[245]](#footnote-246)217 Samson’s petition for increased density, increased allowables, and well location exception was challenged by. asserted that Samson was not the owner of the right to drill on the unit. The Administrative Law Judge (ALJ) concluded that Samson’s claim that it only needed to prove “color of title” in order to give it standing before the Commission was too lenient. The ALJ concluded that while the Commission lacks the power to determine title, it must, *ex necessitate,* be able to determine a “certain quantum of title” for it to carry out its conservation objectives. The court of appeals agreed and stated:

[T]he Corporation Commission has the power to receive evidence and determine whether an applicant owns minerals or has the right to drill in the subject unit. To hold that [the] Commission does not have the authority to determine whether the applicant has standing and hence whether it has jurisdiction, would infringe upon the powers constitutionally and statutorily conferred upon it.[[246]](#footnote-247)218

The court also agreed that Samson must prove that it owned the mineral interest or the right to drill, not merely that it had “color of title.” While the Commission’s decision would not be the equivalent of a quiet title action, the Commission was empowered to determine title for purposes of invoking its constitutional and statutory powers.[[247]](#footnote-248)219

Where private causes of action are alleged, but the factual predicate for those actions relate to Commission proceedings, the question arises as to where the action is to be filed. In *Arrowhead Energy, Inc. v. Baron Exploration Co.,*[[248]](#footnote-249)220 plaintiffs alleged that they had been injured by an erroneous filing made by the defendant which mis-designated the producing formation. Plaintiffs’ causes of action related to drainage and negligence per se. The defendant asserted that the case should have been filed with the Corporation Commission since it was the Commission which received the allegedly erroneous filing. The court disagreed, noting that the crux of the matter involved private rights between adjacent mineral owners. The Commission did not have to make any determination regarding the correlative rights of the parties. Instead, “[t]he district court has jurisdiction to determine whether the defendants have illegally drained the reservoir and whether, if so, a cause of action for damages has been stated by the plaintiffs.”[[249]](#footnote-250)221

Merely because there may be related private causes of action, the Corporation Commission is not ousted from its jurisdiction to resolve compulsory pooling matters. In *Chesapeake Operating, Inc. v. Burlington Resources* ***Oil*** *& Gas Co.*,[[250]](#footnote-251)222 Burlington argued that it was not bound by the Commission’s compulsory pooling order with attached conditions, because it was a party to a joint operating agreement (JOA) that contained different conditions. The conditions related to whether Burlington had to consent to participate in the drilling of a proposed well in order to be able to choose to participate in other wells within the area covered by the JOA. Under the terms of the JOA, a working interest owner could go non-consent as to one well without losing its power to consent to other projects. Under the terms of the Commission’s pooling order, a non-consent election barred the working interest owner from participating in later drilling projects. The court determined that the Commission clearly had jurisdiction to issue the compulsory pooling order under the statutory pooling provision. The Commission had before it a circumstance where one working interest owner had not agreed to pool its interest, one working interest owner had both proposed and then drilled a well, and there was a proper application to pool the interests in order to protect the correlative rights of the interest owners within the unit. The Commission, however, did not have jurisdiction to resolve the Burlington claim that the JOA precluded Chesapeake from seeking a compulsory pooling order because that issue clearly involved private law matters relating to the application and interpretation of a written contract.[[251]](#footnote-252)223

When the Corporation Commission has subject matter jurisdiction, a party may lose its ability to challenge personal jurisdiction over a title issue when the party elects to participate in the proceeding and asserts a claim to title. In *Harding & Shelton, Inc. v. Prospective Inv. & Trading Co.*,[[252]](#footnote-253)224 a party asserted it was not liable for costs on a well workover that was done pursuant to a forced pooling order entered by the Corporation Commission because the Commission lacked jurisdiction over the party. By voluntarily appearing in the Commission proceeding and electing to participate in the workover, the party had waived any objection to the Commission’s jurisdiction. Although the Commission had no power to adjudicate title, the party was estopped to assume a position contrary to its earlier position that it possessed title; indeed, the court found that the party had created a type of interest in the well by electing to participate.

In *Meinders v. Johnson*,[[253]](#footnote-254)225 the public law/private law distinction was analyzed in the context of a public nuisance claim filed by a surface owner asserting that various disposal techniques used over a 50 year period created a public nuisance. The present lessee argued that the Corporation Commission had exclusive jurisdiction to resolve the issues because the various lessees all complied with then-existing Commission regulations in their oilfield disposal practices. Starting from the premise that the Commission’s jurisdiction does not extend to private law matters,[[254]](#footnote-255)226 the court found that the trial court had jurisdiction to award nuisance or negligence damages. The more difficult issue was whether the court had the power to order the cleanup of contaminated oilfield sites.[[255]](#footnote-256)227 After looking at the Oklahoma statutes dealing with both public and private nuisances, the court concluded that the district court had concurrent jurisdiction to order abatements of such nuisances along with the Corporation Commission.[[256]](#footnote-257)228

The complexity of determining what is a public right versus what is a private right is reflected in *New Dominion, LLC v. Parks Family Co., LLC.*[[257]](#footnote-258)229 The Parks Family did not elect to participate in the drilling of a number of wells so under the compulsory pooling orders issued by the Corporation Commission they were paid $60.00/acre and given a 1/8th royalty. New Dominion files an action with the Commission to clarify the orders insofar as the calculation of the royalty is concerned. New Dominion wants to use the netback methodology to calculate royalties to arrive at a wellhead price, while the Parks Family claims that under Oklahoma law, the implied covenant to market requires the lessee to bear many post-production costs.[[258]](#footnote-259)230 The Commission determines, contrary to the ALJ Report, that the implied covenant to market arises from the ***oil*** and gas lease relationship which is not implicated by the Commission’s compulsory pooling order. The court rejects the Parks Family’s claim that the dispute relates to a public law matter relating to the implied covenant to market. The request to the Commission to clarify its order relating to its requirement to pay a royalty arises from the compulsory pooling statute which affects “the correlative rights of mineral owners” and is thus a public right issue.[[259]](#footnote-260)231 The Commission has exclusive jurisdiction to define and describe the rights of the parties bound by a compulsory pooling order.

In *Tucker v. Special Energy Corp.*,[[260]](#footnote-261)232 the issue was whether the plaintiff’s requested relief was a matter relating to title and ownership and thus outside the scope of a compulsory pooling order or a collateral attack on the order. The court interpreted the plaintiffs’ claims as seeking to clarify their ownership of a property interest that would entitle them to proceeds being held in escrow due to the ownership issues. Such claims are private law claims solely within the jurisdiction of the district court and not within the jurisdiction of the Commission.[[261]](#footnote-262)233 In defining what “public rights” entail, the court said: “Public rights are involved when ‘a unitization order, pooling order, or order setting the allowables on the unit’s well’ affect ‘the correlative rights of all mineral rights owners in [a] common source of supply [in a] unit.’ “[[262]](#footnote-263)234

In *Tucker v. New Dominion, L.L.C.*,[[263]](#footnote-264)235 the plaintiffs filed an action seeking to quiet title in some mineral interests and to receive an accounting from the pooled interests based on their asserted claims to ownership. Since the Corporation Commission has no jurisdiction to resolve title disputes, the matter was a private law matter that should be heard from the district court and not the Corporation Commission.

In *Optima* ***Oil*** *& Gas Co., LLC v. Mewbourne* ***Oil*** *Co.*,[[264]](#footnote-265)236 the court affirmed the dismissal of a tort action alleging that the defendants had tortiously interfered with its contracts and with its prospective business. The court determined that the underlying rationale of the claim was Mewbourne’s allegedly fraudulent statements made to the Oklahoma Corporation Commission in a forced pooling application. Because these statements constitute “intrinsic fraud,”[[265]](#footnote-266)237 the Oklahoma Corporation Commission has exclusive jurisdiction depriving the federal district court of subject matter jurisdiction.

In *Samson Resources Co. v. Newfield Exploration Mid-Continent, Inc.*,[[266]](#footnote-267)238 Samson tried to get around the public right/private right dichotomy by arguing that Newfield had committed “extrinsic fraud” in making a presentation to the Commission during a statutory pooling proceeding. While the Supreme Court stated that the Commission lacked jurisdiction to resolve Samson’s private law claims including fraud and intentional misrepresentation, it also stated that the validity of the statutory pooling order could not be challenged in the trial court because that would constitute a collateral attack on the Commission’s order. Thus, the pooling order may not be attacked on the basis of extrinsic fraud.[[267]](#footnote-268)239

In *Ladra v. New Dominion, LLC*,[[268]](#footnote-269)240 the Oklahoma Supreme Court reversed a trial court’s dismissal of a tort claim based upon earthquake damage allegedly caused by the defendant’s injection well operations concluding that the Corporation Commission lacked the authority to render a money judgment in a private tort action. Private tort actions are solely within the juridiction of the district courts and not the Corporation Commission.[[269]](#footnote-270)241

1. **Texas Railroad Commission and a Rule of Strict Construction**

Under varied circumstances, the Texas courts have taken a fairly strict view of the powers that have been delegated to the Railroad Commission by state statutes. We have seen in *Ryan Consolidated Petroleum*[[270]](#footnote-271)242 that the court refused to find a grant of power to the Railroad Commission to force-pool separate interests within a drilling unit. *Ryan* also followed the Oklahoma view that the commission was powerless to act “to determine property rights as between litigants.” Those matters have been left to the judicial system.[[271]](#footnote-272)243 The result of this strict construction rule has been the invalidation on ultra vires grounds of actions of the Railroad Commission relating to proration rules and orders, Rule 37 orders, and orders taken pursuant to the Mineral Interest Pooling Act.

A series of cases and intervening legislative action illustrate quite well how the ultra vires doctrine operates, and how the legislative branch can correct “erroneous” court decisions that have misinterpreted the true intent of the legislature. In *Railroad Commission v. Graford* ***Oil*** *Corp.,*[[272]](#footnote-273)244 a commission order was challenged that consolidated nine gas fields into one field for the purpose of applying a uniform spacing and proration rule throughout. The statute had authorized the commission to prorate the daily gas production from “each common reservoir” in order to prevent waste and protect correlative rights. While there was almost no disagreement that the order would prevent waste and protect correlative rights, several working-interest owners challenged the order under the ultra vires doctrine because more than one reservoir was included in the single order.

The issue was a matter of statutory interpretation. A liberal reading of the statute would define a common reservoir as one that “appears to be underlaid by a common pool or [by an] accumulation of ***oil*** and/or gas.”[[273]](#footnote-274)245 A narrow construction of the statute would use the modifier “common” in front of both “pool” and “accumulation,” thus suggesting that separate reservoirs were not a common reservoir, even where there was an accumulation of ***oil*** or gas. Without much explanation of why it chose the narrow interpretation, the court concluded that a common reservoir requires either a common pool or a common accumulation and that separate and distinct pools that are not connected cannot be the subject of a single proration order. This narrow interpretation of commission powers was also followed in *Gage v. Railroad Commission.*[[274]](#footnote-275)246

The state legislature responded to the *Graford* decision by enacting an amendment that gave the Railroad Commission the power to combine separate sources of supply under certain conditions, for the purpose of imposing a uniform proration order.[[275]](#footnote-276)247 Although it may at times seem inefficient, where acts of state conservation agencies are deemed to be ultra vires, the legislature is free to overturn that result by enacting legislation that clearly empowers the agency to engage in the previously ultra vires activities. That is what happened to *Gage* and *Graford,* although it took several years for the powers to be granted to the commission.

A 1991 decision of the Texas Supreme Court in *Pend Oreille* ***Oil*** *& Gas Co., Inc. v. Railroad Commission,*[[276]](#footnote-277)248 suggests that the legislative changes in response to *Graford* and *Gage* are to be interpreted broadly to provide the Railroad Commission with powers to deal with the issue of commingled reservoirs.[[277]](#footnote-278)249 In *Pend Oreille* the Railroad Commission granted an application force pooling two sands. The operator was commingling the two sands pursuant to a Commission granted exception to Rule 10, which would otherwise prohibit such commingling. The court concluded that the Commission’s interpretation of MIPA and the commingling statutes was “reasonable” and within the powers granted the Commission. Thus the pooling of the two sands by treating them as a “common reservoir” was not ultra vires.

*Pend Oreille* goes further than *Railroad Commission v. Bishop Petroleum, Inc.,*[[278]](#footnote-279)250 in allowing the Commission to force pool common reservoirs. There, in dictum, the court stated that the Commission could only pool multiple reservoirs which were in natural communication. Because there were no fact findings that supported Bishop’s assertion that the reservoirs were not in natural communication, the court upheld the Commission’s order. In fact, there were no fact findings that the reservoirs were communicating naturally or artificially. The fact that the Supreme Court in *Pend Oreille* noted that language from the Court of Appeals decision in *Bishop Petroleum* was too narrow a limitation on the Commission’s authority to force pool common reservoirs when there is commingling suggests that as long as the Commission’s decision is a reasonable interpretation of the appropriate MIPA provisions the ultra vires argument will fail.

The trend away from the strict constructionist view of legislative grants of authority to the Railroad Commission is continued in *Seagull Energy E & P, Inc. v. Railroad Commission*.[[279]](#footnote-280)251 That case concerns the same legislative amendments that followed *Gage* and *Graford* dealing with the Commission’s authority to regulate commingled production and/or reservoirs but in a different factual context than *Pend Oreille*. As noted by the court, the issue was one of first impression in Texas. Seagull was producing from a well on a 115.64-acre lease in the Waskom (Cotton Valley) Field. The well was producing from a single reservoir, the “C,” even though there were other reservoirs from which gas could be produced.[[280]](#footnote-281)252 Seagull opted to shut in the well producing from the C Sands in order to drill a second well that would hopefully produce from multiple sands. The shut in was required because the Waskom Field Rules only allowed one well per 160 acres. The second well was completed, but for reasons not explained in the opinion it was productive from two new reservoirs, but not the C Sands reservoir. Seagull then applied to the Commission for a spacing and density exception under Rule 37 to allow it to produce from both wells since they would be producing from separate reservoirs. The Commission denied the request.

The key issue involved the Commission’s authority to regulate production once it determined that production was commingled from several different common reservoirs under the 1981 statutory amendment.[[281]](#footnote-282)253 It was Seagull’s position that since the Commission had to allow a “first well” to be drilled to any common source of supply or reservoir and that it had to provide for a “living allowable” once that first well was drilled, the Commission had to permit production from the two “first wells” since they were producing from different reservoirs.[[282]](#footnote-283)254 Under the statutes in force at the time of *Gage* and *Graford*, the court admitted that each separate reservoir or sand had to be individually treated for regulatory purposes. But the two legislative amendments following those cases added to the Commission’s regulatory powers. The court observed:

When a permit for commingled production has been issued, the Commission has authority to regulate that production. The 1979 and 1981 amendments confer authority on the Commission in two steps. Under the 1979 amendment, the Commission has authority to issue a permit for commingled production when it will promote conservation, avoid waste, or protect correlative rights. Tex. Nat. Res. Code Ann. § 86.012(b). Under the 1981 amendment, the commission has the power to “regulate” the commingled production from disconnected reservoirs “as if they were a common reservoir.” *Id.* § 86.081(b). As in *Pend Oreille*, the technical question of whether these three gas accumulations *actually* constitute a natural common reservoir is not dispositive because, upon granting a permit for commingled production, the Commission gained the authority to regulate production from the Taylor, Stroud, and C sands, *as if* they were a common reservoir.[[283]](#footnote-284)255

The issue became not whether the Commission had proven by substantial evidence that the three reservoirs were in natural communication with each other, but that for purposes of the well drilling permit, the Commission had classified that permit as one involving commingled production. The power to promote conservation, prevent waste, and protect correlative rights attached at the moment the Commission issued the well drilling permit with the finding of commingled production. The decision not to allow the re-opening of the shut-in well would only be *ultra vires*, according to the court, if it restricted *Pend Oreille* to situations involving compulsory pooling and/or prorationing.[[284]](#footnote-285)256 The court reinforced *Pend Oreille*’s broad interpretation of the statutory amendments as they affected Commission authority to act. The legislature intended the Commission to take steps to achieve the regulatory objectives when it came to all matters relating to commingled production. The regulation of production based on a finding that such regulation would prevent waste and conserve the natural gas resource clearly embraced the power to prevent production from two different wells simultaneously, even if the wells were producing from separate reservoirs, so long as the producer could not show that hydrocarbons were being drained from the leasehold estate.

It is clear that *Pend Oreille*, as expanded by *Seagull Energy*, marks what may be the end to an era of narrow interpretations of Commission authority. The legislative amendments that were enacted in response to *Gage* and *Graford* are not so clear in granting broad powers to the Commission as the courts hold. Nonetheless, Texas courts are now entering what is probably the mainstream of state court jurisprudence regarding statutory grants of authority to state conservation agencies by taking a more liberal, rather than a more literal, approach to such grants of authority.

The Texas Supreme Court affirmed the Court of Appeals decision in *Seagull Energy*.[[285]](#footnote-286)257 Adding little to the Court of Appeals analysis of *Pend Oreille* except for a 2005 amendment to the statute dealing with commingling authority, the Supreme Court ruled that the Commission orders were well within the authority granted them, both before and after the 2005 amendment.

Decisions, however, that antedate *Pend Oreille,* as they interpret and apply the Mineral Interest Pooling Act (MIPA),[[286]](#footnote-287)258 are more consistent with the earlier narrow or literal interpretation approach for statutory grants of authority to the Commission. The issue of ultra vires action was first posed in a series of cases defining who can seek a compulsory pooling order under MIPA.[[287]](#footnote-288)259 In *Railroad Commission v. Coleman,*[[288]](#footnote-289)260 the court interpreted MIPA as only authorizing those who had the right to drill, or those who had drilled a well to force-pool the separate interests within the spacing unit. An order of the Railroad Commission force-pooling interests upon the petition of someone who did not possess the right to drill was ultra vires. The statute was further constricted in *Northwest* ***Oil*** *Co. v. Railroad Commission,*[[289]](#footnote-290)261 where the court found that not only must the applicant have the right to drill, but they must have actually drilled or proposed to drill a well before the Railroad Commission would have the power to issue a compulsory pooling order.

A similar narrow interpretation of the so-called muscle-in provisions of MIPA was adopted in *Broussard v. Texaco, Inc.*[[290]](#footnote-291)262 There the lessee sought a compulsory pooling order including portions of two adjoining leaseholds, each of which was larger than the standard proration unit for the field. The court interpreted the “muscle-in” provisions to apply only for the benefit of small tract owners who might otherwise be left out of a standard proration unit by large tract owners who controlled enough acreage to have a unit without pooling. In this case, a lessee with a large lease had deliberately set up proration units in order to leave a small part of its leasehold outside of any unit. The court determined that it was not the intent of the legislature to allow these “leftover” small tracts to “muscle in” to larger adjacent tracts. Thus, a commission order allowing such a compulsory pooling would be ultra vires.[[291]](#footnote-292)263

As with *Graford* and *Gage,* the legislature was free to change the *Coleman* result by broadening the definition of who could seek a pooling order, which would broaden the powers of the Railroad Commission to issue compulsory pooling orders. This was accomplished in 1971, when the statute was amended to authorize the owners of any interest in an existing or proposed proration unit to apply for a compulsory pooling order.[[292]](#footnote-293)264

The limiting interpretations of Railroad Commission enabling statutes is also accompanied by cases that emphasize the private/public law distinction that has caused severe problems in Oklahoma. Although the distinction has arisen in several cases, Texas does not appear to have had great difficulty in drawing the line between private and public law matters.

One of the clearly private law areas that the Railroad Commission cannot deal with is the area of adjudicating rights and title of owners to mineral interests. That is clearly a judicial function. But the mere fact that title is in dispute does not prevent the Railroad Commission from issuing permits to drill wells.[[293]](#footnote-294)265 The Railroad Commission can rely on good-faith assertions of title, but this is as far as the determination goes. It cannot adjudicate title but can determine, for well permit purposes only, whether the applicant is believed to possess the right to drill.

The Texas Supreme Court developed the “good faith claim” doctrine to deal with the conundrum that the Railroad Commission should not be issuing permits to those who do not have the right to drill or to dispose of salt water while acknowledging the fact that the Commission lacks the power to adjudicate titles. In *Magnolia Petroleum Co. v. Railroad Comm’n*,[[294]](#footnote-295)266 the court noted:

… the commission’s authority to grant permits is negative in nature-the commission, through a permit, merely removes a barrier the conservation laws otherwise would impose on use of property, but does not determine or affirmatively create title or a right of possession in the property itself.[[295]](#footnote-296)267

The permit holder is not insulated from a trespass to try title action where the trial court will resolve the disputed title questions and award damages should the Commission permit holder be found not to have actual, as opposed to a good faith claim to, title.

These issues arose in *Rosenthal v. Railroad Commission of Texas*[[296]](#footnote-297)268 in the context of a surface owner receiving from the Commission a permit to operate a commercial salt water disposal well where the severed mineral owner opposed the issuance of the permit. The mineral owner challenged the permit decision based on the unsettled question of which party owns the right to the pore space beneath the surface when there is a severance.[[297]](#footnote-298)269 The court explores at length the *Magnolia Petroleum* opinion and emphasizes that the Commission’s permit is merely the removal of a statutory impediment to the underground disposal of salt water and not an affirmative statement as to the underlying title or ownership issue. The Commission has no authority to determine whether the surface and/or mineral owner have the right to use the underground pore space where there are apparently no recoverable hydrocarbons. Thus the surface owner’s complaint as to title should be the subject of a trespass to try title action and not an appeal of the Commission order.

The trend towards a more common-sense approach to interpreting grants of power to the Railroad Commission is exemplified in *SWEPI, L.P. v. Railroad Commission of Texas*.[[298]](#footnote-299)270 SWEPI was claiming that the Commission’s adoption of Rule 76 and approval of two contiguous tracts of land as “qualified subdivisions,” whereby surface locations for ***oil*** and gas activities would be limited, was ultra vires. The court found that the Commission’s interpretation of the statutory enabling act “conforms to the common meaning of the language in both the statute and the rule.”[[299]](#footnote-300)271 The language of the enabling act does not restrict the Commission’s power to approve two adjacent tracts of land each containing the statutory maximum acreage. There is nothing in the statutory language of Chapter 92 of the Natural Resources Code suggesting that the Commission’s power is restricted to approving only one “qualified subdivision” containing the maximum amount of acreage. Likewise, the Commission’s determination that the proposed use of the subdivided land for landfill purposes fell within the statutory term “industrial” uses for which a party could seek “qualified subdivision” approval was consistent with the plain meaning of the term.[[300]](#footnote-301)272

In *Superior* ***Oil*** *Co. v. Railroad Commission,*[[301]](#footnote-302)273 the Railroad Commission refused to grant a Rule 37 exception permit application. In a July 1, 1957, memorandum, the Railroad Commission had established both statewide exceptions to Rule 37 and a density policy for East Texas Field applications. The density policy was one well per five acres. For fields developed prior to 1957 in excess of the five-acre density limit, a new drilling permit would only be granted for a substitute well for an existing well that encountered mechanical difficulties. In addition, the substitute well had to be located within 50 feet of the existing, malfunctioning well.

Superior had 21 wells on a tract it claimed was either 99.5 or 100 acres. In 1973, one well watered out and Superior sought to drill a new well under the substitute well policy. There was opposition to the application, and Superior had a new survey performed that showed that it controlled a 106.48-acre tract. Superior then filed a new application to be allowed an additional well under the five-acre density policy. The Railroad Commission could not adjudicate Superior’s right of title to the additional 6 to 7 acres, but it did grant the well permit on the substitute well policy. The Railroad Commission asserted that it could not issue a new well permit since it could not adjudicate title claims. The Court of Appeals affirmed, but found that the Railroad Commission’s assertion of no power was mistaken. It agreed with the general proposition that the Railroad Commission lacked authority to determine title, but the issue before the Railroad Commission was not title but the right to get a well permit under the five-acre density policy. There was, however, substantial evidence in the record to support the conclusion that Superior was not asserting its right to drill in good faith, since the survey did not utilize recognized standards for ascertaining known boundaries. The court stated:

the Railroad Commission should not do the useless thing of granting a permit to one who does not claim the property in good faith. The Commission should deny the permit if it does not reasonably appear to it that the applicant has a good faith claim to the property.[[302]](#footnote-303)274

Thus, it would not have been an ultra vires action for the Railroad Commission to have issued the well permit based on the five-acre density drilling policy if they had determined that Superior had made a good-faith assertion of title to the additional acreage.

*Superior* ***Oil*** is an exception to the rule of narrow interpretation that is otherwise applied by Texas courts. While admitting the general rule that the Railroad Commission is not empowered to settle purely private law matters, the court in *Superior* ***Oil*** suggests that the Railroad Commission has more power than it asserted. The public law issue of whether or not to drill a well prevailed over the private law title action, giving the Railroad Commission the power to resolve the first issue, even though it was in reality dependent on the resolution of the second, private law issue.

Further exploration of the public/private law conundrum was made in *Amerada Petroleum Corp. v. Railroad Commission.*[[303]](#footnote-304)275 The Railroad Commission had granted a permit to L & G ***Oil*** to plug back and redrill five illegally deviated wells. Amerada appealed the order, claiming the permit violated a 1963 settlement contract between L & G and Amerada that had been executed during a recess of a public hearing on a prior application to redrill the wells. They also alleged that it violated the terms of a 1948 judgment. Insofar as the contract claims were concerned, the court said: “The Commission is an administrative body and cannot adjudicate contract rights.”[[304]](#footnote-305)276

In addition to contract rights, which are outside the scope of agency powers, it is also a general rule that agencies cannot decide issues relating to title and ownership of land. Nonetheless, title issues are normally relevant in many areas of agency action. In *Sun* ***Oil*** *Co. v. Railroad Commission,*[[305]](#footnote-306)277 the Railroad Commission assigned 60 productive acres for the purpose of calculating allowables, acting on the operator’s good-faith claim to that amount of acreage under his lease. Adjacent operators opposed, arguing that the lease acreage could not be more than 16 productive acres. The court sustained the Railroad Commission’s order, stating there was sufficient evidence in the record to support the operator’s claim to the 60-productive acre figure. A good-faith claim is all that is required as a basis for proceeding with the conservation powers delegated to the Railroad Commission to set the proper allowables. In dealing with the public/private law distinction the court said:

The function of the Railroad Commission in this connection is to administer the conservation laws. When it grants a permit to drill a well it does not undertake to adjudicate questions of title or rights of possession. These questions must be settled in the courts. When the permit is granted, the permittee may still have no such title as will authorize him to drill on the land … . It grants no affirmative rights to the permittee to occupy the property, and therefore would not cloud his adversary’s title. It merely removes the conservation laws and regulations as a bar to drilling the well, and leaves the permittee to his rights at common law. Where there is a dispute as to those rights, it must be settled in court. The permit may thus be perfectly valid, so far as the conservation laws are concerned, and yet the permittee’s right to drill under it may depend upon his establishing title in a suit at law … . If the applicant makes a reasonably satisfactory showing of a good faith claim of ownership in the property, the mere fact that another in good faith disputes his title is not alone sufficient to defeat his right to the permit;[[306]](#footnote-307)278

An interesting public/private law question was decided in *Estate of Grimes v. Dorchester Gas Producing Co.*[[307]](#footnote-308)279 The plaintiffs were claiming that the lessee had engaged in an invalid pooling of interests beyond the scope of the pooling clause because he included non-contiguous acreage that was separated by a railroad right-of-way. They also alleged that the lessee had made misrepresentations to the Railroad Commission in order to get the necessary permits to drill and produce. The plaintiffs had signed an agreement in 1940, sometime after the misrepresentations were made, affirming and ratifying the prior lease. This agreement specifically referred to the acreage that was pooled, which showed it was not contiguous.

The court found that even if the misrepresentations of the lessee or his predecessor had caused the Railroad Commission to illegally issue the permits and allow production, the actions would not affect the prior contractual agreements between the parties. The Railroad Commission has no authority to determine the contractual rights of the parties that were set out in the 1940 agreement. The court said:

Since the actions of the Railroad Commission of themselves cannot be determinative of contractual questions between the parties … , it follows that the representations made to the Railroad Commission in obtaining drilling permits would not invalidate the underlying lease. Assuming, arguendo, … misrepresentations were made by the operator to the Railroad Commission to obtain drilling permits, that action would be exclusively punishable under the criminal enforcement provisions of the Texas Natural Resources Code.[[308]](#footnote-309)280

The Texas approach requires the legislature to carefully define the powers they delegate to the Railroad Commission. Where the courts interpret existing statutory authority as not being broad enough to cover a particular Railroad Commission action, history has suggested that the legislature will enact statutes to overturn the ultra vires argument by authorizing the actions previously held invalid.

1. **Environmental Protection**

There is a growing tendency of courts to find the acts of state conservation agencies to be within the scope of delegated powers when the agency is taking action to protect the environment. The term “prevention of waste” has been construed to include matters going beyond the traditional notions of the conservation of ***oil*** and gas.

A leading case is *Gulf* ***Oil*** *Corp. v. Wyoming* ***Oil*** *and Gas Conservation Commission,*[[309]](#footnote-310)281 where the commission imposed on a well permit an access condition requiring the operator not to use his preferred route to reach the well site.[[310]](#footnote-311)282 The statute dealing with the well permit suggested that the only considerations that were relevant related to preventing waste or conserving ***oil*** and gas. There were no powers granted to the commission to deal with environmental matters. Yet the commission had adopted a rule relating to environmental impacts of well drilling. The majority ignored the issue entirely, but the dissenting judges concluded that the action adopting the rule and imposing the access condition merely on environmental grounds was ultra vires.[[311]](#footnote-312)283

A similar result was reached in *Michigan* ***Oil*** *Co. v. Natural Resources Commission.*[[312]](#footnote-313)284 The commission had upheld the state supervisor’s denial of a drilling permit on state land even though the applicant had leased the state land for ***oil*** and gas development. The reason given for the denial was the impact on the wildlife near the drillsite. The court found that the commission’s delegation of authority to prevent waste included not only the waste of ***oil*** and gas but the waste or destruction of the environment, including the land and its flora and fauna.[[313]](#footnote-314)285

A concern for the environment may also support an agency’s exercise of power requiring information from ***oil*** and gas operators within the state. In *Hartman v. Corporation Commission,*[[314]](#footnote-315)286 the Kansas Supreme Court upheld the authority of the Corporation Commission to require operators to provide to the state geological survey, well logs, samples, and other information. The authority was found in the general delegation of authority to the Corporation Commission to make such rules, regulations, and orders as may be necessary for the prevention of waste and to carry out the purposes of the conservation act. The court stated:

The foregoing statutes provide broad authority and direction to the corporation commission to prevent waste, including economic waste, in the production of ***oil*** and gas, to conserve these natural resources and to protect usable water as it may be affected by drilling for ***oil*** and gas. It has specific duties with respect to drilling, placement or pipe and abandonment and plugging of wells. To discharge all these responsibilities effectively the legislature must have been aware the commission would need certain information as to the holes drilled.[[315]](#footnote-316)287

The Oklahoma Corporation Commission, at the request of its Conservation Attorney, investigated the pollution of underground aquifers, including those providing the sole source of drinking water for a municipality. In *Union Texas Petroleum Corp. v. Jackson*,[[316]](#footnote-317)288 the Commission concluded that the unit had injected saltwater in greater quantities and with greater pressure than that authorized by Commission rules. Thus, the unit operation was found to have violated Commission rules. Importantly, the court also found that even if the current unit operator has taken remedial steps, such as lessening the pressure and the volume of the injections, it would still be liable for violating Commission rules prohibiting saltwater pollution of underground aquifers because the prior injections were still causing the pollution and the unit operator was doing nothing to prevent that continuing harm.[[317]](#footnote-318)289

In a series of cases, the courts invalidated several different attempts by the Florida Department of Environmental Protection to impose security and bonding requirements for offshore drilling that were in addition to the statutorily mandated payments made into the Petroleum Exploration and Production Trust Fund.[[318]](#footnote-319)290 Initially, the court reversed an order of the Department of Environmental Protection that refused to grant an exploratory well permit until the additional bond and security was filed. Thereafter, the Board of Trustees of the Internal Improvement Trust Fund imposed a bonding requirement as a condition precedent to receiving a well permit.[[319]](#footnote-320)291 The court found this bond requirement was an impairment of the obligation of contract because it was being imposed upon existing state ***oil*** and gas lessees.[[320]](#footnote-321)292 The court expressed a wariness about the state’s attempting to alter at a later date a contract it had executed in a way that benefited the state. The state argued that a leasehold provision requiring the lessee to secure all necessary permits did not save the bonding requirement of the Internal Improvement Trust Fund since that Fund was not the permit-issuing agency. That agency was the Department of Environmental Protection, which had been prohibited by an earlier decision from imposing additional bonding requirements based on an ultra vires theory.[[321]](#footnote-322)293 The court did not discuss the governmental permits requirement which ostensibly reflects an agreement on behalf of the governmental permittee to be subject to later changes in regulations and/or requirements before the drilling permit is issued.[[322]](#footnote-323)294

In *Hawley v. Board of* ***Oil*** *& Gas Conservation*,[[323]](#footnote-324)295 an ***oil*** and gas operator challenged the Board’s issuance of a shut-in order after the operator had failed to bring his operations into compliance with various Board rules and orders relating to leaks and spills. The Board did not make a finding that this was an emergency but nonetheless ordered all of the operator’s wells to be shut-in. The operator asserted that the Board did not have the statutory authority to issue such an order in the absence of an emergency. The Board asserted that it had “necessary and implicit” authority under its statutory charge to prevent contamination, environmental damage and waste to issue such an order without seeking a judicial injunction. The court resolved this *ultra vires* challenge without getting to the Board’s implicit authority argument. Instead it looked to a specific statutory provision which authorizes the Board to issue an order “assessing a civil penalty” or “requiring compliance with this chapter or a rule or order … .”[[324]](#footnote-325)296 This provision authorizing the Board to issue an order seeking compliance with a prior order clearly gives the Board the power to directly shut-in wells without having to seek a judicial injunction. The Board has the option to either directly order the shut-in or to seek judicial enforcement of a prior Board order which has not been complied with.

1. **Money Awards**

In the absence of express authority to issue money awards to parties, most state conservation agencies do not possess an implied power. Those are normally considered private law matters. Of course, this does not apply to civil enforcement authority, which may carry with it administrative fines and penalties for violations of rules.[[325]](#footnote-326)296.1 One exception to the general rule that courts will not imply the power to grant monetary awards from one private party payable to another private party is *Bennion v. Utah State Board of* ***Oil****, Gas & Mining*.[[326]](#footnote-327)297 The board was merely authorized by statute to enforce its orders, rules, and regulations.[[327]](#footnote-328)298 Nonetheless, the court found that monetary awards for underpayment of royalty owed to a non-consenting unleased owner, whose interest was force-pooled, was within the powers of the board.

To contrast with *Bennion,* the Oklahoma Corporation Commission may determine the reasonableness of costs, but the Corporation Commission lacks the power to grant coercive or monetary relief. In *Lear Petroleum Corp. v. Seneca* ***Oil*** *Co.,*[[328]](#footnote-329)299 the dispute arose from a pooling order designating Lear as the operator. Lear billed the other parties on a monthly basis for their share of the costs, rather than demanding up-front payments in cash. A dispute arose as to the proper costs, after the actual costs exceeded the cost estimate that accompanied the pooling order. Lear asked the Corporation Commission for a determination of the reasonable costs and an adjudication of the rights of the parties. The Corporation Commission determined that three items were not properly chargeable and ordered them deleted from the bills. Lear was instructed to send an amended bill, and the other working-interest owners were given ten days to pay. The court concluded that the order was not a money judgment, which would have been ultra vires, but was instead a proper exercise of the authority conferred by the statute to determine costs and specify a time for payment. There was no coercive relief, nor was there a money judgment issued.

The inability of the Oklahoma Corporation Commission to order money damages because of lack of delegated power also impacts the public rights/private rights determination. Obviously if the suit is one seeking money damages the Commission does not have jurisdiction to hear the case. Therefore under the public rights/private rights test the issue involves private rights and the district courts have exclusive jurisdiction. While in theory a distinct line may be possible, in reality the line is quite fuzzy since the private litigation may have direct impacts on public rights matters.

In *Fent v. Oklahoma Natural Gas Co.*,[[329]](#footnote-330)300 plaintiffs reported a gas leak from a meter in their basement. ONG relocated the meter from the basement to their easement off of the Fent property. ONG denied ownership of the pipeline or the easement from its trunkline into the Fent household. The Fents were forced to pay for repairs left by the ONG dismantling of the gas meter. They filed an action in District Court seeking damages for the injuries caused by ONG’s activities. The District Court determined that the Corporation Commission had exclusive jurisdiction because the dispute was one involving a regulated public utility and its patron.[[330]](#footnote-331)301 The Court of Appeals reversed using the simplistic approach that the action sounded in tort and contract and sought money damages. As such the Commission had no power to act. The majority ignored, however, the power of the Commission to regulate the relationship between a public utility and a patron. As the dissent points out a determination of liability will entail a finding of who is responsible for the easement between the trunkline and the house. Such matters are normally left to the Commission according to the dissent.[[331]](#footnote-332)302 The dissent would have the Commission in this case determine whether ONG was responsible for the pipeline and if so the Commission would order them to remedy the problem. If they failed to do so, then a District Court action would be appropriate. The majority, however, felt that a Commission rule made it obvious that responsibility for the pipeline into the house was ONG’s and therefore the Commission had nothing to determine. If the majority’s holding is limited because of the existing rule it makes sense. If the majority is suggesting a more general rule that anyone can avoid Commission action by merely praying for money damages, more litigation lies ahead on drawing the line between private and public rights.

The difference between ascertaining costs and awarding money damages was also highlighted in *Desormeaux v. Inexco* ***Oil*** *Co.*[[332]](#footnote-333)303 This was a dispute over a landowner’s obligation to share in certain costs and the production from a well that had been included in a unit covering part of the landowner’s holdings. The court ruled that the matter was properly before the trial court, rather than the Commissioner of Conservation.[[333]](#footnote-334)304 It was a purely private matter relating to a contractual allocation of the costs that were to be reviewed by the commissioner for their reasonableness. The commissioner had no power to render a money judgment against any party, and thus the district court was the proper forum to resolve the issues between these parties.

Notwithstanding the broad grant of regulatory authority to the New Mexico ***Oil*** Conservation Commission, the court in *Marbob* ***Oil*** *& Gas Corp. v. New Mexico* ***Oil*** *Conservation Commission*,[[334]](#footnote-335)305 found that a rule giving to the OCC and the ***Oil*** Conservation Division the power to impose civil penalties was ultra vires. In construing the enabling act the court had to balance the somewhat conflicting instructions given by the Legislature which in one section authorizes the Attorney General to bring suit to assess the penalties contained in the ***oil*** and gas conservation act with the other sections that give the OCC and OCD broad powers to enforce the act.[[335]](#footnote-336)306 The court applied a plain meaning approach to the specific section authorizing the Attorney General to bring suits to impose penalties and concluded that the OCC and OCD had no power to administratively impose such penalties through their promulgated rule.

1. **Well Plugging**

Several cases have dealt with the ultra vires issue as it relates to agency authority to order abandoned wells plugged or have certain named parties pay for the costs of plugging. In *Minshall v. Corporation Commission,*[[336]](#footnote-337)307 for example, the Oklahoma Supreme Court took a page out of the Texas narrow interpretation rule and found that a statute authorizing the Corporation Commission to require the plugging of a well did not extend to the re-plugging of a well. The statute was relatively broadly written and clearly designed to protect the environment and the public safety. As such, the narrow or constricted view seems to be at odds with the environmental cases discussed in § 24.02[3][f] above and inordinately obtuse.

Several years later, the court returned to the issue of re-plugging in *Currey v. Corporation Commission*.[[337]](#footnote-338)308 In the interim, the legislature had enacted amendments to the statute that broadened the delegation of powers to the Corporation Commission to deal with all aspects of abandoned wells. Thus, the court found that *Minshall* was no longer applicable and dismissed the ultra vires challenge.[[338]](#footnote-339)309 The court’s movement to a more reasonable reading of the well plugging statute can also be seen in *Amax Petroleum Corp. v. Corporation Commission*.[[339]](#footnote-340)310 A well operator sought to avoid its plugging responsibilities by assigning its lease back to the original lessors. The operator then claimed that the statutory duties were transferred and it was no longer responsible. In a fairly broad interpretation of the statute, the court rejected the challenge and imposed the costs of plugging the four wells on the original operator.[[340]](#footnote-341)311

In *Hoover v. Boone Operating, Inc.*,[[341]](#footnote-342)312 the court was faced with another ultra vires attack on a Corporation Commission well-plugging order. In *Hoover*, the surface owner and a salvager who had a contract with the surface owner to remove the casing from an allegedly abandoned well challenged the Commission’s order making them financially liable for the plugging and abandonment costs. While noting that *Minshall* had been limited by *Curry*, so that a strict or narrow interpretation of the Commission’s broad powers to prevent pollution by regulating the plugging and abandonment process was no longer good law, the court did find that because the Commission had not adopted a formal rule expanding plugging and abandonment liability beyond owners and operators, it could not impose such liability.[[342]](#footnote-343)313

The issue of who has the statutory duty to plug has also arisen under the Texas well plugging provisions. In *Railroad Commission v. American Petrofina Co. of Texas,*[[343]](#footnote-344)314 one company had become the operator of a producing well. In 1969 it assigned its working interest to another, and in 1970 the Railroad Commission authorized the well to be used as a saltwater disposal well. Eventually, the entire lease was assigned to Petrofina. Petrofina, however, took a second lease from the lessor. The Railroad Commission ordered Petrofina to plug and abandon the well. They challenged the order, contending that the Railroad Commission only had authority to order the “operator” of a well to plug. The statutes provided: “The operator of a well shall properly plug the well when required and in accordance with the commission’s rules … .”[[344]](#footnote-345)315

“Operator” was defined in the statute as follows: “(2) ‘Operator’ means a person who is responsible for the physical operation and control of a well at the time the well is about to be abandoned or ceases operation.”[[345]](#footnote-346)316

Since Petrofina was not the operator at the time the well was abandoned, it was ultra vires for the Railroad Commission to order it to plug the well.

The Texas well plugging statute also imposes secondary liability on “nonoperators” in the event the operator refuses to plug the well.[[346]](#footnote-347)317 In *Railroad Commission v. Olin Corporation,*[[347]](#footnote-348)318 non-operators under a joint operating agreement using the AAPL 1977 form, went non-consent for the reworking of a well. Thus, they relinquished all income from the well until certain levels of production and profitability were attained. The well blew out, and the Railroad Commission ordered the non-consenting non-operators to pay the plugging costs. A specific statutory provision authorizes the Railroad Commission to order non-operators to plug if the operator cannot be found, no longer exists, or has insufficient assets.[[348]](#footnote-349)319 The non-operators had reversionary interests in the well that provided a sufficient nexus for the Railroad Commission to impose plugging liability, even though the statute defines non-operator as a “person who owns a working interest in the well at the time the well is about to be abandoned … .” Olin argued that it had no working interest under its joint operating agreement until some future date. The court gave an uncharacteristically broad reading of the statute and its overall purpose, namely to avoid unsafe and hazardous unplugged wells. As such, the reach of the Railroad Commission will be extended to all those who can reasonably be defined as non-operators, in order to protect the public interest.

In denying a writ based on no reversible error, the Texas Supreme Court suggested that the rationale underlying the Court of Appeals’ decision was not satisfactory since they “approved only the result reached by the court of appeals, … which requires Olin Corporation and Tenexplo to pay for the plugging of the well … .”[[349]](#footnote-350)320

The Supreme Court does not suggest where it disagrees with the Court of Appeals in its reasoning, but the Court of Appeals result is clearly inconsistent with the older view that interprets enabling statutes strictly or narrowly.[[350]](#footnote-351)321

1. **Mississippi Exhaustion Doctrine**

In a series of cases the Mississippi courts have applied a different type of exhaustion doctrine that has an impact on common law claims for contamination or pollution brought by surface owners. Initially, in *Donald v. Amoco Production Co.*,[[351]](#footnote-352)321.1 a surface owner brought a multi-tort action alleging an injury to the surface estate through the disposal of oilfield waste. The only tort claim that was dismissed in *Donald* was the negligence per se claim because the ***Oil*** and Gas Board’s power to issue fines and reclamation orders provided the surface owner with an adequate remedy. The remaining tort claims, however, were not dimissed.

In *Chevron U.S.A., Inc. v. Smith*,[[352]](#footnote-353)322 plaintiffs sought monetary damages caused by the alleged contamination of their surface estate through the ***oil*** and gas lessee’s use of naturally occurring radioactive materials (NORM) during the ***oil*** and gas exploration and production processes.[[353]](#footnote-354)323 The surface owners rejected the lessee’s offer to actually clean up the surface and were awarded nearly $2.35 million in damages for a surface estate worth only $55,000. The Mississippi Supreme Court reversed the damage award noting that “[w]here an administrative agency regulates certain activity, an aggrieved party must first seek relief from the administrative agency before seeking relief from the trial courts.”[[354]](#footnote-355)324 The court’s rationale was based on protection of the public health. The agency is empowered to order clean up and remediation while the surface owner is free to pocket the cost of remediation damages and leave the pollution unabated.[[355]](#footnote-356)325 The court did not specify which tort claims were made by the surface owner, other than that they were seeking damages for the pollution of the surface estate. The majority opinion relied on *Donald v. Amoco Production Co*.[[356]](#footnote-357)326 to impose the exhaustion requirement, while noting that the agency clearly does not have the authority to resolve the common law claims of the surface owners. The opinion does not reconcile the dismissal of the unstated common law claims seeking “restoration” damages with the statement that the Board lacks statutory authority to resolve such common law claims.

After *Donald* was remanded for trial, the trial judge dismissed the claims based on *Chevron USA.* But the Mississippi Supreme Court in *Howard v. Totalfina E&P USA, Inc.*,[[357]](#footnote-358)327 found that the Mississippi ***Oil*** & Gas Board lacked jurisdiction over the claims made by the surface owner because the pollution in *Howard/Donald* dealt with the commercial disposal of waste products where the ***Oil*** and Gas Board’s jurisdiction was limited to the noncommercial disposal of ***oil*** field exploration and production waste. Since the Board does not have the power to regulate the commercial disposal of waste products, there is no requirement to exhaust its administrative remedies before a court may adjudicate the common law claims relating to negligence, strict liability, trespass and nuisance.[[358]](#footnote-359)328

In *Town of Bolton v. Chevron* ***Oil*** *Co.*,[[359]](#footnote-360)329 the court returned to the *Chevron USA* exhaustion requirement for common law claims because the alleged contamination resulted from ***oil*** field exploration and production activities which fall within the purview of the state ***Oil*** and Gas Board. The court clearly rejected the plaintiffs’ claims that as common law causes of action, the Board lacks any jurisdiction to resolve such claims based on *Chevron USA.*[[360]](#footnote-361)330 The court stated: “[T]he question is whether the Board’s authority embraces the types of harms suffered by the landowners such that the landowners are precluded from seeking monetary and injunctive relief in the circuit court until they exhaust their remedies before the Board … . A review of our recent precedent demonstrates that this question must be answered affirmatively.”[[361]](#footnote-362)331 While a Board decision will not resolve the common law claims, under Mississippi law the private litigants must first file their actions with the Board. This is made clear by the court’s decision to stay the private landowners’ monetary damage claims pending a Board resolution of the issue so that the statutes of limitation would not run against such claims.[[362]](#footnote-363)332

In *Petro Harvester* ***Oil*** *& Gas Co., LLC v. Baucum*,[[363]](#footnote-364)332.1 the Mississippi Supreme Court appears to be limiting the impact of *Chevron USA* and *Town of Bolton* by returning to the traditional view that administrative agencies, in the absence of express statutory enabling statutes, lack the authority to resolve common law tort claims. As with *Town of Bolton*, the trial court had issued a stay of the common law claims filed by a surface owner.[[364]](#footnote-365)332.2 Relying on *Donald*, the court concluded that “the exhaustion doctrine does not apply when no adequate administrative remedy is provided.”[[365]](#footnote-366)332.3 Since the ***Oil*** & Gas Board can only restrain entities from violation statutes and regulations relating to the conservation of ***oil*** and gas, it cannot award the surface owners damages on either their property damage or personal injury claims. The result in *Petro Harvester* appears to return Mississippi to the usual limits on the application of the exhaustion doctrine to common law tort claims. *Baucum* set up a three-part test to determine whether the exhaustion doctrine should apply—“three variables influence whether exhaustion of administrative remedies is required: ‘the extent of injury from pursuit of administrative remedies, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction.’ ”[[366]](#footnote-367)332.4

1. **Estoppel**

An issue that is indirectly related to the delegation of power issue is the principle of estoppel. It involves the question of the extent to which an agent, employee, or official of a state conservation agency can bind the agency to act or not act because others have relied on the representations of that agent, employee, or official. The general rule is that the government cannot be estopped by its employees or officials, even where the employee or official has acted improperly or incorrectly.

The leading case on this subject is *Federal Crop Insurance Corp. v. Merrill*.[[367]](#footnote-368)333 An agent of the FCIC told the plaintiff-farmer that its spring wheat was covered by the insurance program. When the crop failed and the plaintiff sought to recover on the insurance, the government claimed there was no coverage. The Supreme Court denied the plaintiff any right to recover on its alleged estoppel theory, concluding that whatever the plaintiff had been told by the employee, he should have read the *Federal Register* and known that his crops were not covered. The regulations had clearly shown that when spring wheat is reseeded over winter wheat acreage there is no federal crop insurance available. The results may be harsh, but the general rule has had few exceptions carved out of it.[[368]](#footnote-369)334

A reaffirmation of the no estoppel doctrine came in *Burton/Hawks Inc. v. United States.*[[369]](#footnote-370)335 The lessee of a federal ***oil*** and gas lease claimed that the lease was extended for two years because the district engineer of the U.S. Geological Survey had agreed with the lessee that unit drilling operations would prevent the lease from terminating at the end of the primary term. The court applied the *Merrill* case, showing that the regulations of the Department of the Interior did not allow the lease in question to be extended for an additional two-year period.[[370]](#footnote-371)336

In the context of conservation regulations, the Oklahoma Supreme Court in *Ashland* ***Oil****, Inc. v. Corporation Commission*[[371]](#footnote-372)337 has applied a similar principle. The plaintiff was ordered by the Corporation Commission to replug two abandoned wells. They claimed that an agency official had approved the original plugging operations. The court found that estoppel has no application to Corporation Commission actions where the employees were acting beyond the scope of authority granted them. In this case the officials or employees were acting ultra vires in that they purported to give permission to the plaintiff to violate the Corporation Commission rules relating to plugging. An agent of the Corporation Commission is powerless to waive the requirements relating to well plugging since they have the force and effect of law. Persons dealing with those agents are charged with notice of their limited powers and their inability to waive requirements otherwise imposed by the statute or regulation. A contrary rule would allow each public employee to unilaterally amend statutes and regulations by their oral declarations.

It is also quite clear that principles of equitable estoppel cannot be used to deter conservation agencies from meeting their statutory duties to prevent waste, protect correlative rights, and encourage the conservation of ***oil*** and gas. In *Big Piney* ***Oil*** *and Gas Co. v. Wyoming* ***Oil*** *and Gas Conservation Commission,*[[372]](#footnote-373)338 Big Piney had declined an offer to join a unit that was engaging in an enhanced recovery operation. It was producing gas-cap gas from five wells. The unit operator sought to restrict or end production from the wells, or in the alternative to force-unitize the Big Piney lands, because of the dissipation of the gas-cap pressure. Big Piney argued that the commission had no authority to resolve the complaints, but since there was a clear allegation of acts of waste in dissipating reservoir energy, the commission had the authority to act. A fallback position for Big Piney was that its long period of production from the gas cap, some 18 years, created an estoppel against interference in continued gas-cap gas production. They also added a laches and waiver argument against the unit operator. The court rejected that argument and said:

Equitable estoppel should not be invoked against a governmental or public agency functioning in its governmental capacity, except in rare and unusual circumstances and it may not be invoked where it would serve to defeat the effective operation of a policy adopted to protect the public.[[373]](#footnote-374)339

The general view that the government cannot be estopped was followed, with some exceptions, in *Plateau Mining Co. v. Utah Division of State Lands& Forestry.*[[374]](#footnote-375)340 The state was seeking higher royalties from coal leases and one of the arguments presented by the state lessees was that the state was estopped because it had not demanded higher payments as it was apparently entitled to do so under the terms of the lease. The court noted that, in general, estoppel may not be asserted against the state, except “when its rigid application would defeat, rather than serve, the higher purpose that all rules are intended to serve: that of doing justice.”[[375]](#footnote-376)341 The lessee could not rely on the state’s acceptance of the proffered royalty checks to the degree necessary to support an estoppel argument.[[376]](#footnote-377)342

The underlying rationale for the no-estoppel against the government rule is that the public interest must prevail over the actions or inactions of a government employee. To have governmental policies frustrated and the public interest harmed because an official or employee makes a mistake or acts beyond the scope of his or her authority, would be to cripple the effectiveness of state conservation agencies. Thus, where the state continues to accept underpayments of royalty that goes into a trust fund for the school children, no claim of estoppel will be accepted because of the grave harm to the public interest.[[377]](#footnote-378)343 A public employee or official should not be able to replace the choices made by the legislature when it comes to conservation issues. Although the rules may be harsh as individually applied, they are needed to maintain the integrity of state regulatory programs.[[378]](#footnote-379)344

In *Santa Fe Minerals, Inc.,*[[379]](#footnote-380)345 the Interior Board of Land Appeals extensively analyzed the issue of estoppel against the government in the context of a suit by MMS against a federal ***oil*** and gas lessee for underpayment of royalties and interest. Production from the well was covered by a communitization agreement, which under its terms, excluded production from an ***oil*** well. The state conservation agency initially classified the well as an ***oil*** well but the lessee made royalty payments as if the agreement controlled. MMS officials on two separate occasions wrote letters to the lessee advising it to pay royalties as if the well were classified as a gas well. The Board identified the following four requirements for a party to claim estoppel:

(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel had a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former’s conduct to his injury.[[380]](#footnote-381)346

In addition where public lands are involved, the estoppel must be based on affirmative misconduct by the governmental official. Furthermore, where erroneous advice is being relied upon, the advice must concern a crucial misstatement in an official decision.[[381]](#footnote-382)347 Under the facts as presented, the lessee could not prove estoppel because it was aware of the true facts relating to the classification of the well as an ***oil*** well. It is also clear that estoppel against the federal government cannot operate to vest any right not authorized by law, which in this case means that the letters cannot excuse the lessee from making proper royalty payments required by the Indian ***oil*** and gas lease.[[382]](#footnote-383)348 The Board follows the general rule that establishing an estoppel defense to a governmental official’s or employee’s actions is very difficult.

While Texas follows the general rule that estoppel against the government is hard to prove, a recent decision suggests that if the government involved is a municipality, it may be estopped if the private party can satisfy a three-pronged test.[[383]](#footnote-384)349 In *Maguire* ***Oil*** *Co. v. City of Houston*,[[384]](#footnote-385)350 an ***oil*** and gas operator who had received a well drilling permit from the city successfully argued that the city should be estopped from revoking the permit after the operator expended substantial sums in preparing to drill the well. The test the court applied requires the party seeking to estop the municipality to show:

(1) whether the landowner is relying on an authorized act of a city official or employee …; (2) whether this is the kind of case in which justice requires the application of estoppel … ; and (3) whether the application of estoppel would interfere with the exercise of the city’s governmental functions … .[[385]](#footnote-386)351

In applying the three-pronged test, the court found that Maguire’s summary judgment proof was sufficient to create factual issues on all three prongs. The proof showed that Maguire had expended nearly $190,000 after receiving the drilling permit. The court also found that since Maguire was only seeking monetary damages, applying estoppel to the city would not interfere with its governmental functions relating to the drilling regulatory program.[[386]](#footnote-387)352

In *Dewhurst v. Gulf Marine Institute of Technology*,[[387]](#footnote-388)353 the court also estopped the government from revoking a lease that had been issued for Gulf Marine Institute of Technology (GMIT) to occupy an abandoned offshore ***oil*** and gas drilling rig. GMIT’s predecessor had received a surface and subsurface lease from the state General Land Office (GLO) to locate a drilling platform on state waters in order to directionally drill several wells that would be bottomed on federal lands. The original lease had a provision requiring the lessee to plug and abandon the well upon cessation of production. In addition, the lease would terminate upon the plugging and abandonment of the well bores. When the original lessee determined that production was no longer economically viable, GMIT agreed to take over the surface lease and use the platform for its maricultural research activities. The Commissioner of the GLO agreed to have the lease assigned, but after a change in the Commissioner’s office, the new Commissioner sought to terminate the lease since the well had been plugged and abandoned. After interpreting the lease assignment to GMIT as not automatically terminating upon plugging since the well had been plugged prior to the assignment, the court added that the Commissioner would be estopped from terminating the surface lease of the platform. In this case, the court treated the Commissioner as acting in a proprietary, not a governmental, capacity and applied traditional estoppel principles.[[388]](#footnote-389)354 Thus, the lease provision calling for a 50-year term was to be enforced, and the Commissioner could not seek to terminate the lease because the well had been plugged and abandoned.

The Law of Pooling and Unitization, 3rd Edition

Copyright 2024, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

**End of Document**

1. 1U.S. Const. art. I, § 1. *See* Field v. Clark, 143 U.S. 649, 692, 12 S. Ct. 495, 36 L. Ed. 294 (1892), where the court stated “That Congress cannot delegate legislative power … is a principle universally recognized …” *See* 1 K. Davis, Administrative Law Treatise §§ 2.1–2.7 (1978); R. Pierce, S. Shapiro, P. Verkuil, Administrative Law and Process at § 3.4 (1985); B. Schwartz, Administrative Law §§ 2.1–2.4 (1984). An excellent discussion of the history of the non-delegation doctrine and its interphase with the separation of powers doctrine is presented in 1 F. Cooper, State Administrative Law 15–21 (1965). [↑](#footnote-ref-2)
2. 2Old Abe Co. v. New Mexico Mining Comm’n, 121 N.M. 83, 908 P.2d 776 (N.M. App.), *cert. denied*, 120 N.M. 828, 907 P.2d 1009 (1995). *In accord*: Earthwork’s ***Oil*** & Gas Accountability Project v. N.M. ***Oil*** Conservation Comm’n, 374 P.3d 710, 2016-NMCA-055 (Legislature may delegate rulemaking authority to the OCC).

   In BCCA Appeal Group, Inc. v. City of Houston, 496 S.W.3d 1, (Tex. 2016), the Texas Supreme Court concluded that a municipal ordinance that incorporated a state agency’s rules relating to air pollution did not violate the non-delegation doctrine. [↑](#footnote-ref-3)
3. 3The court also rejected the claim that delegating the power to impose fees was contrary to a constitutional prohibition against the granting of the taxing power to a political subdivision which does not have an elected governing authority. 908 P.2d at 788, interpreting N.M. Const. art. VIII, § 9. The Commission was found not be a political subdivision of the State. [↑](#footnote-ref-4)
4. 4Van Horn ***Oil*** Co. v. Oklahoma Corp. Comm’n, 1988 OK 42, 753 P.2d 1359, 99 O.&G.R. 430; Union Texas Petroleum Corp. v. Jackson, 1995 OK CIV APP 63, 909 P.2d 131 (cert. denied). [↑](#footnote-ref-5)
5. 5*See, e.g.,* Buttfield v. Stranahan, 192 U.S. 470, 24 S. Ct. 349, 48 L. Ed. 525, Treas. Dec. 25119(1904) (upholding delegation of rule-making authority to the Department of Treasury to establish standards for the purity, fitness, and quality of imported tea); United States v. Grimaud, 220 U.S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911) (upholding delegation of authority to the Department of Agriculture to conserve the national forests). [↑](#footnote-ref-6)
6. 6Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446, 1 Ohio Op. 389 (1935). *See also* Schecter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 2 Ohio Op. 493 (1935), for another decision invalidating a federal statute based on the non-delegation doctrine. There has been a revival of the nondelegation doctrine in a number of federal opinions. *See* Paul v. United States, 140 S. Ct. 342, 205 L. Ed. 2d 368 (2019); Utility Air Regulatory Group v. Environmental Protection Agency, 573 U.S. 302, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014); Louisiana v. Biden, 2022 U.S. Dist. LEXIS 25496 (W.D. La. Feb. 11, 2022). [↑](#footnote-ref-7)
7. 7The standards provided in the statute were very broad and included such items as removing obstructions to commerce, promoting industrial organization, and eliminating unfair competition. [↑](#footnote-ref-8)
8. 8Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944). [↑](#footnote-ref-9)
9. 9R. Pierce, S. Shapiro, P. Verkuil, Administrative Law and Process § 3.4.3 (Found. Press 3d ed. 1999). [↑](#footnote-ref-10)
10. 10Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001).

    *Whitman* has been also cited for the proposition that where Congress intends to alter the fundamental details of a particular regulatory scheme involving the delegation of authority, it should do so with the “requisite clarity to place that intent beyond dispute. Sackett v. United States Environmental Protection Agency, 2023 U.S. LEXIS 2202 (May 25, 2023); United States Forest Service v. Cowpasture Preservation Association, 140 S. Ct. 1837, 207 L. Ed. 2d 186 (2020). *See also*: Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018).

    The broader and more general the delegation of authority, the tougher it will be to argue that the agency has acted *ultra vires*. In Wyoming v. USDA, 661 F.3d 1209 (10th Cir. 2011), once the court concluded that the Roadless Rule adopted by the Forest Service was not a de facto wilderness designation it had no trouble upholding the Forest Service’s power to adopt the rule under its quite broad authority to regulate the “occupancy and use” of National Forest land. [↑](#footnote-ref-11)
11. 11121 S. Ct. at 913. [↑](#footnote-ref-12)
12. 12*See also* Touby v. United States, 500 U.S. 160, 111 S. Ct. 1752, 114 L. Ed. 2d 219 (1991); American Power & Light Co. v. SEC, 329 U.S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1944). [↑](#footnote-ref-13)
13. 13It is beyond the scope of this Treatise to examine the constitutional parameters of the non-delegation doctrine, be it the unified executive theory or the exclusive grant of legislative authority to Congress, but the following articles provide some historical context for the debate concerning the non-delegation doctrine. *See* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 Geo. Wash. L.Rev. 1088 (2022); Cass R. Sunstein, *There are Two “Major Questions” Doctrines*, 73 Admin L.Rev. 475 (2021); Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 Geo. Wash. L.Rev. 1181 (2018); William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Power Jurisprudence*, 22 Harv. J.L. & Pub. Pol’y 21 (1998); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L.Rev. 1231 (1994); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 Duke L.J. 387 (1987). [↑](#footnote-ref-14)
14. 13.1West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587, 2609, 213 L. Ed. 2d 896 (2022). [↑](#footnote-ref-15)
15. 13.2*West Virginia*, 142 S. Ct. at 2609, relying in part on Utility Air Regulatory Group v. EPA, 573 U.S. 302, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014). For other cases relied on by the majority to assert that the major question doctrine existed as the interpretative standard for congressional delegations of power to administrative agencies, see National Federation of Independent Business v. OSHA, 595 U.S. \_\_\_, 142 S. Ct. 661, 211 L. Ed. 2d 448 (2022) (per curiam); Alabama Association of Realtors v. Department of Health and Human Services, 594 U.S. \_\_\_, 141 S. Ct. 2485, 210 L. Ed. 2d 856 (2021) (per curiam); Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 S. Ctr. 1291, 146 L. Ed. 2d 121 (2000).

    An analogous doctrine has also been declared by the U.S. Supreme Court when it comes to interpreting federal statutes that seek to invade traditional areas of state and/or local police power regulation. In Sackett v. United States Environmental Protection Agency, 2023 U.S. LEXIS 2202 (May 25, 2023), the Court will require Congress to speak with “exceedingly clear language” before a statute will be found to displace or preempt areas of traditional state and/or local regulation, such as land use. The *Sackett* court relied on United States Forest Service v. Cowpasture River Preservation Association, 140 S. Ct. 1837, 207 L. Ed.3d 186 (2020) and Bond v. United States, 572 U.S. 844, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014) to support the “exceedingly clear language” requirement. [↑](#footnote-ref-16)
16. 13.3*West Virginia*, 142 S. Ct. at 2609. [↑](#footnote-ref-17)
17. 13.4Wyoming v. United States Department of the Interior, 136 F. Supp. 3d 1317 (D. Wyo. 2015), *dismissed as moot*, 2016 U.S. App. LEXIS 13210 (10th Cir. July 13, 2016), *final order issued*, 2016 U.S. Dist. LEXIS 82132 (D. Wyo. June 21, 2016). The decision was influenced in part by DOI’s earlier statements and policy that it did not have the authority to regulate hydraulic fracturing operations on public and Indian lands. [↑](#footnote-ref-18)
18. 13.5Wyoming v. United States Department of the Interior, 2017 U.S. Dist. LEXIS 5736 (D. Wyo. Jan. 16, 2017). Subsequently, the Department of the Interior sought to postpone various compliance dates contained within the venting and flaring regulation. In California v. United States Bureau of Land Management, 277 F. Supp. 3d 1106 (N.D. Cal. 2017), the court found that the postponement order violated various provisions of the Administrative Procedures Act and enjoined its implementation.

    In Solenex, LLC v. Haaland, 2022 U.S. Dist. LEXIS 163518 (D.D.C. Sept. 9, 2022), the court found that the Secretary of the Department of Interior had been delegated only three grounds upon which she could terminate a validly-issued federal ***oil*** and gas lease and that the Secretary’s particular action to terminate the Solenex lease did not fit within any of those three grounds.

    A somewhat narrow view of BLM’s power to access privately-owned surface well sites which were part of a communitization agreement involving Indian lands was given by the Tenth Circuit in Maralex Resources, Inc. v. Barnhardt, 913 F.3d 1189 (10th Cir. 2019). While conceding that the relevant statutes and regulations authorized BLM to enter onto fee lands which were communitized with Indian ***oil*** and gas leases, the court found that those statutes and regulations did not authorize BLM to require that any enclosures around the well sites be secured with BLM locks or that the BLM be given keys to any locks. The court further noted that the private surface owner could not deny BLM access to the well site. On remand, the district court conformed the order to comply with the Tenth Circuit’s mandate. Maralex Resources, Inc. v. Barnhardt, 2019 U.S. Dist. LEXIS 48008 (D. Colo. Mar. 21, 2019). [↑](#footnote-ref-19)
19. 13.6State of Wyoming v. United States Department of the Interior, 493 F. Supp. 3d 1046 (D. Wyo. 2020). In Medco Energi US LLC, 197 IBLA 199 (2021), the Board found that several continuing budget resolutions did not authorize the Interior Department to assess inspection fees for OCS facilities. After the issuance of the IBLA decision, the Solicitor issued M-Opinion 37071 which interpreted the same statutes and regulations as authorizing the Interior Department to assess such inspection fees. Because M-Opinions are binding on the IBLA, the IBLA granted the Department’s motion to reconsider, vacated its earlier opinion and retained jurisdiction to resolve other issues. Medco Energi US LLC, 198 IBLA 59 (2022). [↑](#footnote-ref-20)
20. 13.7State of Wyoming v. United States Department of the Interior, 493 F. Supp. 3d 1046 (D. Wyo. 2020).

    In Medco Energi US LLC, 197 IBLA 199 (2021), the Board found that several continuing budget resolutions did not authorize the Interior Department to assess inspection fees for OCS facilities. After the issuance of the IBLA decision, the Solicitor issued M-Opinion 37071 which interpreted the same statutes and regulations as authorizing the Interior Department to assess such inspection fees. Because M-Opinions are binding on the IBLA, the IBLA granted the Department’s motion to reconsider, vacated its earlier opinion and retained jurisdiction to resolve other issues. Medco Energi US LLC, 198 IBLA 59 (2022). [↑](#footnote-ref-21)
21. 13.8*See generally* 1 F. Cooper, State Administrative Law 46–91 (1965), where the author analyzes various state tests under the non-delegation doctrine and lists several state cases where the court invalidated state statutes with a delegation-of-powers argument. The list of cases is at pp. 58–60. *See also* B. Schwartz, Administrative Law § 2.12 (1984). [↑](#footnote-ref-22)
22. 14Hunter Co. v. McHugh, 11 So. 2d 495, 202 La. 97 (1942). [↑](#footnote-ref-23)
23. 15In addition to the non-delegation doctrine issue, the trial court found that the statute and orders violated the substantive due process rights of the mineral lessees. 11 So. 2d at 498. This argument was also rejected by the Louisiana Supreme Court, which upheld the validity of the statute and the orders of the commissioner. 11 So. 2d at 505–506. [↑](#footnote-ref-24)
24. 1611 So. 2d at 498. [↑](#footnote-ref-25)
25. 1711 So. 2d at 500–501. As long as the “essential conditions and definitions” were laid down by the statute, the delegation would be valid. The statutory provision that met the court’s requirements read as follows:

    For the prevention of waste and to avoid the drilling of unnecessary wells, the Commissioner shall establish a drilling unit or units for each pool, except in those pools which, prior to the effective date of this Act, have been developed to an extent and where conditions are such that it would be impracticable or unreasonable to use a drilling unit at the present stage of development. A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one well, and such unit shall constitute a developed area as long as a well is located thereon which is capable of producing ***oil*** or gas in paying quantities.

    11 So. 2d at 497.

    The court further noted that there were procedural safeguards, including the right to seek judicial review of the individual orders, that militated against a finding of improper delegation. The concept that procedural or other safeguards might act as a substitute for adequate or reasonable standards has recently received some support in state court administrative law decisions. *See, e.g.,* Elizondo v. State, Dep’t of Revenue, Motor Vehicle Div., 194 Colo. 113, 570 P.2d 518 (Colo. 1977); State *ex rel.* Schneider v. Bennett, 222 Kan. 12, 564 P.2d 1281 (1977); Finks v. Highway Comm’n, 328 A.2d 791 (Me. 1974); Barry v. Department of Motor Vehicles, 81 Wn.2d 155, 500 P.2d 540 (Wash. 1972). [↑](#footnote-ref-26)
26. 18126 Tex. 296, 83 S.W.2d 935, *reh’g denied,* 126 Tex. 296, 87 S.W.2d 1069 (1935). [↑](#footnote-ref-27)
27. 1983 S.W.2d at 941. The plaintiffs also made a substantive due process/taking issue argument that was rejected by the court. *Id.* at 941–43.

    In Railroad Com. v. Shell ***Oil*** Co., 139 Tex. 66, 161 S.W.2d 1022 (1942), the court used the non-delegation doctrine in an unusual way to justify the overturning of a commission order granting a Rule 37 exception well permit. The court’s basic argument was that the statute must, in order to avoid invalidation under the non-delegation doctrine, contain sufficient standards to limit the discretion of the commission in promulgating and implementing its well-spacing rule. The general principle that must be applied is the prevention of waste. Thus, to be valid the Railroad Commission’s order must be reasonably related to the prevention of waste in order to be within the standards set out by the legislature. Because the evidence did not show that the applicant for the exception had shown exceptional circumstances, the commission could not merely grant it the exception permit because it applied for one. The court was suggesting that the commission’s action, unless limited by the principle of preventing waste, would be beyond the scope of the powers that could be lawfully delegated to the commission. The court was careful to point out that the commission was fully authorized by the legislature to enact a well-spacing regulation under the waste prevention principle, but in this individual application of the rule and its exception, the commission had not been guided by the overriding and necessary legislative policy. [↑](#footnote-ref-28)
28. 20Railroad Commission v. Lone Star Gas Co., 36 Tex. Sup. Ct. J. 436, 844 S.W.2d 679, 117 O.&G.R. 168 (Tex. 1992). For earlier decisions, see 798 S.W.2d 888, 117 O.&G.R. 152 (Tex. App. 1990)*, on remand from,* 32 Tex. Sup. Ct. J. 311, 767 S.W.2d 709 (Tex. 1989). [↑](#footnote-ref-29)
29. 21844 S.W.2d at 689, citing Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961 (1945). [↑](#footnote-ref-30)
30. 22844 S.W.2d at 689–690. [↑](#footnote-ref-31)
31. 23*See, e.g.,* Trapp v. Shell ***Oil*** Co., 145 Tex. 323, 198 S.W.2d 424 (1946). The unique “Texas substantial evidence” rule was largely caused by the Texas Supreme Court’s interpretation of the separation-of-power language of Tex. Const. art. 2, § 1. The majority and the dissenting opinions in *Trapp* articulate the problems caused by the constitutional provision and the growth of administrative agencies. *See also* Hamilton & Jewett, *The Administrative Procedure and Texas Register Act,* 54 Texas L. Rev. 285, 295 (1976); Reavley, *Substantial Evidence and Insubstantial Review in Texas,* 23 Sw. L.J. 239 (1969); Walker, *The* *Application of the Substantial Evidence Rule in Appeals from Orders of the Railroad Commission,* 32 Texas L. Rev. 639 (1954).

    For further discussion, see § 25.06[23] *above.* [↑](#footnote-ref-32)
32. 24Tex. Const. art. 2, § 1. [↑](#footnote-ref-33)
33. 25145 Tex. 323, 198 S.W.2d 424 (1946). [↑](#footnote-ref-34)
34. 26198 S.W.2d at 438. The court added:

    It is within the power of the legislature to delegate to the Railroad Commission the duty of determining facts necessary to show the necessity of promulgating the rule and to find and determine facts necessary to grant exceptions thereto.

    *Id.*

    Oklahoma has reacted in a similar fashion to its state constitutional provision embodying the principle of separation of powers. In Patterson v. Stanolind ***Oil*** & Gas Co., 1938 OK 138, 182 Okla. 155, 77 P.2d 83, *appeal dismissed,* 305 U.S. 376 (1938), the court went to some length in dismissing the non-delegation doctrine challenge to the state’s spacing unit and pool statute that delegated substantial authority to the Oklahoma Corporation Commission. In part because the commission has constitutional status and powers, the court found that strict non-delegation doctrine cases would not be applicable to an agency charged with the duties to regulate certain industries. 77 P.2d at 90. Due to the nature of well-spacing regulations, the court felt it quite proper for the legislature to delegate individual decisions to an administrative body that would have the expertise to carry out the general policies of preventing waste, conserving the ***oil*** and gas, and protecting correlative rights. [↑](#footnote-ref-35)
35. 27An early decision of the Texas Supreme Court did invalidate a delegation of judicial authority to an administrative agency, although by modern standards the powers would have undoubtedly been upheld. Board of Water Eng’rs v. McKnight, 111 Tex. 82, 229 S.W. 301 (1921).

    On somewhat similar facts, a court of civil appeals found no improper delegation some 30 years later. Texas State Bd. of Dental Examiners, 242 S.W.2d 213 (Tex. Civ. App. 1951, writ ref’d n.r.e.). [↑](#footnote-ref-36)
36. 2887 N.M. 286, 532 P.2d 582, 50 O.&G.R. 488 (1975). For another liberal interpretation of rulemaking authority, see New Mexico Mining Ass’n v. New Mexico Mining Comm’n, 122 N.M. 332, 924 P.2d 741 (N.M. App. 1996) (Mining Commission could adopt rule imposing a surcharge on certain regulatory fees to reimburse Department of Game & Fish for expenses incurred in implementing mining regulatory program). [↑](#footnote-ref-37)
37. 29532 P.2d at 585.

    *See also* Oxford ***Oil*** Co. v. Atlantic ***Oil*** & Producing Co., 16 F.2d 639 (N.D. Tex. 1926), *aff’d,* 22 F.2d 597 (5th Cir. 1927), *cert. denied*, 277 U.S. 585 (1928). [↑](#footnote-ref-38)
38. 30Cities Service Gas Co. v. Corporation Comm’n, 197 Kan. 338, 416 P.2d 736, 25 O.&G.R. 646 (1966). The non-delegation doctrine issue was a relatively minor issue in a dispute about a commission order that authorized a waterflood project in a horizon immediately above a horizon that Cities Service was using to store natural gas. It opposed the waterflood project because of its perceived threat to its storage reservoir. Cities Service had argued that the statutory standards governing the granting of a permit to conduct a waterflood operation were too vague. The court concluded that the general standard of achieving ***oil*** and gas conservation was sufficient to justify the delegation of authority. The court stated: “While the legislature cannot delegate its constitutional power to make a law … it can make a law which delegates the power to determine some fact or state of things upon which such law becomes operative.” 416 P.2d at 741. *See also* Colorado Interstate Gas Co. v. State Corporation Comm’n, 192 Kan. 29, 386 P.2d 288, 20O.&G.R. 300 (1963), *cert. denied,* 379 U.S. 131, 85 S. Ct. 272, 13 L. Ed. 2d 333, 21 O.&G.R. 292 (1964). [↑](#footnote-ref-39)
39. 31Amax Petroleum Corp. v. Corporation Comm’n, 1976 OK 91, 552 P.2d 387, 55 O.&G.R. 152. *Amax* involved a statute requiring the plugging of abandoned wells. The commission was delegated the authority to adopt rules relating to plugging and to enforce them through appropriate enforcement actions designated in the statute. The defendant charged that there was an improper delegation of power to determine who was to plug and when plugging was to be required, but the court easily dismissed that challenge. Indiana rejected an improper delegation claim to a municipal ordinance regulating mining operations on the reasoning that as long as the legislative body provides reasonable standards for the administrator to apply, there is no improper delegation. City of Carmel v. Marin Marietta Materials, Inc., 883 N.E.2d 781, 788–89 (Ind. 2008).

    *See also* Natural Aggregates Corp. v. Brighton Township, 213 Mich. App. 287, 539 N.W.2d 761 (1995), *appeal denied,* 452 Mich. 879, 452 Mich. 880, 552 N.W.2d 178 (Mich. 1996), where the court posits in the same opinion a reasonably strict interpretation of the non-delegation doctrine and a statement that the doctrine should not be used to deny the legislature the flexibility needed to adapt to conditions that involve details which the Legislature cannot deal with on an individual basis. 539 N.W.2d at 770. *Compare* Osius v. City of St. Clair Shores, 344 Mich. 693, 75 N.W.2d 25 (1956) *with* Petrus v. Dickinson County Bd. of Comm’rs, 184 Mich. App.282, 457 N.W.2d 359 (1990). [↑](#footnote-ref-40)
40. 32State ***Oil*** & Gas Bd. v. Mississippi Mineral and Royalty Owners Ass’n, 258 So. 2d 767, 42 O.&G.R. 12 (Miss. 1971). [↑](#footnote-ref-41)
41. 33258 So. 2d at 790–92 (Sugg. J. dissenting). The dissent was not unmindful of California Co. v. State ***Oil*** & Gas Board, 200 Miss. 824, 27 So. 2d 542 (1946), a case that had upheld the state statute authorizing spacing unit orders. But Justice Sugg thought that the discussion of the non-delegation doctrine was dictum and that it was time to return to the older standard that the legislature cannot delegate legislative authority. *See, e.g.,* State v. Allstate Ins. Co., 231 Miss. 869, 97 So. 2d 372 (1957); Alcorn v. Hamer, 38 Miss. 652 (1860). [↑](#footnote-ref-42)
42. 34258 So. 2d at 792. [↑](#footnote-ref-43)
43. 35State v. Wallace, 40 Ohio Misc. 29, 69 Ohio Op. 2d 228, 318 N.E.2d 883, 49 O.&G.R. 507 (1974), *rev’d,* 52 Ohio App. 2d 264, 6 Ohio Op. 3d 262, 369 N.E.2d 781, 58 O.&G.R. 549 (1976). [↑](#footnote-ref-44)
44. 36318 N.E.2d at 885. [↑](#footnote-ref-45)
45. 37369 N.E.2d at 784–785. [↑](#footnote-ref-46)
46. 3875 Ohio St. 3d 399, 1996 Ohio 196, 662 N.E.2d 352*, reconsideration denied,* 75 Ohio St. 3d 1488, 664 N.E.2d 540 (1996). [↑](#footnote-ref-47)
47. 39See § 4.05[2] for a discussion of how several states, including Ohio, resolve problems of coordinating coal and ***oil*** and gas development in the same area. [↑](#footnote-ref-48)
48. 40Ohio Rev. Code § 1509.05 reproduced in § 30.35A *below*. [↑](#footnote-ref-49)
49. 41Ohio Rev. Code § 1509.08. [↑](#footnote-ref-50)
50. 42Ohio Rev. Code § 1509.08. Appeal of an ***oil*** or gas well permit application is to the mine examining board. Ohio Rev. Code § 1509.08. [↑](#footnote-ref-51)
51. 43622 N.E.2d at 354. An appeal was taken and the mine examining board affirmed the Chief’s permit denial decision. [↑](#footnote-ref-52)
52. 44As the court noted, “For over a century, the court has adhered to the principle that the General Assembly cannot delegate its essential legislative power to administrative bodies or officers.” 622 N.E.2d at 357 (citing Blue Cross of Northeast Ohio v. Ratchford, 64 Ohio St. 2d 256, 18 Ohio Op. 3d 450, 416 N.E.2d 614 (1980)); Matz v. J.L. Curtis Cartage Co., 132 Ohio St. 271, 8 Ohio Op. 41, 7 N.E.2d 220 (1937). [↑](#footnote-ref-53)
53. 45662 N.E.2d at 357 (citing Yee Bow v. Cleveland, 99 Ohio St. 269, 124 N.E. 132 (1919)*, error dismissed,* 255 U.S. 578, 41 S. Ct. 320, 65 L. Ed. 794 (1921)). [↑](#footnote-ref-54)
54. 46662 N.E.2d at 360–61. [↑](#footnote-ref-55)
55. 47662 N.E.2d at 361. The court likewise rejected Redman’s non-delegation doctrine theory as applied in this case. *Id.* [↑](#footnote-ref-56)
56. 48This has been a continuing problem in the field of land-use planning, where municipal ordinances either require a referendum by some or all of the citizens before a particular land use will be approved, or require the written consent of a particular group, such as neighbors, before a land-use permit will be issued. For example, in Eubank v. City of Richmond, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912), the Supreme Court invalidated a consent provision in a zoning ordinance relating to the placement of setback lines, based on the non-delegation doctrine. But in Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1917), the Supreme Court found the non-delegation doctrine not applicable to an ordinance requiring the consent of at least one half of the residents on the block before a billboard could be erected. *See also* State of Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928); Gorieb v. Fox, 274 U.S. 603, 47 S. Ct. 675, 71 L. Ed. 1228 (1927); Valkanet v. Chicago, 13 Ill. 2d 268, 148 N.E.2d 767 (1958); State *ex rel.* Omaha Gas Co. v. Withnell, 78 Neb. 33, 110 N.W. 680 (1970); O’Brien v. City of St. Paul, 285 Minn. 378, 173 N.W.2d 462 (1969).

    *See* Eugene Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges,* 37 Harv. J.L. & Pub. Pol’y 931 (2014).

    This doctrine is now referred to as the private nondelegation doctrine because it places limits on the manner and extent to which legislative authority may be delegated to private parties. Cox v. State, 2016 U.S. Dist. LEXIS 115184 (N.D. Ohio Aug. 29, 2016). *Cox* involved a challenge to the Ohio statutory scheme giving certain types of common carriers the power of eminent domain. *See also* Kiser v. Kamdar, 831 F.3d 784 (6th Cir. 2016); Center for Powell Crossing, LLC v. City of Powell, Ohio, 173 F. Supp. 3d 639 (S.D. Ohio 2016).

    In Vaquero Energy, Inc. v. County of ***Kern***, 42 Cal. App. 5th 312, 255 Cal. Rptr. 3d 221 (2019), the court rejected a non-delegation challenge to a county ordinance that created an expedited review process for ***oil*** and gas permits where consent of the surface owner was obtained. The court noted the somewhat inconsistent Supreme Court opinions but concluded that there was no private veto power over the permit since it was the county that had the ultimate decision-making authority to approve or disapprove the permit application.

    In Boerschig v. Trans-Pecos Pipeline, LLC, 872 F.3d 701 (5th Cir. 2017), the court rejected a landowner’s assertion that *Eubank* and *Roberge*, along with Carter v. Carter Coal Co., 298 U.S. 238 (1936), invalidated a Texas statutory scheme whereby three layperson commissioners could make the initial determination of the validity of a condemnation instituted by a private entity along with the valuation of the property interest that was being condemned. [↑](#footnote-ref-57)
57. 49Palmer ***Oil*** Corp. v. Phillips Petroleum Co., 1951 OK 78, 204 Okla. 543, 231 P.2d 997 (1951), *appeal dismissed,* 343 U.S. 390, 72 S. Ct. 842, 96 L. Ed. 1022, 1 O.&G.R. 876 (1952). [↑](#footnote-ref-58)
58. 50The two cases were Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936), and State of Washington *ex rel.* Seattle Title Trust v. Roberge, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928). [↑](#footnote-ref-59)
59. 51231 P.2d at 1004, quoting from J.W. Hampton, Jr. v. United States, 276 U.S. 394, 407, 48 S. Ct. 348, 72 L. Ed. 624, Treas. Dec. 42706 (1928). [↑](#footnote-ref-60)
60. 52Samson Resources Co. v. Corporation Commission, 1992 OK CIV APP 62, 831 P.2d 663, 119 O.&G.R. 520. [↑](#footnote-ref-61)
61. 53See § 18.02[4][b] *above* for a discussion of compulsory unitization consent requirements. [↑](#footnote-ref-62)
62. 54Parkin v. Corporation Commission, 234 Kan. 994, 677 P.2d 991, 80 O.&G.R. 39 (1984). [↑](#footnote-ref-63)
63. 55Kan. Stat. Ann. § 55-1301 *et seq.* [↑](#footnote-ref-64)
64. 56677 P.2d at 996. At the time that the unitization hearing was conducted, the unit operators projected a total recovery of over 3 million barrels of ***oil*** from the proposed waterflood project. Three years later, only 200,000 barrels had been produced, and by the time the litigation was commenced there were only six producing wells within the unit. [↑](#footnote-ref-65)
65. 57Kan. Stat. Ann. § 55-1305 provides in part:

    The order providing for the unitization and unit operation of a pool or a part thereof shall be upon terms and conditions that are just and reasonable and shall prescribe a plan for unit operations that shall include: … (j) the time when the unit operations shall commence and the manner in which, and the circumstances under which, the unit operations shall terminate and for the settlement of accounts upon such termination … . [and] (l) such additional provisions that are found to be appropriate for carrying on the unit operations and for the protection of correlative rights … .

    An order providing for unit operations may be amended by the commission in the same manner and subject to the same conditions as are necessary or required for an original order providing for unit operations: …

    The Kansas Compulsory Unitization Act is set forth in full at § 30.16B *below.* [↑](#footnote-ref-66)
66. 58By the time the petition was filed, the working interests were controlled by a single entity. It was therefore impossible for any other owner to terminate the unit without the consent of the single working-interest owner. [↑](#footnote-ref-67)
67. 59677 P.2d at 1004. [↑](#footnote-ref-68)
68. 60The issue of improper delegation to the public was also raised in a case dealing with the issuance of a municipal special-use permit that was required before a well could be drilled inside the city limits. In Peter Henderson ***Oil*** Co. v. City of Port Arthur, 806 F.2d 1273, 94 O.&G.R. 402 (5th Cir. 1987), the city attempted to require the operator to get a special use permit in order to rework a previously drilled and then plugged well. The special use permit was issued by the city, but would only become effective if the operator received the consent of the nearby landowners to the reworking operations. Permission was not received, and the operator initially gave up his attempt to reopen the well bore. Some five years later the operator sought to renew his municipal permit, but this time requested that the neighbors’ consent provision be eliminated. The city refused, and the operator filed a civil rights action in federal district court. The trial court found no violation of the non-delegation doctrine and upheld the city’s imposition of the consent requirements. The Fifth Circuit, however, chose to affirm the trial court’s dismissal of the complaint not on the merits of the consent issue but on statute of limitations grounds. [↑](#footnote-ref-69)
69. 61Robinson Twp. v. Commonwealth, 52 A.3d 463, 181 O.&G.R. 66 (Pa. Commw. Ct. 2012). [↑](#footnote-ref-70)
70. 62The substantive elements of Act 13 are analyzed in § 4.05[2][b][xiii] *supra*. [↑](#footnote-ref-71)
71. 6358 Pa. C. S. § 3215(b). [↑](#footnote-ref-72)
72. 6452 A.3d at 491 citing Eagle Envtl. II, L.P. v. Commonwealth, 584 Pa. 494, 515, 884 A.2d 867, 880 (2005) and Gilligan v. Pennsylvania Horse Racing Com., 492 Pa. 92, 94, 422 A.2d 487, 489 (1980). [↑](#footnote-ref-73)
73. 6552 A.3d at 492 relying on Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 583 Pa. 275, 877 A.2d 383 (2005). [↑](#footnote-ref-74)
74. 66Robinson Twp. v. Commonwealth, 623 Pa. 564, 83 A.3d 901, 973, 982–83, 181 O.&G.R. 102 (2013). The plurality opinion did not cite to the non-delegation cases but emphasized that the discretion given the Department to issue waivers from the setback requirements was much too broad to be consistent with the trust duty that the Environmental Rights Amendment placed on the Commonwealth. The waiver provision sections which were invalidated also lead to the invalidation of other provisions in Act 13. Robinson Township v. Commonwealth, 147 A.3d 536 (Pa. 2016). In Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140 (Pa. Commw. Ct. 2015), the Commonwealth Court narrowly construed the ERA in a challenge by a non-governmental organization to various decisions relating to the leasing of state forest lands for ***oil*** and gas development and to the allocation of state funding to the Department of Conservation and Natural Resources. On appeal, however, the Pennsylvania reversed and mandated a broad interpretation of the ERA to carry out its clear policy of creating a public trust in both privately-owned and publicly-owned natural resources. 161 A.3d 911 (Pa. 2017)*, motion denied,* 2018 Pa. LEXIS 1753 (Pa. Apr. 6, 2018). On remand, Pa. Envtl. Def. Found. V. Commonwealth, 214 A.3d 748 (Pa. Commw. 2019), the court applied a broad reading of Article 27 but nonetheless found that the payment of bonus and rentals for ***oil*** and gas leases on state forests were not part of the principal or corpus of the Article 27 trust so the legislature could appropriate those funds for other uses. Upon appeal, Pennsylvania Environmental Defense Foundation v. Commonwealth, 255 A.3d 289 (Pa. 2021), the Pennsylvania Supreme Court reversed. While it agreed with the Commonwealth Court’s conclusion that bonus, delay rentals and late penalty fees were income, it also found that the Commonwealth held those funds in trust for the beneficiaries, meaning the public, and as such the Commonwealth owed them a fiduciary duty to place such funds back into the corpus.

    A similar reading of the ERA was made in Marcellus Shale Coal. v. Dep’t of Envtl. Prot. of Pa., 193 A.3d 447, 470 (Pa. Commw. Ct. 2018), although in *In re* Appeal of Andover Homeowners’ Association, 217 A.3d 906 (Pa. Commw. Ct. 2019), the court found no nexus between privately-owned land and the degradation of public natural resources. Without further analysis of its earlier interpretation of the ERA, the Commonwealth Court in Marcellus Shale Coalition v. Dep’t of Envtl. Prot., 216 A.3d 448 (Pa. Commw. Ct. 2019), *appeal dism’d*, 2019 Pa. LEXIS 7108, 7116 (Pa. Dec. 24, 2019), approved some of DEP’s proposed regulations, disapproved of others and remanded another group of regulations for development of an adequate factual record. Upon appeal, however, the Pennsylvania Supreme Court, in a highly splintered decision, reversed and upheld all of the challenged regulations while at the same time reinforcing a broad interpretation of the ERA. Marcellus Shale Coalition v. Department of Environmental Protection, 292 A.3d 921 (Pa. 2023).

    A concurring opinion in Clean Air Council v. Commonwealth, 245 A.3d 1207, 1218–19 (Pa. Commw. Ct. 2021) (Brobson, J., concurring), raised the non-delegation doctrine issue as it relates to a statutory delegation of power to the Environmental Hearing Board to order the payment of costs and attorney’s fees in matters before the EHB. The statutory delegation is part of the Clean Streams Law. 35 Pa. Stat. § 691.307(b). [↑](#footnote-ref-75)
75. 67Colo. Const. Art. II, § 14. Similar provisions exist in many of the constitutions of the western states. *See e.g.*, Ariz. Const. Art. II, § 17; Wyo. Const. Art. I, § 32. [↑](#footnote-ref-76)
76. 68*See e.g.*, Idaho Code § 7-701, 7-711A; Ky. Rev. Stat. § 278.502; La. Rev. Stat. 45:254; Miss. Code § 53-3-159; Mont. Code § 70-30-102(4); N. Dak. Cent Code § 32-15-02(10); 52 Okla. Stat. Ann. § 36.1 *et seq.*; Tex. Nat. Res. Code § 111.019; Tex. Utilities Code § 181.004; Va. Code § 56-49.01; Wyo. Stat. Ann. §§ 1-26-814 to 1-26-815.

    *See* Alexandra B. Klass, *Eminent Domain Law as Climate Policy*, 2020 Wis. L. Rev. 49; Alexandra B. Klass, *Takings and Transmission,* 91 N.C. L. Rev. 1079 (2013); Alexandra B. Klass, *The Frontier of Eminent Domain,* 79 U. Colo. L. Rev. 651 (2008).

    Nevada delegates the power of eminent domain to entities engaged in mining operations. In NL Industries, Inc. v. Eisenman Chemical Co., 98 Nev. 253, 645 P.2d 976 (1982), the court resolved a dispute where one mining operator was seeking to condemn a portion of the mineral estate owned by a second mining operator. The court concluded that while Nev. Rev. Stat. § 37.010 authorized those engaging in mining operations to condemn private land, the statute did not authorize such a condemnation where the land was already being put to a public use, which included mining.

    Wyoming allows “Any person, association, company or corporation … [to] appropriate by condemnation a way of necessity,” Wyo Stat. Ann. § 1-26-815(a), and authorizes “a condemnor … [to] enter upon real property and make surveys, examinations, photographs … for the purpose of appraising the property or determining whether it is suitable and within the power of the condemnor to condemn.” Wyo. Stat. Ann. § 1-26-506(a). In EME Wyoming, LLC v. BRW East, LLC, 2021 WY 64 486 P.3d 980, the court found that a person who did not own a mineral or leasehold estate did not meet the definition of a condemnor and thus did not have the power of eminent domain.

    The issues regarding the delegation of eminent domain power to private entities as it impacts Kentucky, Ohio, Pennyslvania and West Virginia are analyzed in J. Kevin West, Paul N. Garinger, Karen J. Greenwell and Andrew J. Sonderman, *Eminent Domain Authority for Midstream Pipelines*, 2014 East. Min. L. Inst ch. 3.

    The general constitutionality of statues delegating eminent domain power to private entities has long been upheld. *See e.g.,* PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244, 210 L. Ed. 2d 624 (2021); EQT Gathering, LLC v. A Tract of Prop. Situated in Knott County, 970 F. Supp. 2d 655 (E.D. Ky. 2012); Cornwell v. Central Kentucky Natural Gas Co., 249 S.W.2d 531, 533 (Ky. Ct. App. 1952); Calor ***Oil*** & Gas Co. v. Franzell, 128 Ky. 715, 109 S.W.328, 331 (Ky. Ct. App. 1908).

    In Davidson v. Tarpon Whitetail Gas Storage, LLC, 90 So. 3d 691 (Miss. Ct. App. 2012), the main issue in the case was ascertain the value of the easement taken by the natural gas utility to expand an existing underground storage facility, however, the court added in dicta that even though the utility had received a FERC certificate of public convenience and necessity it had to rely on Miss. Code § 53-3-159 in order to be able to condemn the easement. One would think that a FERC-certificated natural gas company could rely on the power of eminent domain granted it under the Natural Gas Act rather than the state statute.

    In D-Mil Prod., Inc. v. DKMT, Co., 2011 OK 55, 260 P.3d 1262 (Okla. 2011), the Oklahoma Supreme Court held that a foreign corporation asserting that it had the power of eminent domain to construct a pipeline did not make a prima facie that it was qualified to do so under Okla. Const. art. 9, § 31 and Okla. Stat. tit. 18, §§ 1130–1131.

    Where federal statutes give eminent domain power to private entities, there is also a rule of strict construction so as to exclude rights not expressly granted. *See e.g.*, Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 774–75 (9th Cir. 2008); Northern Border Pipeline Co. v. 86.72 Acres of Land, 144 F.3d 469, 471 (7th Cir. 1998); Moore v. Equitrans, L.P., 49 F. Supp. 3d 456 (N.D. W. Va. 2015), *judgment stayed*, 2015 U.S. Dist. LEXIS 59168 (N.D. W. Va. May 6, 2015), *motion to stay continued*, 2016 U.S. Dist. LEXIS 40784 (N.D. W. Va. Mar. 29, 2016), *motion to amend judgment denied*, *motion to stay continued*, 2017 U.S. Dist. LEXIS 61057 (N.D. W. Va. Apr. 21, 2017), *vacated and remanded on other grounds*, 818 Fed. Appx. 212 (4th Cir. 2020); Humphries v. Williams Natural Gas Co., 48 F. Supp. 2d 1276, 1281 (D. Kan. 1999); Northwest Pipeline Corp. v. 20’ X 1,430’ Pipeline, 197 F. Supp. 2d 1241, 1243–44 (E.D. Wash. 2002); Northern Border Pipeline Co. v. 127.79 Acres of Land, 520 F. Supp. 170, 173 (D.N.D. 1981).

    While it is clear that the Natural Gas Act delegates eminent domain power to those having certificates of public convenience and necessity, 15 U.S.C. § 717f(h), that delegation does not also include a waiver of sovereign immunity that States enjoy under the Eleventh Amendment. *In re* PennEast Pipeline Co., LLC, 938 F.3d 96 (3d Cir. 2019). Thus, a pipeline operator may not seek to condemn state-owned land in federal court without the State’s consent to be sued. *Id*. The Third Circuit opinion was reversed in PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244, 210 L. Ed. 2d 624 (2021), in a 5-4 opinion. But the United States is not so restricted as it may condemn state-owned land. United States v. Carmack, 329 U.S. 230, 67 S. Ct. 252, 91 L. Ed. 209 (1946); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487 (1941).

    When a pipeline seeks a certificate of public convenience and necessity from the FERC, it will typically submit a stakeholder mailing list of landowners who will be entitled to receive notices from FERC. The information contained on that list must be produced under the Freedom of Information Act upon the request of an interested party. *See* Evans v. FERC, 2020 U.S. Dist. LEXIS 92902 (D. Ore. Mar. 3, 2020); 2020 U.S. Dist. LEXIS 92373 (D. Ore. May 27, 2020); 2020 U.S. Dist. LEXIS 247171 (D. Ore. Oct. 22, 2010), *recommendations adopted*, 2021 U.S. Dist. LEXIS 5720 (D. Ore. Jan. 12, 2021).

    Where private entities are given the power of eminent domain and exercise that power, the issue of the proper measurement of damages arises. In Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC, 386 S.W.3d 256 (Tex. 2012), the Texas Supreme Court, in a divided opinion, reaffirmed its commitment to the value-to-the-taker rule which prohibits a condemnation award from representing the value of the interest condemned to the taker but measures the award based on the market value to the condemnor. *See also* Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 627, 155 O.&G.R. 82 (Tex. 2002). In *Enbridge Pipelines*, the owner of a processing plant conveyed ownership of the plant to another related entity which under Texas law had the power of eminent domain in order to condemn the surface estate after negotiations to renew the surface lease were fruitless. [↑](#footnote-ref-77)
77. 69Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 55 Tex. Sup. Ct. J. 380, 363 S.W.3d 192, 180 O.&G.R. 511 (Tex. 2012)*, replacing,* 54 Tex. Sup. Ct. J. 1732, 2011 Tex. LEXIS 607 (Tex. 2011). *Denbury Green* made it clear that it was interpreting only the statute dealing with carbon dioxide pipelines and not crude ***oil*** or natural gas pipelines. Upon remand, the trial court granted Denbury Green’s motion for summary judgment that it complied with the new common carrier test. In Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 457 S.W.3d 115 (Tex. App.—Beaumont 2015, writ filed), the Court of Appeals reversed because it felt that the proffered evidence did not eliminate all factual questions as to whether the pipeline was in fact a common carrier and whether its proposed pipeline served a substantial public interest. The Texas Supreme Court reversed the Court of Appeals and reinstated the trial court judgment that Denbury Green had satisfied the common carrier test by showing that it had executed post-construction contracts for transportation with unaffiliated third parties. Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd., 60 Tex. Sup. Ct. J. 201, 510 S.W.3d 909 (2017). In Rhinoceros Ventures Group, Inc. v. Transcanada Keystone Pipeline, L.P., 388 S.W.3d 405 (Tex. App.—Beaumont 2012), the court had no trouble finding that the defendant was a common carrier under the terms of the statute. A similar result is reached in *In re* Tex. Rice Land Partners, Ltd., 402 S.W.3d 334 (Tex. App.—Beaumont 2013) where the court refused to grant the landowners’ mandamus petition to stop a pipeline from condemning an easement under Tex. Nat. Res. Code § 111.002(1) and Tex. Prop. Code § 21.021. The Property Code provision authorizes an entity with eminent domain authority to take possession pending litigation. In Crawford Family Farm P’ship v. TransPipelineTransCanada Keystone Pipeline, L.P., 409 S.W.3d 908 (Tex. App.—Texarkana 2013, rev. denied), the court did not give a particularly narrow construction to various statutory provisions granting common carrier status to crude ***oil*** pipeline owners. The landowner urged that because the pipeline was to be an interstate pipeline it could not comply with the asserted statutory requirement that the common carrier submit its rates and/or tariffs to the Railroad Commission. Tex. Nat. Res. Code §§ 111.014, 111.181. The court concluded that the pipeline owner must comply with each of the stated provisions in Chapter 111 of the Natural Resources Code in order to attain common carrier status.

    But in Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms-1, Ltd., 404 S.W.3d 754 (Tex. App.—Beaumont 2013), the court followed the *Denbury Green* rationale of closely scrutinizing a claim of common carrier status under different statutory regimes and upheld a trial court order finding that the pipeline was not a common carrier and therefore not entitled to condemn an easement. The pipeline claimed it was a common carrier under Tex. Nat. Res. Code § 111.002(1) as a crude ***oil*** pipeline but the court found that natural gas liquids which were the substance to be transported was not crude ***oil*** and that under Tex. Bus. Orgs. Code § 2.105 they were not a common carrier even though they had a Railroad Commission P-4 because there was conflicting evidence as to whether or not the pipeline would actually be open for non-pipeline owned natural gas liquids. *See also* *In re* Crosstex NGL Pipeline, L.P., 2013 Tex. App. LEXIS 6531 (Tex. App.—Beaumont May 30, 2013).

    Under Tex. Util. Code Ann. § 181.004, a “gas utility” is seemingly given the eminent domain power even if it is not a common carrier. In Sansom v. Texas Railroad Commission, 2021 Tex. App. LEXIS 3977 (Tex. App.—Austin, May 20, 2021), the court dismissed a challenge to the Commission’s issuance of a T-4 permit recognizing an entity as a gas utility so that it could exercise the power of eminent domain. But in *In re* DeRuiter Ranch, LLC, 2021 Tex. App. LEXIS 7941 (Tex. App.—Corpus Christi Sept. 28, 2021), the court said that it is up to the courts to determine whether or not the private entity is engaging in a public use since the Legislature cannot delegate the eminent domain power for private uses. It thus issued a writ of mandamus ordering the gas utility to provide certain documents to the plaintiff whose land was being condemned by the gas utility.

    Even where a governmental entity is involved, the court will narrowly construe the legislative grant of the power of eminent domain. City of Blue Mound v. Southwest Water Co., 449 S.W.3d 678 (Tex.App.—Ft. Worth 2014) (Tex. Loc. Gov’t Code § 251.001 does not authorize the City to condemn a water company’s property for the purpose of operating the water system as a publically-owned system); Lone Star Gas Co. v. City of Ft. Worth, 128 Tex. 392, 98 S.W.2d 799 (Tex. 1936) (eminent domain statutes do not authorize municipal condemnation of natural gas utility since they do not authorize compensation for ongoing business use value).

    In Allen v. Enbridge G & P (E. Tex.) LP, 2016 Tex. App. LEXIS 987 (Tex. App.—Tyler Jan. 29, 2016), the pipeline amended its condemnation petition so that it would be restricted to transporting natural gas and its constituent elements. That was done so it would be clear that it had the power of eminent domain given to gas utilities. Tex. Utilities Code §§ 101.003(7), 121.001, 181.004.

    In Thompson v. Heineman, 289 Neb. 798, 857 N.W.2d 731 (2015), a majority of the court determined that a statute that stripped the constitutionally created Public Service Commission of the task of approving the Keystone Pipeline was unconstitutional because only the PSC could regulate common carriers. Under Nebraska law, however, a statute may only be found to be unconstitutional by a super-majority vote of the Supreme Court. The Nebraska Supreme Court, however, cites to *Denbury Green* for the proposition that even common carriers can only exercise the power of eminent domain for a public use.

    In EQT Gathering, LLC v. A Tract of Prop. Situated in Knott County, 2012 U.S. Dist. LEXIS 132840 (E.D. Ky. Sept. 18, 2012), the court gave a soft glance to EQT’s pleadings showing that EQT qualified under Ky. Rev. Stat. § 278.502 as being delegated the power of eminent domain. *In accord*: K. Petroleum, Inc. v. Property Tax Map No. 7, Parcel 12, 2016 U.S. Dist. LEXIS 30620 (E.D. Ky. Mar. 10, 2016); Milam v. Viking Energy Holdings, LLC, 370 S.W.3d 530 (Ky. App. 2012).

    But in Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc., 478 S.W.3d 386 (Ky. App. 2014, rev. denied), the court gave a hard look at a pipeline’s status as a gathering line and concluded that it was not delegated the private right of eminent domain. *Bluegrass Pipeline* was distinguished in Atlantic Coast Pipeline, LLC v. Avery, 2016 Va. Cir. LEXIS 73 (May 9, 2016).

    In *In re* Condemnation of Easement & Right of Way of Lauchle, 130 A.3d 161, (2016), the condemnors sought to challenge a petition in condemnation for an easement to transport natural gas to a privately-owned electrical generating facility. They argued that since the natural gas was going to a single private consumer the condemnation was for a private purpose in contravention of the Pennsylvania Property Rights Protection Act, 26 Pa. C.S. § 201 *et seq.* The Act provides an exemption from its prohibition against the delegation of the power of eminent domain for public utilities. The court concluded that the condemnee met the definition of a public utility and thus the condemnation proceeding was authorized. A similar result was reached in *In re* DeRuiter Ranch, LLC, 2021 Tex. App. LEXIS 7941 (Tex. App.—Corpus Christi Sept. 28, 2021), where a gas utility sought to condemn a pipeline easement pursuant to a statute that did not require that the gas utility be a common carrier.

    *Denbury Green* was followed in Mountain Valley Pipeline, LLC v. McCurdy, 793 S.E.2d 850 (W. Va. 2016), insofar as the court applied heightened scrutiny to a privately-owned public utility’s attempt to use eminent domain power. *In accord:* Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc., 478 S.W.3d 386 (Ky. Ct. App. 2015). [↑](#footnote-ref-78)
78. 70Tex. Nat. Res. Code § 111.001 *et seq.* [↑](#footnote-ref-79)
79. 71363 S.W.3d at 195–96. [↑](#footnote-ref-80)
80. 72Tex. Nat. Res. Code §§ 111.002(6), 111.011111–.025. In Occidental Chem. Corp. v. ETC NGL Transp., LLC, 2011 Tex. App. LEXIS 5565, 5576 (Tex. App.—Houston [1st Dist.] July 20, 2011), the court determined that a common carrier under Chapter 111 of the Natural Resources Code could file an action in state district court seeking to enjoin the owner of a pipeline corridor from interfering with its exercise of the power of eminent domain granted it under Chapter 111. The pipeline corridor owner asserted that venue was limited to the county court at law in the county in which the eminent domain authority was being exercised. Tex. Gov’t. Code § 25.1032(c). [↑](#footnote-ref-81)
81. 73363 S.W.3d at 196. [↑](#footnote-ref-82)
82. 74*See* Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 310, 312, 156 O.&G.R. 622 (Tex. App.—Tyler 2001, pet. denied). [↑](#footnote-ref-83)
83. 75*See* § 25.02 *infra.* [↑](#footnote-ref-84)
84. 76363 S.W.3d at 198–99. [↑](#footnote-ref-85)
85. 77Tex. Const. Art. I, § 17. [↑](#footnote-ref-86)
86. 78363 S.W.3d at 197. This second canon of construction is widely followed. *See* Linder v. Arkansas Midstream Gas Services Corp., 2010 Ark. 117, 362 S.W.3d 889 (2010); Ralph Loyd Martin Revocable Trust Declaration Dated the First Day of April 1994 v. Arkansas Midstream Gas Servs. Corp., 2010 Ark. 480, 377 S.W.3d 251; Smith v. Ark. Midstream Gas Servs. Corp., 2010 Ark. 256, 377 S.W.3d 199 (2010); Coquina ***Oil*** Corp. v. Harry Kourlis Ranch, 643 P.2d 519, 72 O.&G.R. 21 (Colo. 1982); Steamboat Lake Water & Sanitation Dist. v. Halvorson, 252 P.3d 497 (Colo. Ct. App. 2011) (follows *Coquina* ***Oil***); State v. Aitchison, 96 Mont. 335, 30 P.2d 805 (1934); City of Blue Mound v. Southwest Water Co., 449 S.W.3d 678 (Tex. App.—Ft. Worth 2014); Marion Energy, Inc. v. KFJ Ranch P’ship, 2011 UT 50, 267 P.3d 863; EME Wyoming, LLC v. BRW East, LLC, 2021 WY 64, 486 P.3d 980; L.U. Sheep Co. v. Board of County Comm’rs, 790 P.2d 663, 671 (Wyo. 1990); Coronado ***Oil*** Co. v. Grieves, 603 P.2d 406, 410 (Wyo. 1979).

    The canon of narrowly interpreting statutes that purport to delegate eminent domain power to local governments is also widely utilized although sometimes not as strictly. City of Blue Mound v. Southwest Water Co., 449 S.W.3d 678, 685 (Tex. App.—Ft. Worth 2014) (“it is not meant that the statute shall be strictly or even narrowly construed”).

    The strict or narrow construction canon was not used by the court in Little v. Dominion Transmission, Inc., 138 F. Supp. 3d 699 (W.D. Va. 2015), whereby it upheld the constitutionality of Va. Code § 56-49.01 giving natural gas companies the power of eminent domain against a landowner claim that the statute was void for vagueness.

    In Puntenney v. Iowa Utilities Board, 928 N.W.2d 829 (Iowa 2019), the Iowa Supreme Court gave substantial deference to the Board’s interpretation of the term “public convenience and necessity” relating to the Board’s issuance of a permit for the Dakota Access pipeline which would transport ***oil*** from North Dakota to Illinois. It did not, however, give substantial deference to the Board’s determination that the proposed pipeline was a public use under both statutory and constitutional mandates. The court nonetheless, upheld the Board’s decision to issue the permit under a substantial evidence standard. [↑](#footnote-ref-87)
87. 79363 S.W.3d at 202. Upon remand, the trial court granted Denbury Green’s motion for summary judgment after presenting affidavit testimony upon potential third-party users of the proposed pipeline. In Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 457 S.W.3d 115 (Tex. App.—Beaumont 2015, writ filed), however, the court reversed and found that the proffered evidence was insufficient to find that as a matter of law the proposed pipeline would be a common carrier. In addition, the court determined that a fact issue was raised as to whether the taking serves a substantial public interest which is necessary before the power of eminent domain may be exercised. In Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd., 60 Tex. Sup. Ct. J. 201 2017 Tex. LEXIS 1 (Tex. Jan. 6, 2017), the Texas Supreme Court reinstated the trial court’s order finding that Denbury Green was a common carrier. Evidence of post-construction third-party contracts are sufficient to support a finding that the common carrier test set forth by the first *Denbury Green* decision had been met. [↑](#footnote-ref-88)
88. 80363 S.W.3d at 204. [↑](#footnote-ref-89)
89. 81Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd., 60 Tex. Sup. Ct. J. 201, 510 S.W.3d 909 (2017).

    In Boerschig v. Trans-Pecos Pipeline, LLC, 2016 U.S. Dist. LEXIS 191266 (W.D. Tex. July 13, 2016), the court rejected an attack on the pipeline’s asserted authority under Texas statutes to condemn land for an intrastate pipeline because it would violate the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits a federal court from interfering with an already instituted state eminent domain proceeding. On appeal, Boerschig v. Trans-Pecos Pipeline, LLC, 872 F.3d 701 (5th Cir. 2017), the Fifth Circuit affirmed the denial of the motion for a preliminary injunction but not on the basis of the Anti-Injunction Act. [↑](#footnote-ref-90)
90. 81.1Tex. Bus. Org. Code § 2.105.

    In Tex. Util. Code Ann. § 181.004, the statute delegates the eminent domain power to statutorily defined public utilities who may not be common carriers. Nonetheless, given the fact that it is the courts that determine whether such a delegation meets the constitutional requirement of public use, a landowner is entitled to discovery relating to the gas utility’s proposed use so that the court may determine if a public use is involved. *In re* DeRuiter Ranch, LLC, 2021 Tex. App. LEXIS 7941 (Tex. App.—Corpus Christi Sept. 28, 2021). [↑](#footnote-ref-91)
91. 81.2Hlavinka v. HSC Pipeline Partnership, LLC, 650 S.W.3d 483 (Tex. 2022), *aff’g in part and rev’g in part*, 605 S.W.3d 819 (Tex. App.—Houston [1st Dist.] 2020). [↑](#footnote-ref-92)
92. 81.3650 S.W.3d at 488–89. The issue was whether polymer-grade propylene is an “***oil*** product.” [↑](#footnote-ref-93)
93. 82Robinson Township v. Commonwealth, 147 A.3d 536 (Pa. 2016). [↑](#footnote-ref-94)
94. 8358 Pa. Cons. Stat. § 3241. Section 3241 was added with the enactment of Act 13 in 2012 which attempted to make substantial revisions to the Pennsylvania ***Oil*** and Gas Act, some of which were invalidated in Robinson Township v. Commonwealth, 623 Pa. 564, 83 A.3d 901 (Pa. 2013) and the follow-up decision in 2016. Robinson Township v. Commonwealth, 147 A.3d 536 (Pa. 2016). [↑](#footnote-ref-95)
95. 84Robinson Township v. Commonwealth, 147 A.3d 536, 583–85 (Pa. 2016). Pennsylvania requires that the power of eminent domain be exercised only where the primary and paramount beneficiary will be the public. Hughes v. UGI Storage Co., 243 A.3d 278 (Pa. Commw. Ct. 2020), *rev’d on other grounds,* 263 A.3d 1144 (Pa. 2021); *In re* Opening Private Road for Benefit of O’Reilly, 607 Pa. 280, 5 A.3d 246 (Pa. 2010). *See also* Hughes v. UGI Storage Co., 2017 Pa. Commw. Unpub. LEXIS 166 (Pa. Commw. Ct. Mar. 13, 2017); Fay v. UGI Utilities/Central Penn Gas, 2012 U.S. Dist. LEXIS 136207 (M.D. Pa. Sept. 24, 2012). In *In re* Appeal of Andover Homeowners’ Ass’n, 217 A.3d 906 (Pa. Commw. Ct. 2019), the court found that land under common ownership by a homeowners’ association was not public land subject to the protection of the Environmental Rights Amendment. [↑](#footnote-ref-96)
96. 8566 Pa. Cons. Stat. §§ 1101, 1104, 1511. [↑](#footnote-ref-97)
97. 86*In re* Condemnation by Sunoco Pipeline, LP, 143 A.3d 1000 (Pa. Commw. Ct. 2016), *appeal denied*, 164 A.3d 485 (Pa. 2016). *See also* Hughes v. UGI Storage Co., 243 A.3d 278 (Pa. Commw. Ct. 2020); Delaware Riverkeeper Network v. Sunoco Pipeline LP, 179 A.3d 670 (Pa. Commw. Ct. 2018). [↑](#footnote-ref-98)
98. 87*In re* Condemnation by Sunoco Pipeline, LP, 143 A.3d 1000, 1018–19 (Pa. Commw. Ct. 2016), *appeal denied*, 164 A.3d 485 (Pa. 2016). *See also* Fairview Water Co. v. Public Utility Commission, 509 Pa. 384, 502 A.2d 162 (1985). [↑](#footnote-ref-99)
99. 88Appalachian Voices v. FERC, 2019 U.S. App. LEXIS 4803 (D.C. Cir. Feb. 19, 2019); Midcoast Interstate Transmission, Inc. v. FERC, 198 F.3d 960, 973 (D.C. Cir. 2000). The most robust analysis of the public use/public purpose doctrine by the Supreme Court is Kelo v. City of New London, 545 U.S. 469 (2005), dealing with a public/private partnership in an urban renewal project. The view that property taken for a “public purpose” satisfies the public use requirement was followed in City of Oberlin v. FERC, 39 F.4th 719 (D.C. Cir. 2022). *In accord*: Sierra Club v. FERC, 38 F.4th 220 (D.C. Cir. 2022). The issuance of a certificate of public convenience and necessity by the FERC satisfies the public use requirement. *Id.*; Midcoast Interstate Transmission, Inc. v. FERC, 198 F.3d 960 (D.C. Cir. 2000).

    In Hughes v. UGI Storage Co., 243 A.3d 278 (Pa. Commw. Ct. 2020), *rev’d on other grounds,* 263 A.3d 1144 (Pa. 2021), the court noted that the power of eminent domain granted under the Natural Gas Act will be limited to the geographic area included in the certificate of public convenience and necessity.

    Federal courts have, to date, largely rejected challenges asserting that the proposed pipeline project seeking FERC approval were not public uses and thus should not be given the power of eminent domain. *See, e.g*., Berkley v. Mountain Valley Pipeline, 896 F.3d 624 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 941 (2019); Bohon v. FERC, 37 F.4th 663 (D.C. Cir. 2022), *cert. granted, opinion vacated and remanded on other grounds,* 2023 U.S. LEXIS 1717 (Apr. 24, 2023) *aff’g* 2020 U.S. Dist. LEXIS 79639 (D.D.C. May 6, 2020); New Jersey Conservation Foundation v. FERC, 353 F. Supp. 3d 289 (D.N.J. 2018); Bold Alliance v. FERC, 2018 U.S. Dist. LEXIS 167392 (D.D.C. Sept. 28, 2018).

    A number of state courts have concluded that the public use requirement must mean something more than “indirect economic benefits” that is derived from Justice O’Connor’s dissenting opinion in *Kelo.* *See, e.g.*, Southwestern Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C., 199 Ill. 2d 225, 768 N.E.2d 1, 10–11 (2002); County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765, 783 (2004); City of Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, 1123 (2006); Bd. of County Comm’rs v. Lowery, 2006 OK 31, 136 P.3d 639. While agreeing with the more than indirect economic benefit test, the Iowa Supreme Court concluded that it did not prevent the Iowa Utilities Board from approving a crude ***oil*** pipeline permit even though 90% of the capacity of the pipeline was already reserved to out-of-state contracts. Puntenney v. Iowa Utilities Board, 928 N.W.2d 829 (Iowa 2019). [↑](#footnote-ref-100)
100. 88.1PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244, 210 L. Ed. 2d 624 (2021). The court cited to Custiss v. Georgetown & Alexandria Turnpike Co., 10 U.S. 233, 3 L. Ed. 209, 6 Cranch 233 (1810), an early federal condemnation case involving District of Columbia land and Kohl v. United States, 91 U.S. 367, 23 L. Ed. 449 (1876), involving land in Ohio. The history of the eminent domain power is analyzed in Stoebuck, *A General Theory of Eminent Domain*, 47 Wash L. Rev. 553 (1972) and Bell, *Private Takings*, 76 U. Chi. L. Rev. 517 (2009). [↑](#footnote-ref-101)
101. 88.2*See, e.g.*, Luxton v. North River Brdige Co., 153 U.S. 525, 14 S. Ct. 891, 38 L. Ed. 808 (1894) (delegating eminent domain power to bridge company); Oklahoma *ex rel*. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487 (1941) (federal government has power to take State-owned land in eminent domain). [↑](#footnote-ref-102)
102. 89Marion Energy, Inc. v. KFJ Ranch P’ship, 2011 UT 50, 267 P.3d 863. [↑](#footnote-ref-103)
103. 90Utah Code § 78B-6-501(6)(a) (2008). After this opinion was rendered, the Legislature added the term “***oil***, gas and” before the last phrase minerals in solution, effectively reversing the result in future cases.

     In another example of legislative reaction to judicial opinions in this area, in Kennedy v. Yates Petroleum Corp., 104 N.M. 596, 725 P.2d 572 (1986), the court interpreted a grant of the power of eminent domain to pipeline companies to allow for an ***oil*** and gas lessee to condemn land for gathering lines. The New Mexico Legislature than changed the statute to so that gathering lines could no longer be condemned. N.M. Stat. § 70-3-5(B). Then in 1988, the legislature passed the “Gathering Line Land Acquisition Act,” N.M. Stat. §§ 70-3A-1 to 70-3A-7, which gives an ***oil*** and gas operation the power to condemn lands for gathering line purposes subject to certain procedural requirements. *See* El Paso Field Servs. Co. v. Montoya Sheep & Cattle Co., 134 N.M. 375, 77 P.3d 279, 2003-NMCA-113, 134 N.M. 375, 77 P.3d 279.

     In EME Wyoming, LLC v. BRW East, LLC, 2021 WY 64, the court applied the rule of strict construction against the grant of eminent domain powers to private entities to conclude that the statute did not grant a right of access to ***oil*** and gas operators per se unless they could show that they owned the mineral estate underlying the lands for which they were seeking access.

     In Enbridge Pipeline (Ill.), LLC v. Murfin, 2020 IL App (5th) 160007, 439 Ill. Dec. 733, 148 N.E.3d 786, the court noted that Illinois follows the canon of construction that strictly construes eminent domain enabling statutes in favor of property owners. 148 S.W.3d at 805–06.

     In Puntenney v. Iowa Utilities Board, 928 N.W.2d 829 (Iowa 2019), the court upheld the Board’s decision to permit an ***oil*** pipeline that would transport ***oil*** from North Dakota to Illinois as constituting a public use even though there would be no on-loading or off-loading ***oil*** within Iowa.

     In Atlantic Coast Pipeline, LLC v. Avery, 2016 Va. Cir. LEXIS 73 (Cir. Ct. May 9, 2016), the court interpreted Va. Code § 56-49.01(A) that delegates to a “natural gas company” as defined in the Natural Gas Act (15 U.S.C. § 717a), the power of eminent domain without resorting to any canons of narrow construction. It concluded that an NGA-defined natural gas company did not have to be a Virginia public service company as the landowners had argued.

     In Mountain Valley Pipeline, LLC v. McCurdy, 793 S.E.2d 850 (W. Va. 2016), the court said that eminent domain statutes that delegate such power to public utilities are to be narrowly construed. Under W. Va. Code § 54-1-1 *et seq.*, a privately-owned public utility must show that the proposed condemnation is for a “public use.” The court upheld a finding that because 95% of the throughput of the proposed pipeline was to be owned by the pipeline operator, it was not a public use. [↑](#footnote-ref-104)
104. 91With the exception of Pennsylvania almost every state that has looked at the issue of whether the term “minerals” includes ***oil*** and/or natural gas has concluded that it does. *See* Patrick H. Martin & Bruce M. Kramer, Williams & Meyers ***Oil*** and Gas Law § 219. In Coronado ***Oil*** Co. v. Grieves, 603 P.2d 406, 66 O.&G.R. 387 (Wyo. 1979)*, appeal after remand,* 642 P.2d 423, 74 O.&G.R. 545 (Wyo. 1982), *partially rev’d on other grounds*, L.U. Sheep Co. v. Board of County Comm’rs, 790 P.2d 663 (Wyo. 1990), the court reached the opposite result finding that the constitutional and statutory use of the term “mining” included ***oil*** and gas explorations, although finding that the power of eminent domain did not extend to a federal ***oil*** and gas lessee. [↑](#footnote-ref-105)
105. 92267 P.3d at 871–72 citing Bertagnoli v. Baker, 215 P.2d 626 (Utah 1950). Justice Lee, in dissent, beside questioning the use of “substantive” or outcome-determinative canons, notes that there is an equal and opposite canon relating to eminent domain which interprets such statutes liberally in furtherance of the purpose of those statutes. 267 P.3d at 872–73 citing Monetaire Mining Co. v. Columbus Rexall Consol. Mines Co., 174 P. 172, 175 (Utah 1919). The strict construction canon was applied in EME Wyoming, LLC v. BRW East, LLC, 2021 WY 64, 486 P.3d 980, to disqualify an entity which did not own any mineral interests within the area it sought to geophysically explore from being considered a condemnor under the Wyoming Eminent Domain Act. Wyo. Stat. Ann. § 1-26-506. [↑](#footnote-ref-106)
106. 93Larson v. Sinclair Transp. Co., 284 P.3d 42, 2012 CO 36, *rev’g*, Sinclair Transp. Co. v. Sandberg, 228 P.3d 198 (Colo. Ct. App. 2009). Having already constructed the pipeline, Sinclair went back to state court seeking a declaratory judgment that the new pipeline was within the scope of the express easement. The trial court concluded that if it was a replacement pipeline it was authorized but that would require Sinclair to remove the old pipeline. In Sinclair Transportation Co. v. Sandberg, 2014 COA 76, *as modified upon the denial of the motion for rehearing*, 2014 Colo. App. LEXIS 1115 (July 3, 2014), the court affirmed the trial court’s declaratory relief.

     Ohio appears to take a more liberal approach to determining whether or not the transportation of certain products, including refined petroleum products, fits within the statutory definition of “natural gas, ***oil***, petroleum or coal or its derivatives.” Ohio Rev. Code § 1723.01. *See e.g.*, Kinder Morgan Cochin LLC v. Simonson, 2016-Ohio-4647, 66 N.E.3d 1176 (2016), *cert. denied*, 2017-Ohio-261, 67 N.E.3d 823; Sunoco Pipeline L.P. v. Teter, 2016-Ohio-7073, 63 N.E.3d 160, *discretionary appeal allowed*, 149 Ohio St. 3d 1431, 2017-Ohio-4396, 76 N.E.3d 1207; Ohio River Pipeline, LLC v. Gutheil, 144 Ohio App. 3d 694, 761 N.E.2d 633 (2001); Ohio River Pipe Line LLC v. Henley, 144 Ohio App. 3d 703, 761 N.E.2d 640 (2001). The Ohio Supreme Court, however, has never overruled or modified Ohio Power Co. v. Deist, 154 Ohio St. 473, 477, 96 N.E.2d 771 (1951) which said that statutes delegating the power of eminent domain to private companies must be “strictly construed” but not to the point of being unreasonable. In an urban blight case, the Ohio Supreme Court applied the canon of construction thatany doubt is to be resolved in the property owner’s favor. City of Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115. [↑](#footnote-ref-107)
107. 94Colo. Rev. Stat. § 38-5-105. [↑](#footnote-ref-108)
108. 95Colo. Rev. Stat. §§ 38-5-101, 38-5-102. [↑](#footnote-ref-109)
109. 96The canon of strict or narrow construction was set forth in Bly v. Story, 241 P.3d 529, 533 (Colo. 2010) and Coquina ***Oil*** Corp. v. Harry Kourlis Ranch, 643 P.2d 519, 522, 72 O.&G.R. 21 (Colo. 1982). In *Coquina* ***Oil***, the court denied a federal ***oil*** and gas lessee the right to condemn an access road under Colo. Const. Art. II, § 14 otherwise giving private owners the power to condemn ways of necessity for mining purposes. *In accord*, McCabe Petroleum Corp. v. Easement & Right-Of-Way Across Twp. 12 N., 2004 MT 73, 320 Mont. 384, 87 P.3d 479, 161 O.&G.R. 348 (federal ***oil*** and gas lessee does not have power of eminent domain to condemn a private surface estate for access to a landlocked federal ***oil*** and gas lease tract). In McEwen v. MCR, LLC, 368 Mont. 38, 2012 MT 319, 291 P.3d 1253, the Montana Supreme Court acknowledged the strict construction rule for the grant of the power of eminent domain to private entities, but then reversed a trial court decision concluding that the plaintiff did not have the power to condemn land for a compressor station because the relevant statute (Mont. Code § 70-30-111(2)) expressly provides that natural gas pipelines have that power. The court remanded the case to the trial court to see if the plaintiff met all of the statutory requirements for being granted the power of eminent domain. [↑](#footnote-ref-110)
110. 972012 CO 36, ¶¶ 25–34. The decision was 4-3 with Justice Hobbs joined by Chief Justice Bender dissenting and Justice Eid issuing a separate dissenting opinion. Justice Hobbs also gives a wonderful history lesson in the transportation of ***oil*** and natural gas which served as the backdrop for the first of the statutory grants of the private right of eminent domain to pipeline companies.

     The use of the strict construction canon was applied in EME Wyoming, LLC v. BRW East, 2021 WY 64. While noting that the purpose of statutes allowing private condemnations of ways of necessity served an important public purpose, the statute could not be read as to authorize private condemnees who did not own the mineral estate from entering the surface to explore for potential mineral deposits. *See also*: Wyoming Resources Corp. v. T-Chair Land Co., 2002 WY 104, 49 P.3d 999. [↑](#footnote-ref-111)
111. 98Laird Hill Salt Water Disposal, Ltd. v. E. Tex. Salt Water Disposal, Inc., 351 S.W.3d 81 (Tex. App.—Tyler 2011, writ denied). *Laird Hill* was legislatively overruled as to a portion of the decision relating to the timing of the condemning authority’s governing board initiation of the condemnation process. Tex. Gov’t Code § 2206.053(a)(1) as interpreted in Tex. Mun. Power Agency v. Johnston, 2013 Tex. App. LEXIS 1911 (Tex. App.—Houston [1st Dist.] Feb. 28, 2013). Another case rejecting the strict construction canon is Lyons v. Longmont, 129 P. 198 (Colo. 1912) where the court allowed a municipal corporation to condemn land for a pipeline carrying water even though the statute and constitutional language referred only to ditches, canals, and flumes.

     A number of cases that have been decided after Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd., 60 Tex. Sup. Ct. J. 201, 510 S.W.3d 909 (2017), have not followed a strict interpretational canon of construction when it comes to legislative grants of eminent domain authority to private entities. In Crawford Family Farm P’ship v. TransPipelineTransCanada Keystone Pipeline, L.P., 409 S.W.3d 908 (Tex. App.—Texarkana 2013, rev. denied), the court noted that for over 100 years Texas courts have recognized the legislative power to delegate eminent domain authority to private entities and that such delegation is a legislative, not a judicial, function. Imperial Irr. Co. v. Jayne, 104 Tex. 395, 417, 138 S.W. 575 (Tex. 1911); Buffalo Bayou, B. & C. R. Co. v. Ferris, 26 Tex. 588 (Tex. 1863). *In accord*: Rhinoceros Ventures Group, Inc. v. Transcanada Keystone Pipeline, L.P., 388 S.W.3d 405, 409 (Tex. App.—Beaumont 2012, rev. denied), But in Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms-1, Ltd., 404 S.W.3d 754 (Tex. App.—Beaumont 2013), the court followed the *Denbury Green* rationale of closely scrutinizing a claim of common carrier status under different statutory regimes and upheld a trial court order finding that the pipeline was not a common carrier and therefore not entitled to condemn an easement. The Beaumont Court’s strict interpretation was evident in its decision in Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 457 S.W.3d 115 (Tex. App.—Beaumont 2015, writ filed). After the Texas Supreme Court remanded for a new trial under its new more demanding common carrier test, the trial court granted Denbury Green’s motion for summary judgment. The Beaumont Court of Appeals, however, reversed finding the affidavit evidence insufficient to show that the pipeline met the new common carrier test and furthermore that it was unclear from that evidence that the proposed pipeline served a substantial public interest as is required by the Texas Constitution. On appeal, the Texas Supreme Court reinstated the trial court order finding Denbury Green to be a common carrier, because the Beaumont Court of Appeals had wrongfully excluded from its analysis third-party transportation contracts that had been executed after the pipeline had been constructed. Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd., 60 Tex. Sup. Ct. J. 201, 510 S.W.3d 909 (2017). Some pre-*Denbury Green* decisions applied a very deferential “bad faith, arbitrary or capricious or abuse of discretion” standard to reviewing these private determinations of public use. *See, e.g.,* Circle X Land & Cattle Co. v. Mumford Independent School District, 325 S.W.3d 859 (Tex. App.—Houston [14th Dist.] 2010); Anderson v. Teco Pipeline Co., 985 S.W.2d 559 (Tex. App.—San Antonio 1998).

     In Sansom v. Texas Railroad Commission, 2021 Tex. App. LEXIS 3977 (Tex. App.—Austin, May 20, 2021), several landowners challenged Tex. Util. Code § 181.004, Railroad Commission Rule 4 and the T-4 permitting process for “gas utilities” as violating various constitutional norms since the Commission did not retain any power over where the gas utility could locate its pipelines. The court of appeals dismissed the claims as not stating any cause of action. [↑](#footnote-ref-112)
112. 99Under Tex. Nat. Res. Code § 11.404(a), a well wastewater corporation “may condemn land or a property right necessary for a purpose of the corporation.” It was undisputed that the plaintiff was a well wastewater corporation. [↑](#footnote-ref-113)
113. 99.1KMS Retail Rowlett, LP v. City of Rowlett, 593 S.W.3d 175 (Tex. 2019); Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 353 S.W.3d 192 (Tex. 2012); *In re* DeRuiter Ranch, LLC, 2021 Tex. App. LEXIS 7941 (Tex. App.—Corpus Christi Sept. 28, 2021). [↑](#footnote-ref-114)
114. 99.2KMS Retail Rowlett, LP v. City of Rowlett, 593 S.W.3d 175, 198 (Tex. 2019), quoted in *In re* DeRuiter Ranch, LLC, 2021 Tex. App. LEXIS 7941 (Tex. App.—Corpus Christi Sept. 28, 2021). [↑](#footnote-ref-115)
115. 100*Denbury Green*, 363 S.W.3d at 204. *See also* Crawford Family Farm P’ship v. TransPipelineTransCanada Keystone Pipeline, L.P., 409 S.W.3d 908 (Tex. App.—Texarkana 2013, rev. denied) where the court finds that the pipeline owner met the *Denbury Green* test for showing that its pipeline was open to third parties for the transportation of crude petroleum.

     In Kentucky, gathering lines have been held to be either common carriers or in “public service” even where they are not generally open for public access. K. Petroleum, Inc. v. Property Tax Map No. 7, Parcel 12, 2016 U.S. Dist. LEXIS 30620 (E.D. Ky. Mar. 10, 2016); EQT Gathering, LLC v. A Tract of Prop. Situated in Knott County, 970 F. Supp. 2d 655 (E.D. Ky. 2013); Milam v. Viking Energy Holdings, LLC, 370 S.W.3d 530 (Ky. Ct. App. 2012); Texas ***Oil*** Co. v. Commonwealth, 198 S.W.2d 316, 318 (Ky. 1946) (***oil*** pipeline is a common carrier engaged in public service). In Bluegrass PIpeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, 478 S.W.3d 386 (Ky. Ct. App. 2015, rev. denied), however, the court found that a proposed pipeline that serves mostly private entities could not exercise the private right of eminent domain delegated to public service companies.

     In Oklahoma, the court gives substantial deference to the condemnee’s decision as to the “necessity” of the taking. Natural Gas Pipeline Co. of America, LLC v. Foster OK Resources, LP, 2020 OK 29, 465 P.3d 1206.

     In Pennsylvania, the court uses the term “public purpose” and not “public use” which would seemingly be a broader term. Nonetheless in Robinson Township v. Commonwealth, 147 A.3d 536 (Pa. 2016), the court invalidated a statute which purported to delegate the power of eminent domain to corporations engaged in the production, transportation or storage of natural gas because the public needs to “the primary and paramount beneficiary” of the taking in order to satisfy the public purpose requirement. *Id.* at 586. *See also* Hughes v. UGI Storage Co., 243 A.3d 278 (Pa. Commw. Ct. 2020), *rev’d on other grounds,* 263 A.3d 1144 (Pa. 2021); Hughes v. UGI Storage Co., 2017 Pa. Commw. Unpub. LEXIS 166 (Pa. Commw. Ct. Mar. 13, 2017); Fay v. UGI Utilities/Central Penn Gas, 2012 U.S. Dist. LEXIS 136207 (M.D. Pa. Sept. 24, 2012). [↑](#footnote-ref-116)
116. 101Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 457 S.W.3d 115 (Tex. App.—Beaumont 2015, writ filed). [↑](#footnote-ref-117)
117. 102Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd., 60 Tex. Sup. Ct. J. 201, 510 S.W.3d 909 (2017). The court distinguished Coastal States Gas Producing Co. v. Pate, 158 Tex. 171, 309 S.W.2d 828 (1958). [↑](#footnote-ref-118)
118. 103La. Rev. 45:254. *See* ExxonMobil Pipeline Co. v. Union Pac. R.R. Co., 2009-1629 (La. 3/16/10) 35 So. 3d 192. [↑](#footnote-ref-119)
119. 104Tex. Nat. Res. Code § 111.011. [↑](#footnote-ref-120)
120. 104.1Denbury Green Pipeline-Texas, LLC v. Tex. Rice Land Partners, Ltd., 510 S.W.3d 909 (Tex. 2017). [↑](#footnote-ref-121)
121. 105Hlavinka v. HSC Pipeline Partnership, LLC, 650 S.W.3d 483 (Tex. 2022), *aff’g in part and rev’g in part*, 605 S.W.3d 819 (Tex. App.—Houston [1st Dist.] 2020). In *Hlavinka*, the pipeline had a contract with one unaffiliated customer which was found sufficient to meet the public use standard.

     Laird Hill Salt Water Disposal, Ltd. v. E. Tex. Salt Water Disposal, Inc., 351 S.W.3d 81 (Tex. App.—Tyler 2011) states that when the legislature declares a use a public use it is binding on the courts unless the use is “clearly and palpably” private. *Laird Hill* was legislatively overruled as to a portion of the decision relating to the timing of the condemning authority’s governing board initiation of the condemnation process. Tex. Gov’t Code § 2206.053 (a)(1) as interpreted in Tex. Mun. Power Agency v. Johnston, 2013 Tex. App. LEXIS 1911 (Tex. App.—Houston [1st Dist.] Feb. 28, 2013). *See* Housing Authority of Dallas v. Higginbotham, 143 S.W.2d 79 (Tex. 1940). *See also* Sinclair Transp. Co. v. Sandberg, 228 P.3d 198, 206 (Colo. Ct. App. 2009), *rev’d on other grounds*, Larson v. Sinclair Transp. Co., 284 P.3d 42, 2012 CO 36, *relying on*, Sheridan Redevelopment Agency v. Knightsbridge Land Co., L.L.C., 166 P.3d 259, 265 (Colo. Ct. App. 2007) (as to judicial review of public purpose determinations, court only looks to see if it is supported by the record and if so, the inquiry ends). The Texas Supreme Court, however, seems to be dialing back a bit on what constitutes a public use or a substantial public interest. Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd., 60 Tex. Sup. Ct. J. 201, 510 S.W.3d 909 (2017). [↑](#footnote-ref-122)
122. 105.1Kelo v. City of New London, 545 U.S. 469, 497–98, 125 S.Ct. 2655, 162 L. Ed. 2d 439 (2005) (O’Connor, J., dissenting). A number of state courts have concluded that the public use requirement must mean something more than “indirect economic benefits” that is derived from Justice O’Connor’s dissenting opinion in *Kelo.* *See, e.g.*, Southwestern Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C., 199 Ill. 2d 225, 768 N.E.2d 1, 10–11 (2002); County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765, 783 (2004); City of Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, 1123 (2006); Bd. of County Comm’rs v. Lowery, 2006 OK 31, 136 P.3d 639.

     *See* James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 Minn. L. Rev. 659 (2019).

     In Mt. Valley Pipeline, LLC v. McCurdy, 238 W. Va. 200, 793 S.W.2d 850 (2016) and Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc., 478 S.W.3d 386 (Ky. Ct. App. 2015), the court concluded that the absence of in-state use precluded a finding that the proposed pipeline had been delegated the private right of eminent domain.

     In response to *Kelo*, Texas both amended its constitutional provision relating to the taking of property, Tex. Const. art. I, § 17, and some of its eminent domain statutes, Tex. Loc. Gov’t Code § 251.001 *et seq.*; Tex. Gov’t Code § 2206.001 et *seq.* In KMS Retail Rowlett, LP v. City of Rockwall, 62 Tex. Sup. J. 1038, 593 S.W.3d 175 (2019), the majority and dissent sparred as to how much deference should be given a local government’s decision finding that there is a public use in light of those constitutional and statutory changes.

     In response to *Kelo*, the Pennsylvania Legislature amended its Eminent Domain Code to make it harder for private entities to be granted the eminent domain power. 26 Pa. Cons. Stat. §§ 101–1106. *See* PBS Coals, Inc. v. Department of Transportation, 244 A.3d 386 (Pa. 2021).

     Illinois also amended its eminent domain statute in January 2007, that, among other provisions, created a rebuttable presumption when an administrative agency has determined that a common carrier has met the requirements of public use. 735 ILCS 30/5/5-1 et seq. The Illinois procedure is analyzed in Enbridge Pipeline (Ill.), LLC v. Murfin, 2020 IL App (5th) 160007, 439 Ill. Dec. 733, 148 N.E.3d 786. There have been a series of largely unsuccessful challenges to administrative decisions authorizing a liquids pipeline owner to extend or expand its pipeline system. *See, e.g*., Illinois Extension Pipeline Co., LLC v. Thomas, 2016 U.S. Dist. LEXIS 42599 (C.D. Ill. Mar. 30, 2016); Ill. Extension Pipeline Co., LLC v. Thomas, 2015 U.S. Dist. LEXIS 52966 (C.D. Ill. Apr. 22, 2015); Pliura Intervenors v. Illinois Commerce Commission, 2015 IL App (4th) 140592-U, 2015 IL. App. Unpub. LEXIS 1094 (Ill. App. May 19, 2015); Pliura Intervenors v. Illinois Commerce Commission, 405 Ill. App. 3d 199, 942 N.E.2d 576, 347 Dec. 373. [↑](#footnote-ref-123)
123. 105.2Puntenney v. Iowa Utilities Board, 928 N.W.2d 829 (Iowa 2019) (approving finding that Dakota Access Pipeline was a common carrier and could exercise the power of eminent domain to locate its pipeline in Iowa even though 90% of the throughput of the proposed pipeline was committed to non-Iowa transactions. *In accord*: Enbridge Energy (Illinois) LLC v. Kuerth, 2018 IL App. (4th) 150519-B, 421 Ill. Dec. 210, 99 N.E.3d 210 (2018); Sunoco Pipeline L.P. v. Teter, 2016-Ohio-7073, 63 N.E.3d 160, 171–72 (Ohio App.). [↑](#footnote-ref-124)
124. 106Boerschig v. Trans-Pecos Pipeline, LLC, 872 F.3d 701 (5th Cir. 2017). In *Boerschig*, the pipeline was condemning easements under Tex. Util. Code § 181.004. *See also* Circle X Land & Cattle Co. v. Mumford Independent School District, 325 S.W.3d 859 (Tex. App.—Houston [14th Dist.] 2010); Anderson v. Teco Pipeline Co., 985 S.W.2d 559 (Tex. App.—San Antonio 1998); Bevly v. Tenngasco Gas Gathering Co., 638 S.W.2d 118 (Tex. App.—Corpus Christi 1982, writ ref’d n.r.e.). [↑](#footnote-ref-125)
125. 107Boerschig v. Trans-Pecos Pipeline, LLC, 872 F.3d 701 (5th Cir. 2017).

     In KMS Retail Rowlett, LP v. City of Rockwall, 62 Tex. Sup. J. 1038, 593 S.W.3d 175 (2019), the majority opinion retained a somewhat deferential role in dealing with a city’s determination that the taking of a private road satisfied the heightened constitutional standards for what constitutes a public use after the Texas Constitution was amended to make it harder to condemn land. Tex. Const. art. I, § 17. [↑](#footnote-ref-126)
126. 108Boerschig v. Trans-Pecos Pipeline, LLC, 872 F.3d 701, 706–07 (5th Cir. 2017). *See also* Joiner v. City of Dallas, 380 F. Supp. 754, 766–78 (N.D. Tex. 1974), *aff’d,* 419 U.S. 1042 (1974); Smart v. Texas Power & Light Co., 525 F.2d 1209 (5th Cir. 1976). [↑](#footnote-ref-127)
127. 109Linder v. Arkansas Midstream Gas Services Corp., 2010 Ark. 117, 362 S.W.3d 889 (2010); Ralph Loyd Martin Revocable Trust Declaration Dated the First Day of April 1994 v. Arkansas Midstream Gas Servs. Corp., 2010 Ark. 480, 377 S.W.3d 251 (2010); Smith v. Arkansas Midstream Gas Servs. Corp., 2010 Ark. 256, 377 S.W.3d 199 (2010). *Linder* also included an “as applied” challenge. [↑](#footnote-ref-128)
128. 110Ark. Code § 23-15-101 provides in part that: “All pipeline companies operating in this state are given the right of eminent domain and are declared to be common carriers, except pipelines operated for conveying natural gas for public utility service.” [↑](#footnote-ref-129)
129. 111This is to be contrasted with the “hard look” taken by the Texas Supreme Court in Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd., 60 Tex. Sup. Ct. J. 201, 510 S.W.3d 909 (2017); *but cf.* Linder v. Arkansas Midstream Gas Services Corp., 2010 Ark. 117, 362 S.W.3d 889, 896 (2010). The gathering lines will serve several different leases and royalty and working interest owners but not the general public. [↑](#footnote-ref-130)
130. 111.1The most recent case following the majority view is Natural Gas Pipeline Co. of America, LLC v. Foster OK Resources, LP, 2020 OK 29, 465 P.3d 1206. *See also*: West River Bridge Co. v. Dix, 47 U.S. 507, 12 L. Ed. 535 (1848); Public Service Co. v. Loveland, 79 Colo. 216, 245 P. 493 (1926); Southern Indiana Gas & Electric Co. v. Boonville, 215 Ind. 552, 20 N.E.2d 648 (1939); Herman v. Board of Park Commissioners, 200 Iowa 1116, 206 N.W. 35 (1925); Tennessee Gas Transmission Co. v. Violet Trapping Co., 200 So. 2d 428 (La. Ct. App. 1967); Moberly v. Hogan, 317 Mo. 1225, 298 S.W. 237 (1927); Burke v. City of Oklahoma City, 1960 OK 29, 350 P.2d 264; Mobile & O.R. Co. v. Mayor of Union City, 137 Tenn. 491, 194 S.W. 572 (1917); Muscoda Bridge Co. v. Worden-Allen Co., 196 Wis. 76, 219 N.W. 428 (1928). [↑](#footnote-ref-131)
131. 112Charlottesville Division v. Dominion Transmission, Inc., 138 F. Supp. 3d 673 (W.D. Va. 2015). The district court refers to a submission that references those state statutes. [↑](#footnote-ref-132)
132. 113This privilege has been recognized for well over 150 years. *See e.g.*, Bonaparte v. Camden & A.R. Co., 3 F. Cas. 821, 829, 831, F. Cas. No. 1617 (C.C.D.N.J. 1980); Bloodgood v. Mohawk & Hudson R.R. Co., 18 Wend. 9 (N.Y. 1837). [↑](#footnote-ref-133)
133. 114Charlottesville Division v. Dominion Transmission, Inc., 138 F. Supp. 3d 673 (W.D. Va. 2015). Va. Code § 56-49.01. [↑](#footnote-ref-134)
134. 115Cox v. State, 2016 U.S. Dist. LEXIS 115184 (N.D. Ohio Aug. 29, 2016). [↑](#footnote-ref-135)
135. 116At one time pipelines had to get a state permit from either the Ohio Power Siting Board or the Public Utilities Commission before they could exercise the private right of eminent domain. That was changed in 2012, so that smaller natural gas pipelines were exempt from the permit requirement. 2016 U.S. Dist. LEXIS 115184, at \*5–7. [↑](#footnote-ref-136)
136. 117This doctrine has as its basis several Supreme Court opinions from 100 years ago dealing with local governments giving residents the power to approve or disapprove of zoning ordinance regulations. Washington *ex rel.* Seatte Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Eubank v. City of Richmond, 226 U.S. 137 (1912). [↑](#footnote-ref-137)
137. 118The court also upheld the statute’s rebuttable presumption of necessity that attaches to the pipeline’s decisions. Cox v. State, 2016 U.S. Dist. LEXIS 115184, at \*26–27 (N.D. Ohio Aug. 29, 2016). Ohio Rev. Code § 163.09(b). [↑](#footnote-ref-138)
138. 118.1*See e.g.*, Wyo. Stat. Ann. §§ 1-26-509 to 1-26-510. [↑](#footnote-ref-139)
139. 118.2*Compare* Board of County Commissioners of Mesa County v. Blecha, 697 P.2d 416, 418 (Colo. Ct. App. 1985); Blaize v. Public Service Co., 158 Ind. App. 204, 301 N.E.2d 863, 865 (1973) (discrepancy not fatal) *with* Dzur v. Northern Indiana Public Service Co., 257 Ind. 674, 278 N.E.2d 563, 566 (1972); Cape Girardeau v. Robertson, 615 S.W.2d 526, 530 (Mo. Ct. App. 1981); EOG Resources, Inc. v. Floyd C. Reno & Sons, Inc., 2020 WY 95, 468 P.3d 667 (discrepancy fatal to finding of good faith offer). [↑](#footnote-ref-140)
140. 119Merritt v. Corporation Commission, 1968 OK 19, 438 P.2d 495, 28 O.&G.R. 630. *See also* Railroad Commission v. City of Austin, 18 Tex. Sup. Ct. J. 241, 524 S.W.2d 262, 51 O.&G.R. 231 (Tex. 1975); Magnolia Petroleum Co. v. Railroad Commission, 141 Tex. 96, 170 S.W.2d 189 (Tex. 1943); Estate of Grimes v. Dorchester Gas Producing Co., 707 S.W.2d 196, 90 O.&G.R. 539 (Tex. Civ. App.—Amarillo 1986, writ ref’d n.r.e.).

     In Chesapeake Energy Marketing, Inc. v. State Board of Equalization, 2007 OK CIV APP 79, 167 P.3d 446, the court found that the Board lacked authority to impose statewide assessment of certain real property interests acquired by Chesapeake because the legislature had imposed a moratorium on changes in the assessment procedures while it studied the problem.

     The problems raised in *Chesapeake Energy Marketing* relating to the ad valorem taxation of gathering systems were also discussed in EOG Res. Mktg., Inc. v. Okla. State Bd. of Equalization, 2008 OK 95, 196 P.3d 511, 171 O.&G.R. 336. The issue involves a state statute that sought to freeze the way that certain properties were assessed. Under the Oklahoma Constitution, the Legislature may classify property for the purposes of taxation. Okla. Const. art. 10, § 22. The Legislature created 5 categories of property subject to ad valorem taxation, including property owned by public service corporations. Okla. Rev. Stat. tit. 68, § 2803(A). The State Board of Equalization has constitutional authority to assess public service corporation property. EOG challenged the continued assessment of its gathering line property by the Board of Equalization based on the statutory moratorium that froze all entities as public service corporations or non-public service corporations in 2002. The court said that the moratorium statute was invalid on a number of grounds, one of which was its unlawful extension of authority to the Board to assess property owned by non-public service corporations based on their taxable status in 2002. The Board’s authority was limited by the Constitution to assessing the value of public service corporation property and it could not be extended by statute to assess the value of non-public service corporation property. In addition, the court concluded that the 2002 statute maintaining the status quo regarding assessment practices violated both the constitutional prohibition against special laws, Okla. Const. art. 5, § 46, art. 10, § 14(A) and the constitutional requirement of uniform laws. Okla. Const. art. 10, § 5(B).

     The notion that the conservation agency is an agency of limited jurisdiction or powers also limits the remedies the agency may seek. *See* Prairie Exploration v. Tri-Star Energy, L.L.C., 2002 OK CIV APP 110, 84 P.3d 788, 158 O.&G.R. 302 (Commission did not have authority to order gas producer to repair and restore gatherer’s facilities where gatherer was not complying with prior order giving producer access; statute limited Commission’s authority to using procedure to name a receiver where party was not complying with prior Commission’s orders).

     In State of Missouri *ex rel.* Nixon v. Alternate Fuels, Inc., 181 S.W.3d 177 (Mo. Ct. App. 2005), *transfer denied*, the court found that a state agency retained jurisdiction over a mine operator, who had surrendered its permit, in order to assess penalties for actions undertaken while the permit was still in force.

     The New Mexico ***Oil*** Conservation Commission and ***Oil*** Conservation Division have express powers to prevent waste and protect correlative rights but do not have any power to resolve private claims for damages. Harvey E. Yates Co. v. Cimarex Energy Co., 2014 U.S. Dist. LEXIS 183891 (D.N.M. Mar. 5, 2014).

     In Found. Coal Res. Corp. v. Dep’t of Envtl. Prot., 993 A.2d 1277, 175 O.&G.R. 390 (Pa. Commw. Ct. 2010), the court noted that agencies may “only exercise those powers vested in it by the General Assembly” but then added that agencies also have power from “a strong and necessary implication from” the express enabling language. *See also* PECO Energy Co. v. PUC, 568 Pa. 39, 46, 791 A.2d 1155, 1159 (2002); Commonwealth, Dep’t of Environmental Resources v. Butler County Mushroom Farm, 499 Pa. 509, 454 A.2d 1 (1982).

     In Kidd v. Jarvis Drilling, Inc., 2006 Tenn. App. LEXIS 96 (Tenn. Ct. App. 2006), the court said that the ***Oil*** and Gas Board’s “power is limited to the power that is expressly granted by statute or must be necessarily implied to enable it to carry out its statutory responsibilities.”

     Just as agencies must act within the scope of delegated authority, administrative or executive officials must likewise comply with the scope of delegated power. In Dos Republicas Coal Partnership v. Saucedo, 477 S.W.3d 828 (Tex. App.—Corpus Christi 2015), the County Judge who was the designated flood plain permit issuing entity could only include in his decision-making process the factors and considerations that were contained within the county’s flood plain ordinance. By considering extraneous factors, the County Judge acted ultra vires and was thus subject to a mandamus action. [↑](#footnote-ref-141)
141. 120*See, e.g.,* Continental Pipe Line Co. v. Belle Fourche Pipeline Co., 372 F. Supp. 1333, 49 O.&G.R. 396 (D. Wyo. 1974); Kerr-McGee Corp. v. Wyoming ***Oil*** & Gas Conservation Commission, 903 P.2d 537 (Wyo. 1995); Union Pacific Resources Co. v. State, 839 P.2d 356 (Wyo. 1992), *on later appeal,* 895 P.2d 464 (Wyo. 1994). [↑](#footnote-ref-142)
142. 121Alaskan Crude Corp. v. State, 309 P.3d 1249 (Alaska 2013).

     In French v. Alaska ***Oil*** & Gas Conservation Commission, 498 P.3d 1026 (Alaska 2021), the AOGCC argued that it did not have jurisdiction over a citizen-filed petition that waste has been committed relating to a pipeline link of natural gas. AOGCC clearly was delegated the authority to investigate acts of waste, Alaska Stat. 31.05.030, and individuals were authorized to file petitions before the AOGCC to investigate alleged waste. Alaska Stat. 31.05.060. AOGCC never held a hearing on the petition because it had internally determined that the pipeline leak did not constitute waste since it involved already-produced natural gas that was being transported to a platform. The Supreme Court, however, found that the AOGCC not only had jurisdiction to hold a hearing on the citizen petition but was mandated by statute to do so. [↑](#footnote-ref-143)
143. 121.1Union Pacific R.R. Co. v. ***Oil*** & Gas Conservation Commission of Colorado, 284 P.2d 242, 246–47 (Colo. 1955). [↑](#footnote-ref-144)
144. 122*In re* Abandonment of Wells Located in Illinois, 343 Ill. App. 3d 303, 277 Ill. Dec. 537, 796 N.E.2d 623, 626, 158 O.&G.R. 847 (2003), *appeal denied*, 207 Ill. 2d 602, 283 Ill. Dec. 134, 807 N.E.2d 975 (2004), citing Newkirk v. Bigard, 109 Ill. 2d 28, 37, 92 Ill. Dec. 510, 485 N.E.2d 321, 87 O.&G.R. 266 (1985), *cert. denied*, 475 U.S. 1140, 106 S. Ct. 1789, 90 L. Ed. 2d 335, *reh’g denied*, 477 U.S. 909, 106 S. Ct. 3287, 91 L. Ed. 2d 576 (1986).

     On subsequent appeal, the Illinois appellate court noted in the context of an inverse condemnation claim that the powers granted the Department to deal with the plugging of abandoned wells are important to preserve public health and safety. Leavell v. Department of Natural Resources, 397 Ill. App. 3d 937, 337 Ill. Dec. 978, 923 N.E2d 829 (Ill. App. Ct. 2010).

     While suggesting that administrative agencies cannot limit, enlarge, or amend the scope of the statutory grant of authority, the court in People *ex rel.* Madigan v. Petco Petroleum Corp., 299 Ill. Dec. 333, 841 N.E.2d 1065 (2006), did not take a very restrictive approach to what the agency may do when it is given reasonably broad and/or general powers of enforcement under the ***Oil*** and Gas Act. [↑](#footnote-ref-145)
145. 123Marbob Energy Corp. v. N.M. ***Oil*** Conservation Comm’n, 206 P.3d 135, 2009-NMSC-013, 170 O.G.R. 595, quoting Gonzales v. New Mexico Retirement Board, 190 N.M. 592, 788 P.2d 348, 350 (1990). [↑](#footnote-ref-146)
146. 124Laurel Mt. Res., LLC v. Commonwealth, 360 S.W.3d 791 (Ky. Ct. App. 2012). The Legislature specifically restricted the Cabinet to imposing regulations no more stringent than required under the federal Surface Mining Control and Reclamation Act. [↑](#footnote-ref-147)
147. 124.1Petro Harvester ***Oil*** & Gas Co., LLC v. Baucum, 323 So. 3d 1041, 1046–47 (Miss. 2021), quoting from Transcontinental Gas Pipeline Corp. v. State ***Oil*** & Gas Board, 457 So. 2d 1298, 1325 (Miss. 1984). [↑](#footnote-ref-148)
148. 124.2Petro Harvester ***Oil*** & Gas Co., LLC v. Baucum, 323 So. 3d 1041, 1046–47 (Miss. 2021). [↑](#footnote-ref-149)
149. 125Missouri Public Service Comm’n v. Oneok, Inc., 318 S.W.3d 134 (Mo. App. 2010). The court found that the PSC did not have the power to accept the assignment of causes of action by local distribution companies who were claiming that their suppliers overcharged them for natural gas due to their manipulation of natural gas price indices. [↑](#footnote-ref-150)
150. 126Yates v. Powell, 98 F.3d 1222, 135 O.&G.R. 100 (10th Cir. 1996). [↑](#footnote-ref-151)
151. 12798 F.3d at 1229. [↑](#footnote-ref-152)
152. 128*Compare* Chevron U.S.A., Inc. v. State *ex rel.* Department of Taxation & Revenue, 139 N.M. 498, 134 P.3d 785, 2006 NMCA 50, 167 O.&G.R. 635 (substantial deference to agency interpretation) *with* Marbob Energy Corp. v. N.M. ***Oil*** Conservation Comm’n, 206 P.3d 135, 2009-NMSC-013 (no deference afforded agency interpretations). *See* §§ 24.05[3], 24.06[4] *infra*. [↑](#footnote-ref-153)
153. 128.1Blue Appaloosa v. North Dakota Industrial Commission, 2022 ND 119, 975 N.W.2d 578, 581. *In accord*: Langved v. Continental Resources, Inc., 2017 ND 179, 899 N.W.2d 267; Environmental Driven Solutions, LLC v. Dunn County, 2017 ND 45, 890 N.W.2d 841. [↑](#footnote-ref-154)
154. 129Chesapeake Exploration, L.L.C. v. ***Oil*** & Gas Comm’n, 135 Ohio St. 3d 204, 2013-Ohio-224, 985 N.E.2d 480. ***Oil*** & Gas Commission only has the power to review “orders” and a drilling permit issued by the chief of the Division of ***Oil*** and Gas Resources Management is not an order. *In accord*: Athens Cnty. Fracking Action Network v. Simmers, 2016-Ohio-5388 (Ohio App). *In accord*: Wood v. Simmers, 2017-Ohio-8718 (Ohio App. 2017) (Commission has no power to certify class). Ohio tends to narrowly interpret delegations of power to administrative agencies. *Id*. This narrow interpretation of statutory enabling acts was followed in Columbia Gas Transmission, LLC v. Ohio Valley Coal Co., 2020-Ohio-6787, 164 Ohio St.3d 113, 172 N.E.3d 107. *Ohio Valley Coal* involved a regulation that according to the court abrogated common law property rights by imposing upon a coal owner the obligation to reimburse a surface owner for relocation and other costs relating to a pipeline. *See also* McFee v. Nursing Care Management of America, Inc., 126 Ohio St. 3d 183, 2010-Ohio-2744, 931 N.E.2d 1069; D.A.B.E., Inc. v. Toledo-Lucas County Board of Health, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536. [↑](#footnote-ref-155)
155. 129.1Okla. Const. art. IX, § 19; Tenneco ***Oil*** Co. v. El Paso Natural Gas Co., 1984 OK 52, 687 P.2d 1049, 1050; Merritt v. Corporation Commission, 1968 OK 19, 438 P.2d 495; Toklan ***Oil*** & Gas Corp. v. Citizen Energy II, LLC, 2022 OK CIV APP 37, 520 P.3d 848. [↑](#footnote-ref-156)
156. 130Found. Coal Res. Corp. v. Dep’t of Envtl. Prot., 993 A.2d 1277, 1289, 175 O.&G.R. 390 (Pa. Commw. Ct. 2010) relying on PECO Energy Co. v. PUC, 568 Pa. 39, 791 A.2d 1155, 1159 (2002) and Commonwealth, Dep’t of Environmental Resources v. Butler County Mushroom Farm, 499 Pa. 509, 454 A.2d 1 (1982). [↑](#footnote-ref-157)
157. 131Marcellus Shale Coalition v. Department of Environmental Protection, 193 A.3d 447, 462–63 (Pa. Commw. Ct. 2018); Marcellus Shale Coalition v. Dep’t of Envtl. Prot., 216 A.3d 448, 459–60 (Pa. Commw. Ct. 2019), *appeal dism’d*, 2019 Pa. LEXIS 7108, 7116 (Pa. Dec. 24, 2019), *rev’d*, 292 A.3d 921 (Pa. 2023). *Compare* Eagle Environmental II v. Commonwealth, 584 Pa. 494, 884 A.2d 867, 878 (Pa. 2005) (agency rulemaking power should be upheld if “reasonable’) *with* Commonwealth v. Gilmour Manufacturing, 573 Pa. 143, 822 A.2d 676 (Pa. 2003) (courts should take hard look to see if agency action is empowered by the applicable statutory provisions). [↑](#footnote-ref-158)
158. 131.1Marcellus Shale Coalition v. Department of Environmental Protection, 292 A.3d 921 (Pa. 2023). Two justices were recused, and of the remaining five justices there were four opinions. [↑](#footnote-ref-159)
159. 131.2Public Utilities Commission of Texas v. City Public Services Board of San Antonio, 53 S.W.3d 310, 315 (Tex. 2011); Luminant Energy Co., LLC v. Public Utilities Commission of Texas, 2023 Tex. App. LEXIS 1737 (Tex. App.—Austin Mar. 17, 2023). *See* § 24.02[3][e] *infra*. [↑](#footnote-ref-160)
160. 132Association of Washington Business v. Department of Ecology, 195 Wn.2d 1, 455 P.3d 1126, 1130 (2020). AWB invalidated a DOE rule that attempted to apply emission standards to parties that were not direct emitters. [↑](#footnote-ref-161)
161. 133Exxon Mobil Corp. v. Wyo. Dep’t of Revenue, 2011 WY 161, 266 P.3d 944, 950, quoting from Amoco Prod. Co. v. Wyoming State Bd. of Equalization, 12 P.3d 668, 673 (Wyo. 2000). *See also* Kerr-McGee Corp. v. Wyoming ***Oil*** & Gas Conservation Commission, 903 P.2d 537, 538 (Wyo. 1995). [↑](#footnote-ref-162)
162. 134-136[Reserved.] [↑](#footnote-ref-163)
163. 137It is also axiomatic that administrative agencies are not empowered to determine the constitutional validity of the regulatory or taxation statute which delegates authority to them. Noram Energy Corp. v. Oklahoma Tax Commission, 1995 OK CIV APP 149, 935 P.2d 389, 395, 134 O.&G.R. 390, *cert. dismissed* (released for publication by the Court of Appeals).

     It is often stated that agencies do not have the power to determine whether a trespass has occurred. *In re* SWEPI L.P., 103 S.W.3d 578, 588 (Tex. App.—San Antonio 2003) (*SWEPI I*), *on further appeal*, SWEPI, L.P. v. Camden Resources, Inc., 139 S.W.3d 332, 160 O.&G.R. 266 (Tex. App.—San Antonio Apr. 14, 2004) (*SWEPI II*). For another case supporting this proposition, see L & G ***Oil*** Co. v. Railroad Commission, 6 Tex. Sup. Ct. J. 495, 368 S.W.2d 187, 18 O.&G.R. 664 (Tex. 1963). In *SWEPI I*, the court suggested that an agency determination that a well is bottomed on the operator’s land, after a Commission-ordered deviation test, might preclude an adjacent operator from asserting that the well is trespassing. 103 S.W.3d at 588 n.8. The court was concerned with the collateral attack doctrine, the second suit being a collateral attack on the Commission determination that the well was properly bottomed on the lands of the permit owner. *Id.* For another case dealing with the collateral attack doctrine in a similar context, see Arkla Exploration Co. v. Haywood, Rice & William Venture, 863 S.W.2d 112, 130 O.&G.R. 366 (Tex. App.—Texarkana 1993, writ dism’d by agreement). In *SWEPI II*, the court was dealing with the later-developed fact that the Railroad Commission refused to order a directional survey. It refused to apply the collateral attack doctrine on the basis that the Commission lacked jurisdiction to resolve trespass causes of action, implicitly rejecting the suggestion in *SWEPI I* that had a test been ordered, it may have precluded a trespassory cause of action. SWEPI was entitled to conduct a directional survey as part of the discovery process in the instant litigation because the issue of trespass was essential to both the plaintiff’s claim and the defendant’s affirmative defenses and counterclaims.

     The fact that the Railroad Commission cannot adjudicate common law trespass claims has been used to support the basic proposition that the issuance of an injection well permit does not authorize a trespass should the injected fluids cross a property line. The Commission order deals with governmental regulation and compliance with performance standards imposed to protect the public at large and not with whether or not a common law trespass has occurred. *See e.g.*, Berkley v. Railroad Comm’n, 282 S.W.3d 240, 243–44, 177 O.&G.R. 889 (Tex. App.—Austin 2009). In *Berkley* the court said that since the order does not authorize a trespass it is not ultra vires.

     The *Berkley* rationale was endorsed by the Texas Supreme Court in FPL Farming, Ltd. v. Envtl. Processing Sys., L.C., 54 Tex. Sup. Ct. J. 1744, 351 S.W.3d 306, 178 O.&G.R. 500 (Tex. 2011). The court found that a governmental permittee was not insulated from common law tort claims such as trespass, negligence, or unjust enrichment. *In accord*: Walton v. City of Midland, 409 S.W.3d 926, 178 O.&G.R. 893 (Tex. App.—Eastland 2013, rev. denied).

     In Devon Energy Production Co., LP v. Grayson Mill Operating, LLC, 2020 WY 28, 458 P.3d 1201, the Wyoming Supreme Court noted that the Wyoming ***Oil*** & Gas Conservation Commission lacked jurisdiction to dertermine whether Grayson Mill had committed a seismic trespass which would have later impacted the WYOGCC’s issuance of a permit to drill. Thus, the district court had the exclusive authority to make that determination and then the WYOGCC would have the jurisdiction to review its permit to drill decision.

     In Grynberg v. Colorado ***Oil*** & Gas Conservation Comm’n, 7 P.3d 1060, 145 O.&G.R. 249 (Colo. Ct. App. 1999), an ***oil*** and gas operator sought to invoke the language of now-amended Colo. Rev. Stat. § 34-60-118.5 which gave to the Commission “exclusive jurisdiction” to determine “the amount of the proceeds … if any, due a payee by a payor,” to have a royalty payment dispute resolved by the Commission. The Court agreed with the Commission’s interpretation that the Commission did not have jurisdiction to review royalty disputes except as to the timeliness of the payment. 7 P.3d at 1061.

     In Grant Bros. Ranch, LLC v. Antero Resources Piceance Corp., 2016 Colo. App. LEXIS 1675 (Colo. App. Dec. 1, 2016), the court found that resolving a dispute between an unleased mineral owner and a pooled unit operator acting under a compulsory pooling order, was within the exclusive jurisdiction of the Commission and failure of the unleased mineral owner to seek Commission adjudication meant that his action should be dismissed.

     A similar result was reached in Chase v. Colo. ***Oil*** & Gas Conservation Comm’n., 2012 COA 94, 284 P.3d 161 where a surface owner sought relief from the Commission regarding the interpretation of an ***oil*** and gas lease insofar as it impacted the potential location of a wellsite. The Commission took the same position that it took in *Grynberg*, namely that it did not have the power to interpret an ***oil*** and gas lease under its general grant of authority. (Colo. Rev. Stat. § 34-60-115).

     In Antero Resources Corp. v. Airport Land Partners, Inc., 526 P.3d 204, 2023 CO 13 (Colo. 2023), *rev’g* 2021 Colo. App. LEXIS 830 (June 3, 2021), the Colorado Supreme Court tried to set forth some parameters to the Commission’s jurisdiction over royalty or other payment disputes that is contained in Colo. Rev. Stat. § 34-60-118.5. In a 4-3 decision, the majority found that claims by royalty owners that the lessee had underpaid royalty pursuant to the terms of several ***oil*** and gas leases did not fall within the Commission’s exclusive jurisdiction because they involved a good faith claim that would require the Commission to “interpret a contract” which, under the statute, the Commission had no authority to do. Colo. Rev. Stat. § 34-60-118.5(8)(a). The dissenting opinion would find that the Commission’s resolution of the royalty payment dispute did not involve the interpretation of the royalty clauses but merely the performance of contractual duties. 526 P.3d at \*P45–46 (Samour, J., dissenting).

     In Dominek v. Equinor Energy LP, 2022 ND 211, 982 N.W.2d 303, the North Dakota Supreme Court, in response to several certified questions from the U.S. district court, refused to find that the North Dakota Industrial Commission did not have the authority to allocate production from a newly-established 2560-acre unit to pre-existing units that were partially within and partially outside of that 2560-acre unit. The supreme court did find that the compulsory pooling statute, N.D.C.C. § 38-08-08(1), did not require the North Dakota Industrial Commission to allocate production to the acreage outside of the newly-established unit. The supreme court eschewed answering certified questions regarding the need to exhaust administrative remedies and whether the Commission could allocate production, saying that those questions raised matters involving factual issues not before the court.

     In Gladney v. Anglo-Dutch Energy, LLC, 210 So. 3d 903 (La. App. 2016), the court noted the longstanding position of the Commissioner of Conservation that the Office of Conservation does not have the authority to interpret private mineral leases or contracts. *In accord;* Arkansas Louisiana Gas Co. v. Southwest Natural Production Co., 60 So. 2d 9, 11, 221 La. 608 (1952); Yuma v. Thompson, 731 So. 2d 190, 197 (La. 1999).

     In Harvey E. Yates Co. v. Cimarex Energy Co., 2014 U.S. Dist. LEXIS 183891 (D.N.M. Mar. 5, 2014), the court held that the New Mexico ***Oil*** Conservation Commission and ***Oil*** Conservation Division has been delegated the powers to prevent waste and protect correlative rights, but not the power to determine private causes of action for damages.

     The BLM will normally not act on a decision where there is a pending private law dispute. In Western States International, Inc., 187 IBLA 365 (2016), BLM delayed a decision approving assignments of federal ***oil*** and gas leases until the state law litigation was completed. [↑](#footnote-ref-164)
164. 138*See generally* Merritt v. Corporation Commission, 1968 OK 19, 438 P.2d 495, 28 O.&G.R. 630; Railroad Commission v. City of Austin, 18 Tex. Sup. Ct. J. 241, 524 S.W.2d 262, 51 O.&G.R. 231 (Tex. 1975). *See also* Superior ***Oil*** Co. v. Humble ***Oil*** & Refining Co., 241 So. 2d 911, 257 La. 207, 37 O.&G.R. 513 (1970); Amerada Petroleum Corp. v. Railroad Commission. 395 S.W.2d 403, 23 O.&G.R. 786 (Tex. Civ. App.—Austin 1965, writ ref’d n.r.e.).

     In Oklahoma, the Corporation Commission lacks authority to modify existing overriding royalty burdens even if it might frustrate the exercise of the compulsory pooling power because the Commission would be unduly interfering with the contractual rights of the parties. O’Neill v. American Quasar Petroleum Co., 1980 OK 2, 617 P.2d 181, 185; Toklan ***Oil*** & Gas Corp. v. Citizen Energy III, LLC, 2022 OK CIV APP 37, 520 P.3d 848.

     A number of states, including Colorado and North Dakota, provide that the state ***oil*** and gas conservation agency shall determine the reasonableness of the costs that the operator is charging the non-operating working interest owners. Colo. Rev. Stat. § 30-60-118.5; N.D. Cent. Code § 38-08-08.

     Colorado’s statute gives the Commission the jurisdiction to resolve royalty or other payment disputes relating to “the amount of the proceeds … due” but also provides that the Commission lacks jurisdiction to resolve bona fide disputes over “contract interpretation” matters. Colo. Rev. Stat. § 34-60-118.5(5) to (5.5); 34-60-118.5(8).

     In Antero Resources Corp. v. Airport Land Partners, Inc., 526 P.3d 204, 2023 CO 13 (Colo. 2023), *rev’g* 2021 Colo. App. LEXIS 830 (June 3, 2021), the Colorado Supreme Court resolved the tension between the two statutory provisions in a 4-3 decision, concluding that where the lessee was asserting a bona fide contract interpretation issue, the Commission lacked jurisdiction. The majority relied in part on Grynberg v. Colorado ***Oil*** & Gas Conservation Commission, 7 P.3d 1060 (Colo. App. 1999), which said that issues relating to the legal entitlement of proceeds are to be determined by the courts and not the Commission.

     In Grant Brothers Ranch, LLC v. Antero Resources Piceance Corp., 409 P.3d 637 (Colo. Ct. App. 2016), the court dismissed an action brought by a non-consenting working interest owner subject to a compulsory pooling order because such disputes have to be brought before the Colorado ***Oil*** and Gas Conservation Commission (COGCC). The statutory exception for COGCC exclusive jurisdiction relates to matters where there are contract interpretation issues. In this case, there was no contract between the parties, just the compulsory pooling order under which Grant Brothers had chosen to go non-consent.

     In Continental Resources, Inc. v. Counce Energy BC #1, LLC, 2018 ND 10, 905 N.W.2d 768, the North Dakota Supreme Court concluded that the trial court lacked subject matter jurisdiction over the defendant non-operating working interest owner’s counterclaim that the operator had overcharged it because the Industrial Commission has exclusive jurisdiction to hear that claim. *See* § 14.04 *supra*. In Dominek v. Equinor Energy LP, 2022 ND 211, 982 N.W.2d 303, the court approved of *Counce* relating to whether or not the Commission had jurisdiction, but refused to answer the certified question because there were issues of fact that needed to be resolved before it could so answer.

     In Adams v. PUC, 819 A.2d 631 (Pa. Commw. Ct. 2003), the court found that the Commission’s decision dismissing plaintiff’s petition due to lack of jurisdiction was correct. The dispute centered around the obligation of a lessee to provide free gas under an ***oil*** and gas lease. The Commission lacked jurisdiction to resolve disputes regarding private contractual rights to receive gas. Only if the gas is provided pursuant to a state issued certificate of public convenience and necessity would the Commission have jurisdiction.

     In Pickrell Drilling Co. v. Corporation Commission, 232 Kan. 397, 654 P.2d 477, 75 O.&G.R. 460 (1982), the commission denied a petition by a producer to interpret a gas purchase contract price redetermination clause and apply the provisions of the Kansas Natural Gas Price Protection Act. The court agreed with the commission that the legislature had not delegated either contract interpretation issues or the application of the act’s provisions to gas purchase contract issues to the commission.

     In Preferred Energy Properties v. Wyoming State Board of Equalization, 890 P.2d 1110, 1113 (Wyo. 1995), the court stated the general rule as follows:

     An administrative agency does not have the power to settle and adjudicate the rights of parties under a contract. The reasoning behind the rule is that an agency only has such powers as are granted to it by the legislature. Thus, unless an agency has been specifically granted the power to settle and adjudicate rights and obligations between parties to a contract, it does not have that power. [citations omitted]

     The court nonetheless upheld the Board’s power to interpret a farmout agreement and a judicial settlement of a dispute over that agreement in determining that the assignor had the right to receive production proceeds, thereby making it liable for unpaid severance taxes. *Id.* at 1113–14.

     In Xanadu Exploration Co. v. Welch, 2015 OK CIV APP 92, 362 P.3d 237, the court concluded that damages received under the Surface Damages Act, even though they included acreage outside of a Corporation Commission spacing unit were outside of the jurisdiction of the Commission and properly before the District Court. [↑](#footnote-ref-165)
165. 139Woods Exploration & Production Co. v. Aluminum Co. of America, 382 S.W.2d 343, 21 O.&G.R. 82, 21 O.&G.R. 182 (Tex. Civ. App.—Corpus Christi 1964, writ ref’d n.r.e.). [↑](#footnote-ref-166)
166. 140*See, e.g.,* Kingwood ***Oil*** Co. v. Hall-Jones ***Oil*** Corp., 1964 OK 231, 396 P.2d 510, 21 O.&G.R. 544; Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 563 S.E.2d 109, 156 O.&G.R. 216 (S.C. 2002); Foree v. Crown Central Petroleum Corp., 11 Tex. Sup. Ct. J. 462, 431 S.W.2d 312, 30 O.&G.R. 374 (Tex. 1968). [↑](#footnote-ref-167)
167. 141*See* §§ 24.02[3][d], 25.06[19] *below*. [↑](#footnote-ref-168)
168. 142Kingwood ***Oil*** Co. v. Hall-Jones ***Oil*** Corp., 1964 OK 231, 396 P.2d 510, 21 O.&G.R. 544. The *Kingwood* ***Oil*** approach has been followed in Union Texas Petroleum Corp. v. Jackson, 1995 OK CIV APP 63, 909 P.2d 131, *cert. denied*, and Marathon ***Oil*** Co. v. Corporation Commission, 1994 OK 28, 910 P.2d 966, 135 O.&G.R. 549. Both cases re-emphasized the view that the Commission has only those powers expressly, or by necessary implication, granted to it by the legislature. Commission jurisdiction and power cannot be based on some amorphous sense of legislative intent that is not specifically addressed in the statute. In discussing an administrative order imposing a security or bond requirement in excess of that authorized by statute, a Florida court said:

     Relying upon the well established principle that the powers of administrative agencies are measured and limited by the statutes or acts in which such powers are expressly granted or implicitly conferred, … the appellants correctly argue that the final order must be reversed because the department acted without authority and contrary to legislative intent … .

     Coastal Petroleum Co. v. State Department of Environmental Protection, 649 So. 2d 930, 931, 131 O.&G.R. 137 (Fla. Dist. Ct. App.), *review denied*, 660 So. 2d 712 (Fla. 1995). *See also* Coastal Petroleum Co. v. Chiles, 672 So. 2d 571 (Fla. Dist. Ct. App.), *review denied*, 678 So. 2d 1287 (Fla. 1996); Coastal Petroleum Co. v. Department of Environmental Protection, 672 So. 2d 574 (Fla. Dist. Ct. App. 1996); National Steel Corp. v. Public Service Commission, 204 Mich. App. 630, 516 N.W.2d 139 (1994)*, appeal denied,* 448 Mich. 909, 448 Mich. 910, 533 N.W.2d 581, *reconsideration denied,* 538 N.W.2d 677 (Mich. 1995) (Commission without authority to regulate pipeline project when gas was not being put to a public use as required by statute). [↑](#footnote-ref-169)
169. 143396 P.2d at 512. [↑](#footnote-ref-170)
170. 144396 P.2d at 512. [↑](#footnote-ref-171)
171. 145396 P.2d at 513. [↑](#footnote-ref-172)
172. 146State ***Oil*** & Gas Board v. Crane, 271 So. 2d 84, 43 O.&G.R. 527 (Miss. 1972). [↑](#footnote-ref-173)
173. 147271 So. 2d at 87. [↑](#footnote-ref-174)
174. 148Cities Service Gas Co. v. Corporation Commission, 197 Kan. 338, 416 P.2d 736, 25 O.&G.R. 646 (1966). [↑](#footnote-ref-175)
175. 149416 P.2d at 740. [↑](#footnote-ref-176)
176. 150Amarillo ***Oil*** Co. v. Energy Agri-Products, Inc., 33 Tex. Sup. Ct. J. 623, 794 S.W.2d 20, 109 O.&G.R. 524 (Tex. 1990). [↑](#footnote-ref-177)
177. 151794 S.W.2d at 21–22. For other cases dealing with the “white ***oil***” dispute in the Panhandle Field in Texas, see R.R. Comm’n v. WBD ***Oil*** & Gas Co., 104 S.W.3d 69, 159 O.&G.R. 122 (Tex. 2002), *rev’g,* 35 S.W.3d 34, 148 O.&G.R. 447 (Tex. App.—Austin 1999), *opinion on remand*, *opinion on remand*, 2003 Tex. App. LEXIS 6914 (Tex. App.—Austin Aug. 14, 2003) (judicial review of field rules governing the 13 fields in the Texas Panhandle); Rawhide ***Oil*** & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 105 O.&G.R. 389 (Tex. App.—Amarillo 1989, writ denied); Dorchester Gas Producing Co. v. Harlow Corp., 743 S.W.2d 243, 103 O.&G.R. 304 (Tex. App.—Amarillo 1987), motion to vacate granting writ of error issued by Supreme Court on May 16, 1990. The Panhandle Field is unique in that early in the development of the field the ownership of ***oil*** and gas was severed. ***Oil*** rights owners achieved little production until fairly recently and the “white ***oil***” dispute itself has been brewing for at least 10 years. *See* Sinclair ***Oil*** & Gas Co. v. Masterson, 271 F.2d 310, 11 O.&G.R. 632 (1959), *cert. denied,* 362 U.S. 952, 80 S. Ct. 864, 4 L. Ed. 2d 870, 12 O.&G.R. 586 (1960). [↑](#footnote-ref-178)
178. 152794 S.W.2d at 23–24. Because Energy’s production was not related to production from an ***oil*** stratum, it could not be casinghead gas as defined at Tex. Nat. Res. Code Ann., § 86.002(10). Production from the Brown Dolomite formation was production of gas owned by Amarillo. 794 S.W.2d at 25. [↑](#footnote-ref-179)
179. 153794 S.W.2d at 26 citing Railroad Comm’n v. City of Austin, 18 Tex. Sup. Ct. J. 241, 524 S.W.2d 262, 51 O.&G.R. 231 (Tex. 1975); Jones v. Killingsworth, 9 Tex. Sup. Ct. J. 155, 403 S.W.2d 325, 24 O.&G.R. 508 (Tex. 1965); Nale v. Carroll, 155 Tex. 555, 289 S.W.2d 743, 5 O.&G.R. 1379 (1955).

     *Accord* Petro Pro, Ltd. v. Upland Res., Inc., 279 S.W.3d 743, 169 O.&G.R. 607 (Tex. App.—Amarillo 2007, rev. denied) (“the Railroad Commission is a regulatory agency and lacks the authority to determine the ownership of land or property rights”).

     *See also* SWEPI, L.P. v. Camden Res., Inc., 139 S.W.3d 332, 160 O.&G.R. 266 (Tex. App.—San Antonio 2004) (Railroad Commission denial of request for directional survey does not preclude jury from independently determining that well is bottomed under the lands of another lessee since Commission has no authority to resolve private disputes such as trespass causes of action); *In re* SWEPI L.P., 103 S.W.3d 578, 588, 163 O.&G.R. 140 (Tex. App.—San Antonio 2003) (“[The Texas Railroad Commission] cannot make a determination that a well is not trespassing, a defense the jury must evaluate in this case.”); L & G ***Oil*** Co. v. Railroad Commission, 6 Tex. Sup. Ct. J. 495, 368 S.W.2d 187, 191, 18 O.&G.R. 664 (Tex. 1963).

     There is a continuing tension between the principle that the Railroad Commission lacks jurisdiction over property or title matters and the requirement imposed in Magnolia Petroleum Co. v. Railroad Commission, 170 S.W.2d 189, 191 (Tex. 1943) that the Commission determine that the applicant has some good faith claim to a property interest that will entitle it to the requested-for permit. *Magnolia Petroleum* has been followed in a number of cases. Humble ***Oil*** & Refining Co. v. MacDonald, 279 S.W.2d 914 (Tex. Civ. App.—Austin 1955, writ ref’d n.r.e.); Cheesman v. Amerada Petroleum Corp., 227 S.W.2d 829 (Tex. Civ. App.—Austin 1950). *See generally* Bret Wells, *Allocation Wells, Unauthorized Pooling, and the Lessor’s Remedies*, 68 Baylor L. Rev. 1, 26–27 (2016). [↑](#footnote-ref-180)
180. 154See § 25.04 *below* for a more complete discussion of the doctrines of primary jurisdiction and exhaustion of administrative remedies. [↑](#footnote-ref-181)
181. 155*See also* Foree v. Crown Petroleum Corp., 11 Tex. Sup. Ct. J. 462, 431 S.W.2d 312, 30 O.&G.R. 374 (Tex. 1968); Gregg v. Delhi-Taylor ***Oil*** Corp., 162 Tex. 26, 4 Tex. Sup. Ct. J. 324, 344 S.W.2d 411, 14 O.&G.R. 106 (1961); Biskamp v. General Crude ***Oil*** Co., 452 S.W.2d 515, 36 O.&G.R. 279 (Tex. Civ. App.—San Antonio 1970, writ ref’d). [↑](#footnote-ref-182)
182. 156Arco ***Oil*** & Gas Co. v. Marshall, 30 S.W.3d 469 (Tex. App.—San Antonio 2000)*, opinion vacated in aid of settlement,* 2001 Tex. App. LEXIS 123 (Tex. App.—San Antonio, Aug. 16, 2001). [↑](#footnote-ref-183)
183. 157FPL Farming, Ltd. v. Envtl. Processing Sys., L.C., 351 S.W.3d 306, 178 O.&G.R. 500 (Tex. 2011). *See also* Whiteman v. Chesapeake Appalachia, L.L.C., 729 F.3d 381 (4th Cir. 2013) (applying West Virginia law). In Envtl. Processing Sys., L.C. v. FPL Farming Ltd., 58 Tex. Sup. Ct. J. 293, 457 S.W.3d 414 (2015), the Texas Supreme Court ultimately affirmed a take-nothing judgment against the surface owner who had failed to show that the alleged trespass was unauthorized or not consented to. [↑](#footnote-ref-184)
184. 158Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 55 Tex. Sup. Ct. J. 380, 363 S.W.3d 192, 180 O.&G.R. 511 (Tex. 2012)*, replacing* 54 Tex. Sup. Ct. J. 1732, 2011 Tex. LEXIS 607 (Aug. 26, 2011). On remand, Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 457 S.W.3d 115 (Tex. App.—Beaumont 2015, writ filed), the court reversed the trial court’s granting of a motion for summary judgment in favor of Denbury Green arguing that fact issues still remain as to whether or not the pipeline is a common carrier and whether the taking serves a substantial public interest. On appeal, the Texas Supreme Court reinstated the trial court order, concluding that the Court of Appeals wrongfully excluded from the common carrier test the execution of post-construction contracts with third parties. Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd., 60 Tex. Sup. Ct. J. 201, 510 S.W.3d 909 (2017).

     *Denbury Green II* was followed in Hlavinka v. HSC Pipeline Partnership, LLC, 650 S.W.3d 483 (Tex. 2022), *aff’g in part and rev’g in part*, 605 S.W.3d 819 (Tex. App.—Houston [1st Dist.] 2020), where the court reaffirmed that a single contract with an unaffiliated party can satisfy the public use test, and that it is the court and not the jury which ultimately determines whether or not the public use requirement is satisfied. [↑](#footnote-ref-185)
185. 159Southern Indiana Gas & Elec. Co. v. Indiana Farm Gas Prod. Co., Inc., 540 N.E.2d 621, 104 O.&G.R. 439 (Ind. Ct. App. 1989)*, vacated,* 549 N.E.2d 1063, 104 O.&G.R. 449 (Ind. Ct. App. 1989). The commission held evidentiary hearings and dismissed the application again based on a lack of jurisdiction. IFG again appealed and, applying Indiana’s strict view of the “law of the case” doctrine, the court of appeals affirmed the commission’s decision that it lacked jurisdiction to decide the title questions raised by SIGECO’s assertions about the ownership of non-native gas. Indiana Farm Gas Prod. Co., Inc. v. Southern Indiana Gas & Elec. Co., 662 N.E.2d 977, 136 O.&G.R. 513 (Ind. Ct. App. 1996). [↑](#footnote-ref-186)
186. 160540 N.E.2d at 622. There were additional requirements relating to the quality of the gas and the capacity of the pipeline to accept the gas which were not contested. *Id.* [↑](#footnote-ref-187)
187. 161540 N.E.2d at 624. The court also concluded that the use of rebuttable presumptions by the commission was also ultra vires because it shifted the burden of proof created by the statute. *Id.*

     In Ky. S. Coal Corp. v. Ky. Energy & Env’t Cabinet Formerly the Envtl. & Pub. Prot. Cabinet, 396 S.W.3d 804 (Ky. 2013), the Cabinet refused to issue a mining license renewal because it determined that there was a bona fide dispute over the renewal applicant’s right of entry for mining purposes. Since the Cabinet lacks authority to resolve the property-based dispute, its decision to deny what would otherwise be an automatic renewal, was justified.

     In Gypsum Resources, LLC, 185 IBLA 375 (2015), the Board concluded that it lacked authority to resolve a common law dispute over ownership and use of a right-of-way even though the right-of-way was issued by BLM. In *accord*: Thelbert Watts v. United States, 148 IBLA 213 (1999).

     In Joe McMahon, Jr., 143 IBLA 165 (1998), the Interior Board of Land Appeals found that it could not adjudicate a request by the alleged owner of some unleased minerals included in a federal exploratory unit to remove that tract from the unit because the basis for the request was a title dispute. Under the BLM Manual, the BLM must treat the state of the title of private lands as shown in the application for approval of a unit as correct, since it has no power to adjudicate such disputes. Even where BLM requires unanimous consent of all owners prior to approving the unit, it will not hear disputes as to which party has the ownership interest sufficient to give consent. [↑](#footnote-ref-188)
188. 162540 N.E.2d at 624. [↑](#footnote-ref-189)
189. 163Simpson v. Div. of Mines & Reclamation, 145 Ohio App. 3d 817, 2001 Ohio 3348, 764 N.E.2d 1059 (2001).

     In Columbia Gas Transmission, LLC v. Ohio Valley Coal Co., 2020-Ohio-6787, 164 Ohio St. 3d 113, 172 N.E.3d 107, the court was dealing with a challenge to a rule that imposed liability upon a surface coal mining operator for costs relating to a pipeline operation. The coal operator’s property rights included the right to mine coal even if it damaged the surface estate. The issue is whether the Legislature had authorized the agency to abrogate common law property interests. The Ohio Supreme Court concludes that the statute did not so authorize. [↑](#footnote-ref-190)
190. 164CBC Holdings, LLC v. Dynatec Corp., USA, 224 W. Va. 25, 680 S.E.2d 40, 173 O.&G.R. 533 (2009). [↑](#footnote-ref-191)
191. 165W.Va. Code §§ 22-21-1 to 22-21-29. [↑](#footnote-ref-192)
192. 166Edwin Smith, LLC v. Clark, 2011 NMCA 003, 149 N.M. 249, 247 P.3d 1134, *cert. granted*. [↑](#footnote-ref-193)
193. 167247 P.3d at 1144, relying on Smith v. City of Santa Fe, 142 N.M. 786, 171 P.3d 300, 2007-NMSC-055. [↑](#footnote-ref-194)
194. 168Va. Code § 45.1-361.22(5). *See* Hale v. CNX Gas Co., LLC, 2011 U.S. Dist. LEXIS 52935 (W.D. Va. Jan. 21, 2011), *report and recommendation accepted*, 2011 U.S. Dist. LEXIS 110645 (W.D. Va. Sept. 28, 2011); Adair v. EQT Prod. Co., 2011 U.S. Dist. LEXIS 52932 (W.D. Va. Jan. 21, 2011), *report and recommendation accepted*, 2011 U.S. Dist. LEXIS 110512 (W.D. Va. Sept. 28, 2011). Texas deals with this issue by requiring the permit or order applicant to make a good faith claim to a continuing possessory right in a mineral estate without involving the Commission in the ultimate determination that the applicant is the true owner. Magnolia Petroleum Co. v. Railroad Commission, 141 Tex. 96, 170 S.W.2d 189, 190–91 (1943); Roland ***Oil*** Co. v. R.R. Comm’n of Tex., 2015 Tex. App. LEXIS 1906 (Tex. App.—Austin Feb. 27, 2015); Humble ***Oil*** & Refining Co. v. MacDonald, 279 S.W.2d 914 (Tex. Civ. App.—Austin 1955, writ ref’d n.r.e.); Cheesman v. Amerada Petroleum Corp., 227 S.W.2d 829 (Tex. Civ. App.—Austin 1950). [↑](#footnote-ref-195)
195. 169Hale v. CNX Gas Co., LLC, 2011 U.S. Dist. LEXIS 52935 (W.D. Va. Jan. 21, 2011); Adair v. EQT Prod. Co., 2011 U.S. Dist. LEXIS 52932 (W.D. Va. Jan. 21, 2011). [↑](#footnote-ref-196)
196. 170Riverside Energy Mich., LLC v. Mich. PSC (*In re* Antrim Shale Formation re Operation of Wells Under Vacuum), 319 Mich. App. 175, 899 N.W.2d 799 (2017); *In re* Michigan Electric & Gas Ass’n, 252 Mich. App. 254, 652 N.W.2d 1 (2002). [↑](#footnote-ref-197)
197. 171Mich. Comp. L. § 483.114. [↑](#footnote-ref-198)
198. 172Riverside Energy Mich., LLC v. Mich. PSC (*In re* Antrim Shale Formation re Operation of Wells Under Vacuum), 319 Mich. App. 175, 181–82, 899 N.W.2d 799 (2017). [↑](#footnote-ref-199)
199. 173Merritt v. Corporation Comm’n, 1968 OK 19, 438 P.2d 495, 28 O.&G.R. 630. [↑](#footnote-ref-200)
200. 174The ultimate issue of whether fresh water could be used for unit purposes was later resolved in Oklahoma Water Resources Bd. v. Texas County Irrigation and Water Resources Ass’n, 1984 OK 96, 711 P.2d 38, 88 O.&G.R. 331. *See* § 2.03[2][a] *above.* [↑](#footnote-ref-201)
201. 175Kerr-McGee Corp. v. Wyoming ***Oil*** & Gas Conservation Comm’n, 903 P.2d 537 (Wyo. 1995). The Wyoming Supreme Court tackled a similar problem relating to the overlapping functions of the Department of Revenue and the Board of Equalization relating to the administrative appeals process for severance tax matters. As with other cases, the court took a reasonably “hard look” at the statutes, giving little, if any, deference, to the agency’s interpretation of law. Amoco Production Co. v. Wyoming State Board of Equalization, 12 P.3d 668 (Wyo. 2000). *Accord* Wyodak Resources Development Corp. v. Wyoming Department of Revenue, 2002 WY 181, 60 P.3d 129, 155 O.&G.R. 611; Union Pacific Resources Co. v. State, 839 P.2d 356 (Wyo. 1992)*, on subsequent appeal,* 895 P.2d 464 (Wyo. 1993), discussed at note 77.3 *below*. The court said: “An agency’s conclusions of law can be affirmed only if they are in accord with law. Our function is to correct any error that an agency makes in its interpretation or application of the law.” 12 P.3d at 671. [↑](#footnote-ref-202)
202. 176Wyo. Stat. Ann. § 39-6-302(j). [↑](#footnote-ref-203)
203. 177In Union Pacific Resources Co. v. State, 839 P.2d 356 (Wyo. 1992)*, on subsequent appeal,* 895 P.2d 464 (Wyo. 1993), the court stated that “[a]dministrative agencies are creatures of statute and their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim.” *Id.* at 370. *In accord* Solvay Chems., Inc. v. Dep’t of Revenue, 2018 WY 124, 430 P.3d 295; Exxon Mobil Corp. v. Wyoming Department of Revenue, 2011 WY 161, 266 P.3d 944, 951; Wyodak Resources Development Corp. v. Wyoming Department of Revenue, 2002 WY 181, 60 P.3d 129, 141, 155 O.&G.R. 611. [↑](#footnote-ref-204)
204. 178Wyo. Stat. Ann. § 39-1-304(a)(iv). [↑](#footnote-ref-205)
205. 179W. Va. Code § 22C-9-2. [↑](#footnote-ref-206)
206. 180W. Va. Code § 22C-8-1 *et seq.* (shallow wells); W. Va. Code § 22C-9-1 *et seq.* (deep wells). [↑](#footnote-ref-207)
207. 181State *ex rel.* Blue Eagle Land, LLC v. W. Va. ***Oil*** & Gas Conservation Comm’n, 222 W. Va. 342, 664 S.E.2d 683, 173 O.&G.R. 541 (2008). In Murray Energy Corp. v. Steager, 241 W. Va. 629, 827 S.E.2d 417 (2019), the court noted that while the Legislature is free to delegate authority to an administrative agency that agency may not exericse that authroity in a manner which is “inconsistent with, or which alters or limits its statutory authority.” 827 S.E.2d at 426, citing Rowe v. W. Va. Department of Corrections, 170 W. Va. 230, 292 S.E.2d 650 (1982). [↑](#footnote-ref-208)
208. 182Brumark Corp. v. Corporation Comm’n, 1993 OK CIV APP 108, 864 P.2d 1287, 123 O.&G.R. 70, *cert. denied*, 1996 OK CIV APP 89, 924 P.2d 296, 135 O.&G.R. 151. [↑](#footnote-ref-209)
209. 183864 P.2d at 1288. The court distinguished Van Horn ***Oil*** Co. v. Corporation Comm’n, 1988 OK 42, 753 P.2d 1359, 99 O.&G.R. 430, treating the waived rule in that case as being a procedural, not a substantive, rule. [↑](#footnote-ref-210)
210. 184Larsen v. ***Oil*** and Gas Conservation Comm’n, 569 P.2d 87, 61 O.&G.R. 246 (Wyo. 1977). *See also* Hockett v. The Trees ***Oil*** Co., 251 P.3d 65 (Kan. 2011) (statutory enabling act on its face does not authorize the Kansas Corporation Commission to adopt a “conservation fee”; no deference is given to the Commission’s interpretation of the enabling act). Arkansas also requires its ***Oil*** and Gas Commission to follow its own rules in order to avoid having its orders overturned. *See* Capstone Oilfield Disposal of Ark., Inc. v. Pope County, 2012 Ark. App. 231, 408 S.W.3d 65. [↑](#footnote-ref-211)
211. 185Legal Envtl. Assistance Found. v. United States EPA, 118 F.3d 1467, 139 O.&G.R. 175 (11th Cir. 1997), *on later appeal*, 276 F.3d 1253, 154 O.&G.R. 318 (11th Cir. 2001), *cert. denied*, 537 U.S. 989, 123 S. Ct. 475, 154 L. Ed. 2d 358 (2002).

     Often the ultra vires issue will arise in the context of conflicting federal statutory grants of power. In Cowpasture River Preservation Association v. U.S. Forest Service, 911 F.3d 150 (4th Cir. 2018), *reh’g and reh’g en banc denied*, 2019 U.S. App. LEXIS 5532 (4th Cir. Feb. 25, 2019), for example, the court concluded that the Secretary of the Interior did not have the authority to grant a right of way through a National Scenic Trail because such trails fall under the authority of the National Park Service. Under the Mineral Leasing Act, the Department is specifically shorn of the power to grant rights-of-way through lands in the National Park System. 30 U.S.C. § 185 (b)(1). On appeal, however, the U.S. Supreme Court reversed. United States Forest Serv. v. Cowpasture River Pres. Ass’n, 140 S. Ct. 1837, 207 L. Ed. 2d 186 (2020). The Supreme Court looked at the same relevant statutes as did the Fourth Circuit, applied some basic property principles relating to the nature of easements and rights-of-way, and concluded that the transfer of an easement from the Forest Service to the Department of the Interior did not convey a fee interest so as to divest the Forest Service of its ownership and control.

     *Cowpasture* is analyzed in Nina Lincoff, *The Atlantic Coast Pipeline and the Pipeline Pipe Dream,* 47 Ecol. L.Q. 405 (2020).

     In Sackett v. United States Environmental Protection Agency, 2023 U.S. LEXIS 2202 (May 25, 2023), the Supreme Court relied on *Cowpasture* for the proposition that before a federal statute will be interpreted to supplant or preempt areas that traditionally have been regulated by state and local governments, the language that is “exceedingly clear.”

     In Sierra Club v. United States Army Corps of Engineers, 909 F.3d 635 (4th Cir. 2018), the court found that the Clean Water Act did not authorize the Corps to waive or eliminate a state-imposed condition on a water quality permit as part of its review for the issuance of a nautral gas pipeline permit. For a later case dealing with the ramifications of the reversal of the Corps’ decision, see Sierra Club v. United States Army Corps of Engineers, 981 F.3d 251 (4th Cir. 2020). [↑](#footnote-ref-212)
212. 186The 45-day period was set forth in the SDWA. 42 U.S.C. § 300j-7(a)(2). [↑](#footnote-ref-213)
213. 187118 F.3d at 1472, quoting Natural Resources Defense Council v. Nuclear Regulatory Comm’n, 666 F.2d 595 (D.C. Cir. 1981). [↑](#footnote-ref-214)
214. 188Union P. R. Co. v. ***Oil*** & Gas Conservation Com., 131 Colo. 528, 284 P.2d 242, 4 O.&G.R. 1179 (1955). [↑](#footnote-ref-215)
215. 189See Jacqueline Weaver, *Unitization of* ***Oil*** *and Gas Fields in Texas* 138–165 (1986) for a provocative and thorough study of the Railroad Commission’s use of no-flare orders to achieve what the political system could not unitized and coordinated development of ***oil*** and gas reservoirs. It was clear that Texas treated attempts to compel unitization by the Railroad Commission as ultra vires after Ryan Consolidated Petroleum Corp. v. Pickens, 155 Tex. 221, 285 S.W.2d 201, 5 O.&G.R. 99 (1955), *cert. denied,* 351 U.S. 933, 76 S. Ct. 790, 100 L. Ed. 1462, 5 O.&G.R. 1383 (1956). [↑](#footnote-ref-216)
216. 190Dobson v. Arkansas ***Oil*** & Gas Comm’n, 218 Ark. 160, 235 S.W.2d 33 (1950). While the court found that the commission was not authorized to compel unitization, the court left open other devices that the commission could use to encourage parties to enter into voluntary unitization agreements. It was shortly after *Dobson* that Arkansas adopted a compulsory unitization statute. Ark. Code Ann. §§ 53-72-300 to 53-72-323.

     In Arkansas ***Oil*** & Gas Commission v. Hurd, 2018 Ark. 397, 564 S.W.3d 248 (2018), certain well operators were challenging an integration (pooling) order issued by the AOGC because it rejected their arguments that the non-consenting working interest owners should be paying a 25% royalty. The court did not answer that question because the trial court dismissed the lawsuit based on an interpretation of Board of Trustees of the University of Arkansas v. Andrews, 2018 Ark. 12, 535 S.W.3d 616, that precluded litigation against a state entity on state constitutional grounds. The Arkansas Supreme Court remanded the case to determine whether the integration order was ultra vires. On later appeal, the supreme court affirmed the Commission’s integration order as it related to the reduction in royalty that was to be paid to the complaining parties finding that it was authorized by various provisions of the conservation statute. Hurd v. Arkansas ***Oil*** & Gas Comm’n, 2020 Ark. 210, 601 S.W.3d 100 (2020). [↑](#footnote-ref-217)
217. 191Western Gulf ***Oil*** Co. v. Superior ***Oil*** Co., 92 Cal. App.2d 299, 206 P.2d 944 (1949). [↑](#footnote-ref-218)
218. 192Ryan Consolidated Petroleum Corp. v. Pickens, 155 Tex. 221, 285 S.W.2d 201, 5 O.&G.R. 99 (1955), *cert. denied,* 351 U.S. 933, 76 S. Ct. 790, 100 L. Ed. 1462, 5 O.&G.R. 1383 (1956). [↑](#footnote-ref-219)
219. 193Santa Fe Exploration Co. v. ***Oil*** Conservation Commission, 114 N.M. 103, 835 P.2d 819, 120 O.&G.R. 535 (1992). [↑](#footnote-ref-220)
220. 194N.M. Stat. Ann. §§ 70-7-1 to 70-7-21, reproduced at § 30.31[B] *below*. [↑](#footnote-ref-221)
221. 195Helmerich and Payne, Inc. v. Corporation Commission, 1975 OK 23, 532 P.2d 419, 50 O.&G.R. 192. [↑](#footnote-ref-222)
222. 196532 P.2d at 421. The commission’s attempt to employ this comprehensive drilling and pooling scheme was also designed to avoid the fractionalized ownership patterns where some six companies owned substantial shares of the working interest. *Id.* at 420. [↑](#footnote-ref-223)
223. 197532 P.2d at 422. [↑](#footnote-ref-224)
224. 198532 P.2d at 423, quoting from H.F. Wilcox ***Oil*** & Gas Co. v. State, 1933 OK 110, 162 Okla. 89, 19 P.2d 347. [↑](#footnote-ref-225)
225. 199Discussion Notes, 50 O.&G.R. at 200, 202. [↑](#footnote-ref-226)
226. 200Mobil ***Oil*** Corp. v. Corporation Commission, 227 Kan. 594, 608 P.2d 1325, 66 O.&G.R. 19 (1980). [↑](#footnote-ref-227)
227. 201Osborn v. Texas ***Oil*** & Gas Corp., 1982 OK CIV APP 44, 661 P.2d 71, 76 O.&G.R. 101. [↑](#footnote-ref-228)
228. 202Eads Operating Co. v. Thompson, La. App. 93-2155, La. App. 93-2155, 646 So. 2d 948, 132 O.&G.R. 555 (La. App. 1994). [↑](#footnote-ref-229)
229. 203For a complete discussion of the judicial or equitable pooling doctrine, see §§ 5.03[3], 7.02 *above.* [↑](#footnote-ref-230)
230. 204*See, e.g.,* Superior ***Oil*** Co. v. Beery, 216 Miss. 664, 64 So. 2d 357, 2 O.&G.R. 193, 2 O.&G.R. 1094. [↑](#footnote-ref-231)
231. 205GEM Razorback, LLC v. Zenergy, Inc., 2017 ND 33, 890 N.W.2d 544. The court noted that N.D. Cent. Code § 38-08-08(3) gives the Industrial Commission the power to request information from the operator for such purposes and that, in addition, if the non-operating working interest owners are not satisfied, they may file an action before the Commission in order to properly determine the actual and reasonable costs plus risk penalty. *See* N.D. Admin. Code § 43-04-03-88. [↑](#footnote-ref-232)
232. 206For a more complete discussion of the Oklahoma cases, see §§ 13.08[2], 14.03, 14.04 *supra*.

     The public rights/private rights distinction is discussed in Pat Martin & Bruce Kramer, *Jurisdiction of Commission and Court: The Public Right/Private Right Distinction in Oklahoma Law,* 25 Tulsa L.J. 535 (1990). [↑](#footnote-ref-233)
233. 207Southern Union Production Co. v. Corporation Commission, 1970 OK 16, 465 P.2d 454, 36 O.&G.R. 97. [↑](#footnote-ref-234)
234. 208For other cases dealing with this issue, see Ladra v. New Dominion, LLC, 2015 OK 53, 353 P.3d 529; Nilsen v. Ports of Call ***Oil*** Co., 1985 OK 104, 711 P.2d 98, 89 O.&G.R. 135; Samson Resources Co. v. Corporation Commission, 1985 OK 31, 702 P.2d 19, 87 O.&G.R. 366; Tenneco ***Oil*** Co. v. El Paso Natural Gas Co., 1984 OK 52, 687 P.2d 1049, 82 O.&G.R. 322; Amarex, Inc. v. Baker, 1982 OK 155, 655 P.2d 1040, 75 O.&G.R. 329; Amoco Production Co. v. Corporation Commission, 1987 OK CIV APP 80, 752 P.2d 835, 97 O.&G.R. 604, *approved for publication by the Supreme Court.* [↑](#footnote-ref-235)
235. 208.1FourPoint Energy, LLC v. BCE-Mach II, LLC, 2021 OK CIV APP 46, 503 P.3d 435. [↑](#footnote-ref-236)
236. 208.2503 P.3d at 439, citing Crest Resources & Exploration Corp. v. Corp. Comm’n, 1980 OK 133, 617 P.2d 215. [↑](#footnote-ref-237)
237. 209Burmah ***Oil*** & Gas Co. v. Corporation Com., 541 P.2d 834, 53 O.&G.R. 205 (Okla. 1975). [↑](#footnote-ref-238)
238. 210Samson Resources Co. v. Corporation Com., 702 P.2d 19, 87 O.&G.R. 366 (Okla. 1985). [↑](#footnote-ref-239)
239. 211702 P.2d at 22. The decision is based in part on Tenneco ***Oil*** Co. v. El Paso Natural Gas Co., 1989 OK 89, 775 P.2d 296, 103 O.&G.R. 603 (Okla. 1985), which laid out in detail the public/private concern dichotomy. For further analysis of *Tenneco* ***Oil****,* see § 13.08[2] *supra.* [↑](#footnote-ref-240)
240. 212*See* Crest Resources and Exploration Co. v. Corporation Commission, 1980 OK 133, 617 P.2d 215, 66 O.&G.R. 507, for a case finding that there was a duty on behalf of the unit operator to protect the correlative rights of the other working-interest owners.

     Had the working-interest owners been force-pooled by an order of the commission, it would have been clear that the commission would have had the power to designate a new unit operator. [↑](#footnote-ref-241)
241. 213Union Texas Petroleum Corp. v. Jackson, 1995 OK CIV APP 63, 909 P.2d 131, *cert denied*. [↑](#footnote-ref-242)
242. 214*See, e.g.,* Greyhound Leasing & Financial Corp. v. Joiner City Unit, 444 F.2d 439, 40 O.&G.R. 60 (10th Cir. 1971); Harper-Turner ***Oil*** Co. v. Bridge, 1957 OK 124, 311 P.2d 947, 7 O.&G.R. 1017. [↑](#footnote-ref-243)
243. 215Greyhound Leasing & Financial Corp. v. Joiner City Unit, 444 F.2d 439, 40 O.&G.R. 60 (10th Cir. 1971); Texaco, Inc. v. Berry Petroleum Corp., 869 F. Supp. 1523, 131 O.&G.R. 81 (W.D. Okla. 1994); Commercial Drilling Co. v. Kennedy, 1935 OK 232, 172 Okla. 475, 45 P.2d 534. [↑](#footnote-ref-244)
244. 216909 P.2d at 141–142. [↑](#footnote-ref-245)
245. 217Samson Resources Co. v. Corporation Commission, 1993 OK CIV APP 67, 859 P.2d 1118 (Okla. App. 1993, *cert. denied*) (released for publication by order of the Court of Appeals). [↑](#footnote-ref-246)
246. 218859 P.2d at 1121. [↑](#footnote-ref-247)
247. 219*See also* Marathon ***Oil*** Co. v. Corporation Commission, 1994 OK 28, 910 P.2d 966, 135 O.&G.R. 549. [↑](#footnote-ref-248)
248. 220Arrowhead Energy, Inc. v. Baron Exploration Co., 1996 OK 120, 930 P.2d 181, 133 O.&G.R. 340. [↑](#footnote-ref-249)
249. 221930 P.2d at 182–183, distinguishing Pelican Production v. Wishbone ***Oil*** & Gas, 1987 OK CIV APP 74, 746 P.2d 209, 97 O.&G.R. 143. [↑](#footnote-ref-250)
250. 222Chesapeake Operating, Inc. v. Burlington Resources ***Oil*** & Gas Co., 2002 OK CIV APP 125, 60 P.3d 1052, 157 O.&G.R. 625, 157 O.&G.R. 637, *cert. denied*. [↑](#footnote-ref-251)
251. 22360 P.3d at 1057, citing Samson Resources Co. v. Corporation Commission, 1985 OK 31, 702 P.2d 19, 22, 87 O.&G.R. 366; Atlantic Richfield Co. v. Tomlinson, 1993 OK 106, 859 P.2d 1088, 126 O.&G.R. 536. The issue of the effect of private agreements on Commission order is analyzed in § 13.08[1] *above*. *See, e.g.*, Union Pacific Resources Co. v. Texaco, Inc., 882 P.2d 212, 133 O.&G.R. 549 (Wyo. 1994); Pacific Enterprises ***Oil*** Co. (USA) v. Howell Petroleum Corp., 614 So. 2d 409, 122 O.&G.R. 1 (Ala. 1993). [↑](#footnote-ref-252)
252. 224Harding & Shelton, Inc. v. Prospective Inv. & Trading Co., 2005 OK CIV APP 88, 123 P.3d 56. [↑](#footnote-ref-253)
253. 225Meinders v. Johnson, 2006 OK CIV APP 35, 134 P.3d 858. [↑](#footnote-ref-254)
254. 226*See* Union Tex. Petroleum Corp. v. Jackson, 1995 OK CIV APP 63, 909 P.2d 131, 131 O.&G.R. 635; Tenneco ***Oil*** Co. v. Allen, 1973 OK 129, 515 P.2d 1391, 47 O.&G.R. 180. [↑](#footnote-ref-255)
255. 227That issue had been left undecided in Bowen v. Amoco Pipeline Co., 254 F.3d 925, 150 O.&G.R. 234, discussed at § 13.08 *supra*. [↑](#footnote-ref-256)
256. 228134 P.3d at 867–68, relying on Schneberger v. Apache Corp., 1994 OK 117, 890 P.2d 847, 131 O.&G.R. 587, discussed at § 21.01 *supra*. [↑](#footnote-ref-257)
257. 229New Dominion, LLC v. Parks Family Co., LLC, 2008 OK CIV APP 112, 216 P.3d 292. [↑](#footnote-ref-258)
258. 230Oklahoma applies a form of the “first marketable product” rule in calculating leasehold royalty payments which would not allow for the deduction of most post-production costs. *See* Mittelstaedt v. Santa Fe Minerals, Inc., 1998 OK 7, 954 P.2d 1203, 140 O.&G.R. 551; Panola Indep. Sch. Dist. No. 4 v. Unit Petroleum Co., 2012 OK CIV APP 94, 287 P.3d 1033, *cert. denied*. *See generally*, Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers* ***Oil*** *and Gas Law* § 645.2 (2008). [↑](#footnote-ref-259)
259. 23152 Okla. Stat. § 87.1(e). [↑](#footnote-ref-260)
260. 232Tucker v. Special Energy Corp., 2008 OK 57, 187 P.3d 730. After the remand, the court again dismissed the plaintiff’s claims as to the validity of the pooling order as a collateral attack on that order. Tucker v. Special Energy Corp., 2013 OK CIV APP 56, 308 P.3d 169. [↑](#footnote-ref-261)
261. 233187 P.3d at 734. *See* Samson Resources Co. v. Corporation Commission, 1985 OK 31, 702 P.2d 19, 87 O.&G.R. 205; Tenneco ***Oil*** Co. v. El Paso Natural Gas Co., 1984 OK 52, 687 P.2d 1049, 82 O.&G.R. 322. [↑](#footnote-ref-262)
262. 234187 P.3d at 733 quoted in Samson Resources Co. v. Newfield Exploration Mid-Continent, 2012 OK 68, 281 P.3d 1278. [↑](#footnote-ref-263)
263. 235Tucker v. New Dominion, L.L.C., 2008 OK CIV APP 42, 182 P.3d 169. [↑](#footnote-ref-264)
264. 236Optima ***Oil*** & Gas Co., LLC v. Mewbourne ***Oil*** Co., 2012 U.S. App. LEXIS 22031 (10th Cir. Oct. 23, 2012), *aff’g*, 2011 U.S. Dist. LEXIS 87670 (W.D. Okla. Aug. 8, 2011). [↑](#footnote-ref-265)
265. 237*See* Leck v. Continental ***Oil*** Co., 800 P.2d 224, 111 O.&G.R. 110 (Okla. 1989). [↑](#footnote-ref-266)
266. 238Samson Res. Co. v. Newfield Exploration Mid-Continent, 2012 OK 68, 281 P.3d 1278. [↑](#footnote-ref-267)
267. 239281 P.3d at 1282, citing Okla. Const. art. IX, § 20, 52 Okla. Rev. Stat. § 111 and Mullins v. Ward, 712 P.2d 55, 59, 87 O.&G.R. 340 (Okla. 1985). [↑](#footnote-ref-268)
268. 240Ladra v. New Dominion, LLC, 2015 OK 53, 353 P.3d 529. [↑](#footnote-ref-269)
269. 241*See also* Grayhorse Energy, LLC v. Crawley Petroleum Corp., 2010 OK CIV APP 145, 245 P.3d 1249, 1254, 173 O.&G.R. 641; Tenneco ***Oil*** Co. v. El Paso Natural Gas Co., 1984 OK 52, 687 P.2d 1049, 82 O.&G.R. 322. [↑](#footnote-ref-270)
270. 242Ryan Consolidated Petroleum Corp. v. Pickens, 155 Tex. 221, 285 S.W.2d 201, 5 O.&G.R. 99 (1955)*, cert. denied,* 351 U.S. 933, 76 S. Ct. 790, 100 L. Ed. 1462, 5 O.&G.R. 1383 (1956). The Texas Supreme Court stated:

     The Railroad Commission is without power from the Legislature or by decisions of this Court to do anything more than declare illegal the drilling of wells? which are prohibited by Rule 37. The Railroad Commission cannot change the law of Texas. The Legislature of this State has heretofore conferred broad, extensive and exclusive regulatory powers upon the Railroad Commission … , but the Commission has not been given the power to determine property rights as between litigants.

     285 S.W.2d at 207. [↑](#footnote-ref-271)
271. 243285 S.W.2d at 207. [↑](#footnote-ref-272)
272. 244Railroad Commission v. Graford ***Oil*** Corp., 21 Tex. Sup. Ct. J. 53, 557 S.W.2d 946, 59 O.&G.R. 338 (Tex. 1977). [↑](#footnote-ref-273)
273. 245557 S.W.2d at 950. The statute defined common reservoir as follows:

     any ***oil*** and/or gas field or part thereof which comprises and includes any area which is underlaid, or which from geological or other scientific data or experiments or from drilling operations or other evidence appears to be underlaid by a common pool or accumulation of ***oil***/and or gas … .

     *Id.* [↑](#footnote-ref-274)
274. 246Gage v. Railroad Commission, 22 Tex. Sup. Ct. J. 371, 582 S.W.2d 410, 63 O.&G.R. 218 (Tex. 1979). For a case in which a single source of supply might be defined differently under different circumstances, see Corporation Commission v. Union ***Oil*** Co. of California, 1979 OK 30, 591 P.2d 711, 63 O.&G.R. 196 (Okla. 1979). The canon of narrow construction of agency powers is sometimes based on the notion that governmental interference with established or traditional property rights is to be discouraged. *See, e.g.*, City Public Service Board of San Antonio v. Public Utility Commission, 9 S.W.3d 868 (Tex. App.—Austin 1999). [↑](#footnote-ref-275)
275. 247The amendments were enacted in 1981 and appear at Tex. Nat. Res. Code § 85.055(d), reproduced at § 30.43A *below.* The legislature had failed in an attempt to overrule the *Graford* and *Gage* holdings in 1979, although some changes were made to the definition of a common reservoir. In Railroad Commission v. Mote Resources, Inc., 645 S.W.2d 639, 76 O.&G.R. 113 (Tex. App.—Austin 1983, no writ), the petitioners had argued that the 1979 amendments gave the commission the necessary authority to combine separate reservoirs. The court rejected the argument, largely on the basis of the legislative history of the 1979 amendments that showed that when the bill was first introduced it clearly would have overruled *Graford,* but that the language that did overrule the earlier decisions was removed prior to the passage of the bill. [↑](#footnote-ref-276)
276. 248Pend Oreille ***Oil*** & Gas Co., Inc. v. Railroad Commission, 34 Tex. Sup. Ct. J. 616, 817 S.W.2d 36, 113 O.&G.R. 573 (Tex. 1991)*, aff’g in part rev’g in part,* 788 S.W.2d 878, 113 O.&G.R. 557 (Tex. App.—Corpus Christi 1990). At the time of this change the Texas Supreme Court had not yet released this decision for publication. Because the Texas Supreme Court has a history of granting motions for rehearing, readers should carefully check the advanced sheets or computerized legal research services to see if the decision has been finally published and all pending motions dismissed. [↑](#footnote-ref-277)
277. 249817 S.W.2d at 44–46. The court said:

     The legislature does intend the Railroad Commission to have discretion in regulating commingled ***oil*** and gas, including pooling. The ultimate outcome of the Boonsville Field cases demonstrates how the legislature resisted an interpretation of the term “common reservoir” that would have limited the commission’s regulatory authority. *Id.* at 46.

     The court disapproved language to the contrary in both the Court of Appeals decision in *Pend Oreille* and the Court of Appeals decision in Railroad Commission v. Bishop Petroleum, Inc., 736 S.W.2d 724, 732, 101 O.&G.R. 559 (Tex. App.—Waco 1987)*, aff’d in part, rev’d in part,* 31 Tex. Sup. Ct. J. 369, 751 S.W.2d 485, 101 O.&G.R. 597 (Tex. 1988). [↑](#footnote-ref-278)
278. 250Railroad Commission v. Bishop Petroleum, Inc., 31 Tex. Sup. Ct. J. 369, 751 S.W.2d 485, 101 O.&G.R. 597 (Tex. 1988). [↑](#footnote-ref-279)
279. 251Seagull Energy E & P, Inc. v. R.R. Comm’n of Tex., 99 S.W.3d 232 (Tex. App.Austin 2003), *aff’d*, 226 S.W.3d 383, 168 O.&G.R. 323 (Tex. 2007).

     In R.R. Comm’n v. Coppock, 215 S.W.3d 559 (Tex. App.—Austin 2007, rev. denied), the court refused to apply a narrow interpretation of a statute granting the Railroad Commission the power to grant extensions for surface mining permits. As long as the extension is requested prior to the termination of the permit, the Commission has the power to issue the extension even if the date of the extension occurs after the expiration of the permit. In addition, the court liberally construed the power delegated to the Commission to determine what grounds would form the basis of a decision to extend a permit. 215 S.W.3d at 568–69. [↑](#footnote-ref-280)
280. 25299 S.W.3d at 235–56. The Waskom Field was made up of relatively narrow lenticular sands that were geologically separate. [↑](#footnote-ref-281)
281. 253Tex. Nat. Res. Code § 86.081(b). [↑](#footnote-ref-282)
282. 25499 S.W.3d at 241–42, relying on Benz-Stoddard v. Aluminum Co. of America, 6 Tex. Sup. Ct. J. 459, 368 S.W.2d 94, 18 O.&G.R. 508 (1963)*, rev’g,* 357 S.W.2d 809, 16 O.&G.R. 1255 (Tex. Civ. App.—Austin 1962). *Benz-Stoddard* is discussed in § 5.01[4][g] *above*. [↑](#footnote-ref-283)
283. 25599 S.W.3d at 242. [↑](#footnote-ref-284)
284. 256While the result and analysis seemingly refute the rule of strict construction, the court cited several Texas Supreme Court decisions that elucidate that rule, including the statement that an “agency has only the powers conferred upon it in clear and unmistakable language.” 99 S.W.3d at 237, citing PUC of Tex. v. City Pub. Serv. Bd. of San Antonio, 53 S.W.3d 310, 315–16 (Tex. 2001) and Humble ***Oil*** & Refining Co. v. Railroad Commission, 133 Tex. 330, 128 S.W.2d 9, 15 (1939). [↑](#footnote-ref-285)
285. 257Seagull Energy E&P, Inc. v. R.R. Comm’n, 226 S.W.3d 383, 168 O.&G.R. 323 (Tex. 2007). [↑](#footnote-ref-286)
286. 258MIPA is codified at Tex. Nat. Res. Code § 102.001 *et seq.*, reproduced at § 30.43C *infra*. [↑](#footnote-ref-287)
287. 259For a discussion of who can seek a pooling order, see § 11.02 *above*. [↑](#footnote-ref-288)
288. 260Railroad Commission v. Coleman, 14 Tex. Sup. Ct. J. 48, 460 S.W.2d 404, 38 O.&G.R. 69 (Tex. 1970). [↑](#footnote-ref-289)
289. 261Northwest ***Oil*** Co. v. Railroad Commission, 462 S.W.2d 371, 38 O.&G.R. 53 (Tex. Civ. App.—Beaumont 1971, writ ref’d n.r.e.). [↑](#footnote-ref-290)
290. 262Broussard v. Texaco, Inc., 15 Tex. Sup. Ct. J. 282, 479 S.W.2d 270, 42 O.&G.R. 75 (Tex. 1972). The Railroad Commission has used the muscle-in provisions of MIPA to force pool state-owned minerals underneath a riverbed where the existing operator opposed the application. The Commission’s approach to what constitutes a fair and reasonable offer to pool was seemingly much more liberal than the standard announced in *Broussard*. In re Application of Ammonite ***Oil*** and Gas, Inc., ***Oil*** & Gas Docket No. 08-0282996 (March 29, 2016). [↑](#footnote-ref-291)
291. 263479 S.W.2d at 276. [↑](#footnote-ref-292)
292. 264*See* Tex. Nat. Res. Code § 102.012, reproduced at § 30.34C *infra*. [↑](#footnote-ref-293)
293. 265*See, e.g.,* Jones v. Hunt ***Oil***. 456 S.W.2d 506, 37 O.&G.R. 253 (Tex. Civ. App.—Dallas 1970. writ ref’d n.r.e.); Trapp v. Shell ***Oil*** Co., 145 Tex. 323, 198 S.W.2d 424 (Tex. 1946); Magnolia Petroleum Co. v. Railroad Commission, 141 Tex. 96, 170 S.W.2d 189 (1943).

     The applicant for a Commission order or permit must make a good faith claim to a continuing possessory right in a mineral estate even though the Commission lacks jurisdiction to resolve potentially competing claims. In Roland ***Oil*** Co. v. R.R. Comm’n of Tex., 2015 Tex. App. LEXIS 1906 (Tex. App.—Austin Feb. 27, 2015), the court affirmed the Commission’s determination that the unit operator had not satisfied its burden to show that the unit agreement was still in force. Therefore, the denial of an order seeking an extension to test some unit wells that were plugged and abandoned was affirmed. *See also:* Humble ***Oil*** & Refining Co. v. MacDonald, 279 S.W.2d 914 (Tex. Civ. App.—Austin 1955, writ ref’d n.r.e.); Cheesman v. Amerada Petroleum Corp., 227 S.W.2d 829 (Tex. Civ. App.—Austin 1950).

     In Department of Natural Resources v. Waide, 2013 IL App (5th) 120340, 372 Ill. Dec. 648, 992 N.E.2d 187, the court did not rely on the basic proposition that governmental agencies do not have the power to adjudicate title but nonetheless held that inclusion of the defendants in a generic list of persons owning mineral interests that will be subject to a pooling or unitization order is insufficient to bar DNR from asserting title to the disputed mineral estate. Neither the doctrine of collateral estoppel nor res judicata would attach to the unitization order insofar as ownership of the minerals was concerned. [↑](#footnote-ref-294)
294. 266Magnolia Petroleum Co. v. Railroad Commission, 141 Tex. 96, 170 S.W.2d 189 (1943). In Ky. S. Coal Corp. v. Ky. Energy & Env’t Cabinet Formerly the Envtl. & Pub. Prot. Cabinet, 396 S.W.3d 804 (Ky. 2013), the Kentucky Supreme Court seemingly applied the converse of the Magnolia Petroleum “good faith” claim to title doctrine when it upheld a decision by the Cabinet to issue a renewal of a mining permit because there was a good faith dispute about the applicant’s right to mine. Since the Cabinet could not resolve the property dispute, it could deny the permit. [↑](#footnote-ref-295)
295. 267170 S.W.2d at 190–91. [↑](#footnote-ref-296)
296. 268Rosenthal v. R.R. Comm’n, 2009 Tex. App. LEXIS 6522 (Tex. App.—Austin 2009, rev. denied). [↑](#footnote-ref-297)
297. 269*See* Patrick H. Martin & Bruce M. Kramer, Williams & Meyers, ***Oil*** and Gas Law § 222 (LexisNexis Matthew Bender). *See generally* Humble ***Oil*** & Refining Co. v. West, 508 S.W.2d 812, 48 O.&G.R. 516 (Tex. 1974); Emeny v. United States 412 F.2d 1319 (Ct. Cl. 1969). [↑](#footnote-ref-298)
298. 270SWEPI LP v. R.R. Comm’n of Tex. & Hidalgo County, 314 S.W.2d 253, 170 O.&G.R. 446 (Tex. App.—Austin 2010).

     The general approach taken by the Texas Supreme Court to the ultra vires doctrine appears to be more generous in its interpretation of delegated authority. The court has said: “State administrative agencies have only those powers that the legislature expressly confers upon them and those implied powers that are reasonably necessary to carry out their express functions or duties.” Public Utilities Commission of Texas v. City Public Services Board of San Antonio, 53 S.W.3d 310, 315 (Tex. 2001); Luminant Energy Co., LLC v. Public Utilities Commission of Texas, 2023 Tex. App. LEXIS 1737 (Tex. App.—Austin Mar. 17, 2023). [↑](#footnote-ref-299)
299. 271314 S.W.2d at 260–61, applying Tex. Nat. Res. Code § 92.003 and Tex. Admin. Code § 3.76. [↑](#footnote-ref-300)
300. 272314 S.W.3d at 264–65. The court refused to apply the canon of statutory construction that narrowly interprets statutes that deprive persons of common law rights because the plain language of the statute showed an intent to modify the mineral owner’s common-law-implied easement of surface use. *Id.* at 264 n.12. [↑](#footnote-ref-301)
301. 273Superior ***Oil*** Co. v. Railroad Commission, 571 S.W.2d 51, 61 O.&G.R. 422 (Tex. Civ. App. 1978, writ ref’d n.r.e.). [↑](#footnote-ref-302)
302. 274571 S.W. 2d at 55, quoting from Magnolia Petroleum Co. v. Railroad Commission, 141 Tex. 96, 170 S.W.2d 189 (1943). *In accord* Roland ***Oil*** Co. v. R.R Comm’n of Tex., 2015 Tex. App. LEXIS 1906 (Tex. App.—Austin Feb. 27, 2015); Humble ***Oil*** & Refining Co. v. MacDonald, 279 S.W.2d 914 (Tex. Civ. App.—Austin 1955, writ ref’d n.r.e.); Cheesman v. Amerada Petroleum Corp., 227 S.W.2d 829 (Tex.Civ. App.—Austin 1950). *See generally* Bret Wells, *Allocation Wells, Unauthorized Pooling, and the Lessor’s Remedies*, 68 Baylor L. Rev. 1 (2016). [↑](#footnote-ref-303)
303. 275Amerada Petroleum Corp. v. Railroad Commission, 395 S.W.2d 403, 23 O.&G.R. 786 (Tex. Civ. App. 1965. writ ref’d n.r.e.). [↑](#footnote-ref-304)
304. 276395 S.W.2d at 406, *citing* Magnolia Petroleum Co. v. Railroad Commission, 141 Tex. 96, 170 S.W.2d 189 (1943). *See also* Harrington v. Railroad Commission. 7 Tex. Sup. Ct. J. 210, 375 S.W.2d 892, 19 O.&G.R. 830 (Tex. 1964); Stewart v. Humble ***Oil*** & Refining Co., 7 Tex. Sup. Ct. J. 338, 377 S.W.2d 830, 20 O.&G.R. 436 (Tex. 1964). [↑](#footnote-ref-305)
305. 277Sun ***Oil*** Co. v. Railroad Commission, 390 S.W.2d 803, 22 O.&G.R. 828 (Tex. Civ. App. 1965, writ ref’d n.r.e.). [↑](#footnote-ref-306)
306. 278390 S.W.2d at 808. The genesis of the public/private law distinction in Texas is Magnolia Petroleum Co. v. Railroad Commission, 141 Tex. 96, 170 S.W.2d 189 (1943). [↑](#footnote-ref-307)
307. 279Estate of Grimes v. Dorchester Gas Producing Co., 707 S.W.2d 196, 90 O.&G.R. 539 (Tex. App. 1986, writ ref’d n.r.e.). [↑](#footnote-ref-308)
308. 280707 S.W.2d at 204. On a motion for rehearing, the court reiterated the basic rule that the Railroad Commission is an agency of limited powers. The statement by the court summarizes the nature and extent of the ultra vires doctrine as it applies to state conservation laws.

     The power of the Railroad Commission is not derived from the constitution but comes from legislative grants of powers and jurisdiction. The Supreme Court has generally held that the Commission has only such powers as are specifically delegated to the Commission [citations omitted]. As relevant here, the power delegated to the Commission is to regulate production and to prevent waste. It is so well established as to have become axiomatic that the Commission has no power to determine property rights.

     *Id.* at 205.

     For other Texas cases that support the general rule, see, e.g., Railroad Commission v. City of Austin, 18 Tex. Sup. Ct. J. 241, 524 S.W.2d 262, 51 O.&G.R. 231 (Tex. 1975); Jones v. Killingsworth, 9 Tex. Sup. Ct. J. 155, 403 S.W.2d 325, 328, 24 O.&G.R. 508 (Tex. 1965); Magnolia Petroleum Co. v. Railroad Commission, 141 Tex. 96, 170 S.W.2d 189 (1943); Elliott v. Davis, 553 S.W.2d 223, 227, 58 O.&G.R. 390 (Tex. Civ. App. 1977, writ ref’d n.r.e.). [↑](#footnote-ref-309)
309. 281Gulf ***Oil*** Corp. v. Wyoming ***Oil*** and Gas Conservation Commission, 693 P.2d 227, 84 O.&G.R. 579 (Wyo. 1985). [↑](#footnote-ref-310)
310. 282In addition to the ultra vires issue, there was a problem in that the lease was on federal lands. *See* Ch. 16 *above*. [↑](#footnote-ref-311)
311. 283693 P.2d at 241 (Rooney, J. dissenting). The dissenting judge concluded:

     The powers and duties given to the Commission are likewise directed to the same end [waste prevention]. In § 30-5-104 W.S. 1977, its jurisdiction and authority is that “necessary to effectuate the purposes and intent of this act.” Can anyone take an impartial look at the act and not conclude its purpose and intent is only to prohibit waste of ***oil*** and gas, and to protect correlative rights in ***oil*** and gas, or stated the other way to conserve ***oil*** and gas? There is nothing in the act directed at general environmental protection.

     *Id.* [↑](#footnote-ref-312)
312. 284Michigan ***Oil*** Co. v. Natural Resources Commission, 406 Mich. 1, 276 N.W.2d 141, 62 O.&G.R. 313 (1979)*, aff’g,* 71 Mich. App. 667, 249 N.W.2d 135, 56 O.&G.R. 234 (1976), *cert. denied,* 444 U.S. 980, 100 S. Ct. 482, 62 L. Ed. 2d 407 (1979). [↑](#footnote-ref-313)
313. 285At the federal level, a similar approach was taken in Gulf ***Oil*** Corp. v. Morton, 493 F.2d 141, 47 O.&G.R. 455 (9th Cir. 1973). The court found that the Outer Continental Shelf Lands Act gave the Secretary of the Interior authority to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf. The term “natural resources” included not only mineral interests but also the marine animal and plant life. Thus, the secretary, in suspending activities on the lease in question, was acting to promote conservation of natural resources. His actions were therefore not ultra vires. [↑](#footnote-ref-314)
314. 286Hartman v. Corporation Commission, 215 Kan. 758, 529 P.2d 134, 52 O.&G.R. 469 (1974).

     *See also* State *ex rel.* Fisher v. Nacelle Land & Management Corp., 90 Ohio App. 3d 93, 628 N.E.2d 67, 126 O.&G.R. 520 (1993)*, appeal dismissed for want of prosecution,* 68 Ohio St. 3d 1439, 626 N.E.2d 123 (1994). The court upheld the imposition of additional conditions on a permit for the storage and injection of brine. The court rejected the permittee’s claim that only the generally applicable rules regulating brine storage and injection could be applied. There was sufficient statutory authority for the imposition of additional permit conditions as the agency deemed appropriate. [↑](#footnote-ref-315)
315. 287529 P.2d at 143. [↑](#footnote-ref-316)
316. 288Union Texas Petroleum Corp. v. Jackson, 1995 OK CIV APP 63, 909 P.2d 131. This case is also discussed in §§ 3.03[1] and 24.02[2] *above*. [↑](#footnote-ref-317)
317. 289909 P.2d at 138–139. [↑](#footnote-ref-318)
318. 290Fla. Stat. Ann. § 253.371. Coastal Petroleum Co. v. Department of Environmental Protection, 672 So. 2d 574 (Fla. Dist. Ct. App. 1996); Coastal Petroleum Co. v. Chiles, 672 So. 2d 571 (Fla. Dist. Ct. App.), *review denied,* 678 So. 2d 1287 (Fla. 1996); Coastal Petroleum Co. v. State Department of Environmental Protection, 649 So. 2d 930, 131 O.&G.R. 137 (Fla. Dist. Ct. App.), *review denied,* 660 So. 2d 712 (Fla. 1995). These cases are also discussed in § 24.02[3][b] *above*. [↑](#footnote-ref-319)
319. 291The alleged statutory basis for this bond requirement was Fla. Stat. Ann. § 253.571. [↑](#footnote-ref-320)
320. 292672 So. 2d at 573. [↑](#footnote-ref-321)
321. 293649 So. 2d at 931. [↑](#footnote-ref-322)
322. 294The court merely concluded that the attempted “retroactive” application of § 253.371 “impaired obligations under Coastal’s lease contract.” 672 So. 2d at 574. [↑](#footnote-ref-323)
323. 295Hawley v. Board of ***Oil*** & Gas Conservation, 297 Mont. 467, 2000 MT 2, 993 P.2d 677, 146 O.&G.R. 162. [↑](#footnote-ref-324)
324. 296Mont. Code Ann. § 82-11-147, reproduced at § 30.26A *above*. [↑](#footnote-ref-325)
325. 296.1On occasion, a statute may authorize an administrative agency to award attorney’s fees and costs to a prevailing party. In State *ex rel*. Department of Natural Resources v. Fowler Land Co., 2022 Mo. App. LEXIS 460 (July 19, 2022), *motion for reh’g denied,* 2022 Mo. App. LEXIS 485 (Aug. 2, 2022), *trans. granted*, 2022 Mo. LEXIS 247 (Nov. 22, 2022), the court held that the prevailing party in an administrative action that was appealed to the court of appeals had not followed the statutory requirements of filing within 30 days of being declared the prevailing party under Mo. Rev. Stat. § 536.087. [↑](#footnote-ref-326)
326. 297Bennion v. Utah State Board of ***Oil***, Gas & Mining, 675 P.2d 1135, 79 O.&G.R. 341 (Utah 1983).

     In later litigation spawned by the principal case the Utah Supreme Court in Bennion v. Utex ***Oil*** Co., 905 F.2d 324, 109 O.&G.R. 571 (10th Cir. 1990), recognized the power of the Utah Board to order a monetary penalty award for intentional or knowing delays in making payments that result from a Board order to pool or unitize. This case did not involve an attack on a Board order but was a private action by Bennion claiming punitive damages for the failure of the operator to make timely payments under a compulsory pooling order. [↑](#footnote-ref-327)
327. 298The statute read in part:

     The board shall have and is hereby given jurisdiction and authority over all persons and property, public and private, necessary to enforce the provisions of this act and shall have the power and authority to make and enforce rules, regulations and orders and do whatever may reasonably be necessary to carry out the provisions of this act … .

     Utah Code Ann. § 40-6-6(a). The issues relating to the awarding of monetary damages can also affect federal agencies and federal courts. In Amoco Production Co. v. Hodel, 815 F.2d 352, 97 O.&G.R. 24 (5th Cir. 1987)*, vacating and remanding,* 627 F. Supp. 1375, 90 O.&G.R. 390 (W.D. La. 1986), the court determined that Amoco’s claims against the Interior Department was in fact a claim for money damages that under the Tucker Act (28 U.S.C. 1346(a)(2), § 1491(a)) must be brought in the United States Court of Claims. It therefore remanded the case to the Court of Claims since the federal district court lacked subject-matter jurisdiction. [↑](#footnote-ref-328)
328. 299Lear Petroleum Corp. v. Seneca ***Oil*** Co., 1979 OK 15, 590 P.2d 670, 62 O.&G.R. 383.

     The MMS has the power to impose civil penalties for violations of its regulations relating to production from the Outer Continental Shelf (43 U.S.C. § 1350(b); 30 C.F.R. § 250.1404(b)). MMS has developed a table for civil penalty assessments based on the gravity of the violation and its threat to humans and/or the environment. In reviewing a civil penalty imposed by MMS for failing to maintain operableemergency shutdown stations on a platform, the Interior Board of Land Appeals will give substantial deference to the MMS when it is operating within the parameters of its regulations. Petro Venutres, Inc., 167 IBLA 315, GFS (OCS) 241 (2006), IBLA 2003-328; Seneca Resources Corp., 167 IBLA 1, GFS(OCS) 240, IBLA 2001-397 (2005); Blue Dolphin Exploration Co., 166 IBLA 131, IBLA 2002-438 (2005) (upholding civil penalty for lessee’s failure to properly test OCS tubing plugs, a type of subsurface safety device).

     These penalties may be imposed on contractors as well as lessees and operators. Island Operating Co., Inc., 186 IBLA 199 (2015). [↑](#footnote-ref-329)
329. 300Fent v. Oklahoma Natural Gas Co., 1990 OK CIV APP 70, 804 P.2d 1146, *cert. denied* (released for publication by order of the Court of Appeals). [↑](#footnote-ref-330)
330. 301804 P.2d at 1149 (Garrett, P.J. dissenting). Judge Garrett cited Pelican Production Corp. v. Wishbone ***Oil*** & Gas Inc., 1987 OK CIV APP 74, 746 P.2d 209, 97 O.&G.R. 143, an ***oil*** and gas case when he concluded: “the Corporation Commission has sole authority to adjust equities and to protect correlative rights of interested parties … The Pelican court held that a Corporation Commission determination is prerequisite to an action for money damages in the district court.” *Id.* [↑](#footnote-ref-331)
331. 302*Id.* The dissenting argument also goes too far in suggesting that any adjustment of the equities between private parties pursuant to an agency order or action is a matter within the jurisdiction of the agency. [↑](#footnote-ref-332)
332. 303Desormeaux v. Inexco ***Oil*** Co., 277 So. 2d 218, 45 O.&G.R. 592 (La. App. 1973)*, after remand,* 298 So. 2d 897, 50 O.&G.R. 18 (La. App. 1974), *writ ref’d,* 302 So. 2d 37 (La. 1974). [↑](#footnote-ref-333)
333. 304277 So. 2d at 220–221. The court said:

     When the statute [La. Rev. Stat. Ann. § 30:10] states that “the commissioner shall determine the proper costs” it is obviously referring to the cost of development and operation of the pool unit and the reasonableness thereof. Therefore, the Commissioner only has the fact-finding authority to determine the amount of reasonable and proper costs. He has no authority to determine how costs are to be apportioned or what effect his orders have on pre-existing contractual or legal relationships.

     *Id.* [↑](#footnote-ref-334)
334. 305Marbob Energy Corp. v. N.M. ***Oil*** Conservation Comm’n, 206 P.3d 135, 2009-NMSC-013, 170 O.G.R. 595. *In accord*: Harvey E. Yates Co. v. Cimarex Energy Co., 2014 U.S. Dist. LEXIS 183891 (D.N.M. Mar. 5, 2014) (plaintiff need not exhaust administrative remedies because ***Oil*** Conservation Commission has no jurisdiction over plaintiff’s tort-based claims. [↑](#footnote-ref-335)
335. 306Compare N.M. Stat. Ann. § 70-2-28 with N.M. Stat. Ann. §§ 70-2-6 to 70-2-11. [↑](#footnote-ref-336)
336. 307Minshall v. Corporation Commission, 1971 OK 74, 485 P.2d 1058, 39 O.&G.R. 637.

     In K2 America Corp., 163 IBLA 199, 2004 IBLA LEXIS 78 (2004), the Board upheld a fine imposed on a federal ***oil*** and gas lessee who mistakenly located a well on a tract different from that provided for in the APD, stopped all further activities and eventually got permission to complete the well. The fact that permission was given to continue drilling operations does not mean that the imposition of a fine of $2,500 is arbitrary or capricious. The BLM has substantial interests in seeing that no surface-disturbing activity occurs on its lands without the required permit. That justifies the fine even though the lessee suffered substantially more in damages due to the delay caused by the mistaken location. [↑](#footnote-ref-337)
337. 308Currey v. Corporation Commission, 1979 OK 89, 617 P.2d 177, 68 O.&G.R. 274, *cert. denied,* 452 U.S. 938, 101 S. Ct. 3080, 69 L. Ed. 2d 952, *reh’g denied,* 453 U.S. 927, 102 S. Ct. 890, 69 L. Ed. 2d 1023 (1981). [↑](#footnote-ref-338)
338. 309For another case dealing with abandoned wells, see Ashland ***Oil***, Inc. v. Corporation Commission, 1979 OK 17, 595 P.2d 423, 63 O.&G.R. 331. It is not entirely clear from a reading of this case whether the decision’s distinction from *Minshall* turns on the factual finding of an initially improper plugging effort or the effect of the amended statutory provisions. [↑](#footnote-ref-339)
339. 310Amax Petroleum Corp. v. Corporation Commission, 1976 OK 91, 552 P.2d 387, 55 O.&G.R. 162. The court in *Amax* also dismissed challenges based on an improper delegation of legislative power without reasonable standards. *See* § 24.02[2] *above*. [↑](#footnote-ref-340)
340. 311The court further declared that the statute was neither too vague nor too indefinite for not specifying exactly who had the duty to plug abandon wells. *See also* Loriaux v. Corporation Commission, 1973 OK 109, 514 P.2d 941, 46 O.&G.R. 193.

     While suggesting that takes a narrow approach to the powers granted the Department of Natural Resources to issue plug abandoned wells, the underlying issue was whether the owner of the well was given appropriate notice prior to the issuance of the order to plug. *In re* Abandonment of Wells Located in Illinois, 343 Ill. App. 3d 303, 277 Ill. Dec. 537, 796 N.E.2d 623, 158 O.&G.R. 847 (2003), *appeal denied*, 207 Ill. 2d 602, 283 Ill. Dec. 134, 807 N.E.2d 975 (2004).

     While initially suggesting that the courts should take a narrow approach to the powers granted to the Department of Natural Resources to issue plug and abandonment orders, the Illinois appellate court on subsequent appeal noted that the powers of the Department to protect the public health and safety are vitally served by the power to order the plugging of abandoned wells. Leavell v. Department of Natural Resources (*In re Leavell*), 343 Ill. App. 3d 303, 277 Ill. Dec. 537, 796 N.E.2d 623, 158 O.&G.R. 847 (Ill. App. Ct. 5th Dist. 2003), *appeal denied*, 207 Ill. 2d 602, 283 Ill. Dec. 134, 807 N.E.2d 975 (Ill. 2004), *on later appeal*, 397 Ill. App. 3d 937, 337 Ill. Dec. 978, 923 N.E.2d 829 (Ill. App. Ct. 5th Dist. 2010). [↑](#footnote-ref-341)
341. 312Hoover v. Boone Operating, Inc., 2012 OK CIV APP 39, 274 P.3d 815. [↑](#footnote-ref-342)
342. 313274 P.3d at 819, relying on Henry v. Corporation Com. of Oklahoma, 1990 OK 103, 825 P.2d 1262; Oklahoma Water Resources Board v. Texas County Irrigation and Water Resources Ass’n, Inc., 1984 OK 96, 711 P.2d 38, 88 O.&G.R. 331. [↑](#footnote-ref-343)
343. 314Railroad Commission v. American Petrofina Co. of Texas, 576 S.W.2d 658, 62 O.&G.R. 421 (Tex. Civ. App.—Beaumont 1978, no writ). [↑](#footnote-ref-344)
344. 315Tex. Nat. Res. Code Ann. § 89.011. [↑](#footnote-ref-345)
345. 316Tex. Nat. Res. Code Ann. § 89.002. [↑](#footnote-ref-346)
346. 317Tex. Nat. Res. Code Ann. § 89.002 defines a non-operator as “a person who owns a working interest in a well at the time the well is about to be abandoned or ceases operation and is not an operator … .”

     The statutory duties of the non-operator are as follows: “If the operator of a well fails to comply with Section 89.011 of this code, each nonoperator is responsible for his proportionate share of the cost of the proper plugging of the well … .” Tex. Nat. Res. Code Ann. § 89.012. [↑](#footnote-ref-347)
347. 318Railroad Commission v. Olin Corporation, 690 S.W.2d 628, 88 O.&G.R. 579 (Tex. App.—Austin 1985)*, writ ref’d n.r.e,* 29 Tex. Sup. Ct. J. 60, 700 S.W.2d 641, 701 S.W.2d 641, 88 O.&G.R. 586 (Tex. 1986). [↑](#footnote-ref-348)
348. 319Tex. Nat. Res. Code Ann. § 89.042(b). [↑](#footnote-ref-349)
349. 320701 S.W.2d at 641. [↑](#footnote-ref-350)
350. 321For another case involving the well plugging statute, see Carbide International, Ltd. v. State of Texas, 695 S.W.2d 653, 86 O.&G.R. 600 (Tex. App.—Austin 1985, n.w.h.). The Railroad Commission had ordered Carbide to plug a well. Carbide had refused, and the Railroad Commission sought statutory civil penalties for violation of the 45-day order to plug. Carbide had argued that the civil penalty provisions only applied to acts concerning waste, and not acts relating to well plugging. The court had to struggle with the effects of the codification process, but nonetheless concluded that the civil penalty provisions were intended to apply to all orders of the Railroad Commission, including orders to plug abandoned wells. [↑](#footnote-ref-351)
351. 321.1Donald v. Amoco Production Co., 735 So. 2d 161 (Miss. 1999). [↑](#footnote-ref-352)
352. 322Chevron U.S.A., Inc. v. Smith, 844 So. 2d 1145, 156 O.&G.R. 201 (Miss. 2002), *cert. denied*, 540 U.S. 881, 124 S. Ct. 327, 157 L. Ed. 2d 147 (2003). [↑](#footnote-ref-353)
353. 323844 So. 2d at 1145–46. [↑](#footnote-ref-354)
354. 324844 So. 2d at 1148. A concurring and dissenting opinion would not award the surface owners the full cost of restoration but would require Chevron to restore the surface regardless of cost. 844 So. 2d at 1149–50 (MacRae, P.J., concurring and dissenting. Another judge would remit the $2.35 million award to the value of the surface estate. 844 So. 2d at 1151–52 (Easley, J., concurring and dissenting). [↑](#footnote-ref-355)
355. 325844 So. 2d at 1149. [↑](#footnote-ref-356)
356. 326Donald v. Amoco Production Co., 735 So. 2d 161, 141 O.&G.R. 490 (Miss. 1999). [↑](#footnote-ref-357)
357. 327Howard v. TotalFina E&P USA, Inc., 899 So. 2d 882 (Miss. 2005). [↑](#footnote-ref-358)
358. 328899 So. 2d at 888. [↑](#footnote-ref-359)
359. 329Town of Bolton v. Chevron ***Oil*** Co., 919 So. 2d 1101 (Miss. Ct. App. 2005). [↑](#footnote-ref-360)
360. 330919 So. 2d at 1104–05. [↑](#footnote-ref-361)
361. 331919 So. 2d at 1108. [↑](#footnote-ref-362)
362. 332919 So. 2d at 1110–11. The town’s cause of action was not subject to the statute of limitations because the statute does not run against municipalities. [↑](#footnote-ref-363)
363. 332.1Petro Harvester ***Oil*** & Gas Co., LLC v. Baucum, 323 So. 3d 1041 (Miss. 2021). *Petro Harvester* is not cited in Darville v. Germany, 2021 U.S. Dist. LEXIS 37480 (S.D. Miss. Mar. 1, 2021), 2021 U.S. Dist. LEXIS 106166 (S.D. Miss. June 7, 2021), a case asserting various common law claims relating to a unit operator’s failure to comply with a compulsory unitization order requiring the re-determination of the tract participation formula. The court stayed the common law litigation pending the Board’s determination of the appropriate tract participation factors. [↑](#footnote-ref-364)
364. 332.2The surface owners had amended their complaint to delete their negligence per se claim, since those claims do require a finding that a statutory or regulatory violation has occurred. 323 So. 3d at 1046. [↑](#footnote-ref-365)
365. 332.3323 So. 3d at 150. *See also* Campbell Sixty-Six Express, Inc. v. J. & G. Express, Inc., 244 Miss. 427, 141 So. 2d 720, 726 (1962). [↑](#footnote-ref-366)
366. 332.4323 So. 3d at 1050. This three-part test was applied in Tiger Production Co. v. Pace, 353 So. 3d 429 (Miss. 2022), where the Mississippi Supreme Court concluded that a surface owner need not exhaust its remedies as to a claim for injury to cattle and trespass even though the defendant was engaged in ***oil*** and gas operations that allegedly caused the damages. [↑](#footnote-ref-367)
367. 333Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947). *See generally* B. Schwartz, *Administrative Law* § 3.18 (2d ed. 1984).

     In Torch Energy Marketing, Inc. v. Pacific Gas & Electric Co., 2003 U.S. Dist. LEXIS 20941 (S.D. Tex. Mar. 31, 2003)*, as modified on reh’g,* 280 F. Supp. 2d 632, 158 O.&G.R. 345 (S.D. Tex. 2003), *reconsideration denied*, (S.D. Tex. 2004), a seller of natural gas argued that a public utility should be estopped from claiming contractually-authorized and state agency approved penalties for failing to provide the required quantities of natural gas. The public utility had failed to bill the seller for the under-production in what the seller termed a timely and contractually-mandated manner. The court concluded that equitable estoppel against a public utility that is statutorily required to apply the tariff schedules approved by the state agency was not authorized by statute. [↑](#footnote-ref-368)
368. 334One possible exception may be Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979). This was a taking issue case where the plaintiff relied on statements made by officials of the Corps of Engineers that the waterway the plaintiff was constructing would be non-navigable. As it turned out the waterway was deemed navigable, which meant the plaintiff was subject to a substantial amount of federal regulation. Although Chief Justice Rehnquist cited the general rule that the government cannot be estopped by the acts of its employees and officials, the authors believe that the representations made clearly colored the tone of the opinion finding that a taking had occurred. [↑](#footnote-ref-369)
369. 335Burton/Hawks Inc. v. United States, 553 F. Supp. 86, 75 O.&G.R. 618 (D. Utah 1982). *See also* Enfield v. Kleppe, 566 F.2d 1139, 60 O.&G.R. 46 (10th Cir. 1977), where the court said: “Since the defective regulation was never valid, there was no right to rely on it.” There a correcting regulation was made retroactively applicable, and the private party claimed estoppel based on the earlier, and now repealed, regulation. Thus, in dealing with the federal government, one must rely on the regulation rather than the words or acts of an official, but if one does rely on a regulation, one should be sure it is a correct application of the law. [↑](#footnote-ref-370)
370. 336The regulations appeared at 43 C.F.R. § 1810.3 and are quoted at 553 F. Supp. at 92. [↑](#footnote-ref-371)
371. 337Ashland ***Oil***, Inc. v. Corporation Commission, 1979 OK 17, 595 P.2d 423, 63 O.&G.R. 331 (Okla. 1979). [↑](#footnote-ref-372)
372. 338Big Piney ***Oil*** and Gas Co. v. Wyoming ***Oil*** and Gas Conservation Commission, 715 P.2d 557, 91 O.&G.R. 620 (Wyo. 1986). [↑](#footnote-ref-373)
373. 339715 P.2d at 560. See also Edgar v. Stanolind ***Oil*** & Gas Co., 90 S.W.2d 656 (Tex. Civ. App. 1935. writ ref’d), where the court said:

     That is a matter in which the public is concerned and the private parties cannot by conduct and agreement between themselves, whether by estoppel or otherwise, vitiate the conservation laws, nor obstruct their proper enforcement. And it is immaterial whether the enforcement of such conservation laws is invoked by interested parties or by the state, if a violation thereof is shown. The public interest in the conservation of such natural resources is the matter of paramount concern, and one against which estoppel as between the private property rights of the adjacent leaseholders cannot prevail.

     90 S.W.2d at 658.

     A case applying the general principle that estoppel cannot work against the government, especially as it acts to protect the public interest to prevent waste, is Northwest Central Pipeline Corp. v. Corporation Commission, 237 Kan. 248, 699 P.2d 1002, 86 O.&G.R. 276*, vacated and remanded,* 475 U.S. 1002, 106 S. Ct. 1169, 89 L. Ed. 2d 289 (1986), *on remand,* 240 Kan. 638, 732 P.2d 775, 92 O.&G.R. 290 (1987) *aff’d,* 489 U.S. 493, 109 S. Ct. 1262, 103 L. Ed. 2d 509, 100 O.&G.R. 269 (1989). *See also* Martin, *Regulation of Gas Production Rates and Imbalances After Transco v.* ***Oil*** *& Gas Board*, 27 Washburn L.J. 298 (1988). [↑](#footnote-ref-374)
374. 340Plateau Mining Co. v. Utah Division of State Lands & Forestry, 802 P.2d 720, 112 O.&G.R. 546 (Utah 1990), *on later appeal,* 886 P.2d 514 (Utah 1994). [↑](#footnote-ref-375)
375. 341802 P.2d at 728. [↑](#footnote-ref-376)
376. 342In the private sector, many cases have found that accepting a lower than required royalty check does not constitute estoppel. *See, e.g.,* Foster v. Atlantic Refining Co., 329 F.2d 485, 20 O.&G.R. 422 (5th Cir. 1964); Texas ***Oil*** & Gas Corp. v. Vela, 11 Tex. Sup. Ct. J. 340, 429 S.W.2d 866, 29 O.&G.R. 121 (Tex. 1968). On the federal level, there can be no estoppel because acceptance of royalty checks is expressly made subject to later audit and requests for additional payments. Arch Mineral Corp. v. Lujan, 911 F.2d 408 (10th Cir. 1990). [↑](#footnote-ref-377)
377. 343Plateau Mining Co. v. Utah Division of State Lands & Forestry, 802 P.2d 720, 728, 112 O.&G.R. 546 (Utah 1990), *on later appeal,* 886 P.2d 514 (Utah 1994). [↑](#footnote-ref-378)
378. 344In addition to estoppel, a related doctrine that deals with individual reliance on actions or non-actions is the doctrine of laches. Normally, laches bars a recovery when a party delays bringing the action which causes a substantial disadvantage to the other party. The person claiming laches as a defense would usually have to prove a lack of diligence on the part of the claimant and an injury caused by the delay. In Plateau Mining Co. v. Utah Division of State Lands & Forestry, 802 P.2d 720, 112 O.&G.R. 546 (Utah 1990), *on later appeal,* 886 P.2d 514 (Utah 1994), the state was not guilty of laches because it was up to the lessee, not the state, to determine the proper amount of royalty owed. Therefore, the state had no duty to prove or make its claim. 802 P.2d at 728.

     *See also* Montana Wilderness Ass’n v. Fry, 310 F. Supp. 2d 1127, 1139, 162 O.&G.R. 303 (D. Mont. 2004) (defense of laches invoked sparingly in environmental cases and is usually within the sound discretion of the trial court). [↑](#footnote-ref-379)
379. 345Santa Fe Minerals, Inc., 145 IBLA 317 (1998). [↑](#footnote-ref-380)
380. 346Santa Fe Minerals, Inc., 145 IBLA 317, 324 (1998). [↑](#footnote-ref-381)
381. 347“Estoppel against the Government in matters concerning the public lands is an extraordinary remedy, and must be based upon affirmative misconduct, such as misrepresentation or concealment of material fact.” Carlyle, Inc., 164 IBLA 178, 180, 2004 IBLA LEXIS 107 (2004), quoting from United States v. Ruby Co., 588 F.2d 697, 703–04 (9th Cir. 1978). [↑](#footnote-ref-382)
382. 348Santa Fe Minerals, Inc., 145 IBLA 317, 325 (1998). *See also* 43 C.F.R. § 1810.3(c) (1988); Marathon ***Oil*** Co., 128 IBLA 168 (1994). [↑](#footnote-ref-383)
383. 349Maguire ***Oil*** Co. v. City of Houston, 69 S.W.3d 350, 365, 154 O.&G.R. 428 (Tex. App.—Texarkana 2002, rev. denied). The rule against estoppel applies where the governmental entity is exercising a governmental, as opposed to a proprietary, power. The most analogous area involves municipal zoning decisions. *See generally* Black & Daniel, *The Texas Rule of Estoppel in Zoning Cases*, 33 Baylor L. Rev. 241 (1981). [↑](#footnote-ref-384)
384. 350Maguire ***Oil*** Co. v. City of Houston, 69 S.W.3d 350, 365, 154 O.&G.R. 428 (Tex. App.—Texarkana 2002). Eventually Maguire ***Oil*** was successful on its *Penn Central* inverse condemnation claim recovering a $2 million damage award for an unreasonable and intentional interference with the use and enjoyment of its mineral interest. City of Houston v. Maguire ***Oil*** Co., 342 S.W.3d 726 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). The case is also analyzed in § 24.01[2], *above*, relating to the operator’s inverse condemnation claims. [↑](#footnote-ref-385)
385. 35169 S.W.3d at 366, relying on City of Dallas v. Rosenthal, 239 S.W.2d 636 (Tex. Civ. App.—Dallas 1951, writ ref’d n.r.e.) and Rosenthal v. City of Dallas, 211 S.W.2d 279 (Tex. Civ. App.—Dallas 1948, writ ref’d n.r.e.). [↑](#footnote-ref-386)
386. 352In addition to the “usual” equitable estoppel claim, Maguire asserted that a promissory estoppel claim against the city. While governmental permits are usually not considered to create a contractual relationship between the government and the permit applicant, *Ex parte* Mata, 925 S.W.2d 292 (Tex. App.—Corpus Christi 1996, no writ), the court found that the permits issued prior to their revocation may have caused Maguire to expend substantial sums in reliance thereof creating a type of promissory estoppel contract. The application of the promissory estoppel doctrine to a governmental permit would greatly expand the rights of the permit holder at the expense of the governmental authority exercising its police power. [↑](#footnote-ref-387)
387. 353Dewhurst v. Gulf Marine Institute of Technology, 55 S.W.3d 91, 159 O.&G.R. 777 (Tex. App.—Corpus Christi 2001, rev. denied). [↑](#footnote-ref-388)
388. 35455 S.W.2d at 99–100. Since Texas owns the waters in question as both a sovereign and a proprietor, the court’s conclusion that the lease assignment reflected proprietary powers may be questioned. The court also found that the Commissioner had waived any contractual right to demand the lease assignment be forfeited by its series of actions executing the assignment and allowing GMIT to occupy the platform. Again, waiver is typically not available as a defense against the government. [↑](#footnote-ref-389)