# A BIG BEND IN JURISDICTION: PRESERVING THE ENVIRONMENT AND ADDRESSING THE BASIS OF A CLAIM THROUGH SEQUENTIAL JURISDICTION

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## I. THE GREENBELT: TIGHTENING UP LITIGATION AND FOCUSING ON THE BASIS OF A CLAIM

"The environment is where we all meet; where we all have a mutual interest; it is the one thing all of us share."[1] This proposition rings especially true in light of the oil and gas exploration that has inundated the South

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1. LADY BIRD JOHNSON, http://www.ladybirdjohnson.org (last visited Dec. 30, 2018).

throughout the last century.[2] The bitter reality is that some landowners are suing oil and gas companies in order to win large damages with no intent to actually remediate the contaminated land.[3] Because of this, either the environment remains polluted or oil and gas companies are subjected to double recovery through state agencies and the judicial system.

It is important to address any environmental impact the oil and gas industry inflicts on the world by mandating the remediation of environmental contamination from those oil and gas operations. Addressing the basis of the claim, instead of awarding double damages to plaintiffs, ensures exploration of natural resources is encouraged *and* the environment is being restored. Preserving the integrity of the environment is essential and not only requires the protection of national parks and historical landmarks like the Greenbelt but also the protection of farmland and the backyards of everyday Americans. Texas needs to regulate claims that are being brought against defendants twice and ensure that plaintiffs are independently addressing the basis of their claim if damages are awarded.

This Comment focuses on developing an understanding of primary jurisdiction and how an adaptation to that authority, called sequential jurisdiction, can benefit Texas landowners and oil and gas companies. Part II explains how the oil and gas industry took over the economy of Texas and allowed its state regulatory agency to engage in contamination disputes. Part III analyzes primary jurisdiction in Texas, Mississippi, and Louisiana and weighs the benefits and consequences of specialized court proceedings. Part IV addresses the fears of proponents and opponents of primary jurisdiction, including a legislative proposal for sequential jurisdiction. Part V concludes by suggesting how Texas can maximize the benefits of this proposal and preserve the integrity of the environment.

## II. THE DENSE EVERGREENS: INFORMATION ON PRIMARY JURISDICTION AND OIL AND GAS

This Part discusses the history and the continued interaction of the oil and gas industry in Texas. While the topic may be as dense as the Evergreens, understanding the significant impact the industry has on the state and understanding the agency that specializes in the regulation of oil and gas should contextualize the importance of encouraging exploration in the State of Texas. It is likely this industry will continue to permeate the Texas

2. *See infra* Section II.A (explaining the history and development of the oil and gas industry in Texas).

3. *See infra* text accompanying notes 26–28 (asserting the belief of scholars that some landowners are no longer concerned with addressing the basis of their claim, but rather with winning large damages and leaving the land polluted).

economy, so addressing the current and future challenges associated with exploration is vital.[4]

### *A. The Ancient Pyramids: The History of the Oil and Gas Industry in Texas*

While the oil and gas industry has not been around since the ancient times of the pyramids, it has saturated Texas history since the beginning of the 20th century.[5] In 1901, an oil well near Spindletop Hill gushed over 100 feet in the air and eventually produced 17 million barrels of crude oil.[6] Ever since that time, oil and gas has been entrenched in Texas history and has been the source for much of the wealth in the state.[7] Many of the top oil and gas companies in America can trace their origins to the East Texas gusher at Spindletop Hill.[8] These companies include Gulf Oil, Texaco, and Exxon.[9]

Today, the industry is responsible for over 400,000 high-quality, high-paying jobs and expects to generate over one million new jobs in the next twenty years.[10] Employment opportunities in "[t]he oil and gas industry include[] . . . exploration and production, pipelines, refining, petrochemicals, natural gas distribution, . . . petroleum products wholesaling, and oilfield equipment manufacturing."[11] Half of the United States' oil and gas reserves are supplied by the production from Texas.[12] Clearly, there are many opportunities in the oil and gas industry, and this reality is possible because exploration of natural resources is a high priority in the state.[13] However, with great exploration comes great opportunity for drill site and environmental contamination.[14]

### *B. Saving the Rainforest: Preventing Waste in Oil and Gas Operations*

Preserving the rainforest provides a plethora of advantages for the general population, and the same can be said for preventing waste from

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4. *See infra* text accompanying note 10 (discussing projected industry growth in the coming years).

5. *Spindletop*, HIST. CHANNEL ONLINE (Apr. 22, 2010), http://www.history.com/topics/landmarks/spindletop.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Economic Impact of Oil and Gas in Texas*, PERMIAN BASIN PETROLEUM ASS'N, http://pbpa.info/industry-statistics (last visited Dec. 29, 2018); *Oil and Natural Gas: Powering Careers*, TEX. OIL & GAS ASS'N, https://www.txoga.org/oil-and-natural-gas-powering-careers/ (last visited Dec. 29, 2018).

11. *Economic Impact of Oil and Gas in Texas*, *supra* note 10.

12. Frank L. Scurlock, *Jurisdiction of and Procedure Before the Railroad Commission of Texas*, 17 DALL. B. SPEAKS 321, 321 (1956).

13. *See* Kelly v. Ohio Oil Co., 49 N.E. 399, 401 (Ohio 1897) (explaining the Rule of Capture and why the encouragement of exploration of natural resources is important for states, which can be applied in Texas).

14. *See* J. Michael Veron, *Oilfield Contamination Litigation in Louisiana: Property Rights on Trial*, 25 TUL. ENVTL. L.J. 1, 3–5 (2011).

occurring during oil and gas operations.[15] At least three types of waste can occur during the production and the operation of an oil and gas well.[16] Economic waste is a situation in which operators drill too many wells and the efficiency of draining from a reservoir has been diminished.[17] Underground waste is a situation in which operators utilize poor production techniques and a substantial portion of the oil and natural gases being sought after are deemed unrecoverable.[18] Finally, surface waste is a situation in which operators utilize too much equipment at the drilling site, which leads to adverse environmental impacts from leakage.[19]

State regulatory agencies try to ensure operators avoid any type of waste when attempting to produce oil and gas; however, an operator's overarching goal should be to avoid contamination that has any adverse effect on the environment.[20] This goal is not always achieved.[21] In some areas, oilfield operations are the leading source of groundwater contamination.[22] In other areas, "surface owners [are] left with the headaches and eyesores of abandoned equipment, scarred land, and less-than-pristine surroundings."[23]

Because of this contamination, surface owners have traditionally sought damages and site remediation through lawsuits resolved in the judiciary.[24] However, some scholars believe that, somewhere along the line, surface owners developed ulterior motives behind their lawsuits.[25] Further, some plaintiff attorneys specializing in this field obtained clients by going door to door and asking not if the land contamination was an issue, but rather if those individuals were interested in winning large sums of money.[26] Instead of suing oil and gas companies or operators to fix their alleged contamination, plaintiffs began to sue in hopes of large settlements and jury verdicts.[27] These same plaintiffs have refused to address the basis of their claims, the environmental pollution, and have sought further damages through other avenues.[28]

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15. *See id.* at 5; *see also Saving the Rainforest*, ECONOMIST (July 22, 2004), https://www.economist.com/leaders/2004/07/22/saving-the-rainforest (discussing the advantages of preserving the rainforest).

16. William R. Keffer, Professor of Law, Lecture at Texas Tech School of Law for Oil and Gas Law I (Summer 2016) (discussing the types of waste that could occur during the operation and production of oil and gas).

17. *Id.*

18. *Id.*

19. *Id.*

20. JOHN S. LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 648 (Thomson Reuters eds., 6th ed. 2013).

21. *See* William R. Keffer, *Cleaning Up – The Right Way*, 32 OIL GAS & ENERGY RESOURCES L. SEC. ST. B. TEXAS 2, 5 (Dec. 2007), http://www.mkp-law.net/cleaning-up-the-right-way.pdf.

22. *See* Veron, *supra* note 14, at 3.

23. *See* Keffer, *supra* note 21.

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.* at 2.

### *C. Navigating Mount Everest: Figuring Out Where to Fix the Problem*

These additional avenues that aggrieved plaintiffs pursue to receive additional compensation include seeking remedies from state regulatory agencies.[29] "Historically, exploration activities, including geophysical (seismic) exploration, were not regulated. Today, however, either the state conservation agency or local governments or both may require a permit to engage in geophysical exploration."[30] In Texas, the Railroad Commission of Texas (the Commission) is in charge of regulatory matters involving oil and gas operations.[31] This agency uses its highly specialized knowledge to regulate pipelines, prevent further harm, resolve hearing disputes, issue permits, and more.[32] Accordingly, this agency has the potential to be a great resource for parties to remediate contaminated land without double penalizing oil and gas companies with unnecessarily large settlements that could eventually diminish the desire to produce oil and gas in the state.[33] As it stands, the Commission does not have the authority to execute this type of action, and persuading courts and the Texas Legislature to take action seems as impossible as hiking up Mount Everest.[34]

### *D. Old Faithful of the Lone Star State: The Railroad Commission of Texas*

The Texas Legislature established the Commission on April 3, 1891, granting it "jurisdiction over rates and operations of railroads, terminals, wharves[,] and express companies."[35] In fact, "[t]he Railroad Commission of Texas is the oldest regulatory agency in the state and one of the oldest in the country," acting as the Old Faithful of the Lone Star State.[36] Eventually, the

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29. *Office of General Counsel*, RAILROAD COMMISSION TEXAS, http://www.rrc.state.tx.us/about-us/organization-activities/divisions-of-the-rrc/general-counsel/ (last updated Jan. 30, 2017, 9:49:37 AM).

30. LOWE ET AL., *supra* note 20, at 647.

31. TEX. NAT. RES. CODE ANN. § 81.052 (West 2017) (giving the Commission the authority to "adopt all necessary rules for governing and regulating persons and their operations . . . including such rules as the [C]ommission may consider necessary and appropriate to implement state responsibility under any federal law or rules governing such persons and their operations"); *see also* 56 TEX. JUR. 3D *Oil and Gas* § 738 (2018); *History of the Railroad Commission 1866–1939*, RAILROAD COMMISSION TEXAS, http://www.rrc.state.tx.us/about-us/history/history-1866-1939/ (last updated Feb. 29, 2016, 8:08:38 AM) (exploring the history of the Commission).

32. *History of the Railroad Commission 1866–1939*, s*upra* note 31 (explaining that the Commission implemented a statewide rule to use its specialized knowledge within the oil and gas field to regulate the spacing of wells in order to "reduce fire hazards, and to minimize the danger of water percolation into oil stratum from wells drilled in too great a number or in too close proximity").

33. *See infra* Part IV (proposing for the Texas Legislature to grant the Commission sequential jurisdiction).

34. *See infra* text accompanying notes 185–86 (explaining that the Texas Legislature has not demonstrated an intent to grant the Commission such authority).

35. *History of the Railroad Commission 1866–1939*, *supra* note 31.

36. *History of the Railroad Commission*, RAILROAD COMMISSION TEXAS, http://www.rrc.state.tx.us/about-us/history/ (last updated July 14, 2016, 1:05:12 PM).

Commission's original jurisdiction for regulating railroads shifted to regulating energy and oil and gas.[37] The Commission has three presiding judges, called Commissioners, who hear and try cases that fall within the Commission's jurisdiction.[38] The Commissioners act as the appellate court within the agency after the initial hearings have concluded.[39] The initial hearings "are very informal" and

> [n]otwithstanding the fact that very few rules exist in regard to procedure, the hearings are dignified, orderly[,] and brief. All witnesses are sworn, and their testimony is recorded by a reporter. Most of the testimony is given by petroleum engineers, and the witnesses usually make narrative statements. The right of cross-examination is afforded the opposition, but the examiners will not tolerate browbeating tactics.[40]

As mentioned, the examiners are typically experienced and qualified petroleum engineers.[41] This fact is especially helpful because the hearings and proceedings are very technical in nature.[42] Hearings require "[m]aps, charts, schematic drawings, cross-sections, graphs, statistics[,] and other information of that character"; therefore, it is important to have individuals equipped with the knowledge to understand and effectively resolve these types of problems.[43]

Today, the Commission continues to faithfully "serve[] Texas through: [its] stewardship of natural resources and the environment; [its] concern for personal and community safety; and [its] support of enhanced development and economic vitality for the benefit of Texans."[44] It is composed of individuals who are knowledgeable in each of the sub-sectors that make up the Commission: Oil and Gas, Alternative Fuels, Gas Services, Pipeline Safety, Mining and Exploration, Hearings Division, and the Office of General Counsel.[45] In the Oil and Gas Division of the Commission there are more than 200 employees alone, most of whom have the technical background to understand the complex implications of a case.[46] Ideally, the Office of General Counsel and the Enforcement Division at the Commission are made up of individuals who have a thorough understanding of both the

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37. TEX. NAT. RES. CODE ANN. § 81.051 (West 2017); *see also History of the Railroad Commission 1866–1939*, *supra* note 31.

38. *History of the Railroad Commission 1866–1939*, *supra* note 31.

39. *See* Scurlock, *supra* note 12, at 327.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Railroad Commission of Texas*, RAILROAD COMMISSION TEXAS, http://www.rrc.state.tx.us (last visited Dec. 29, 2018).

45. *Organizations & Activities*, RAILROAD COMMISSION TEXAS, http://www.rrc.state.tx.us/about-us/organization-activities/ (last visited Dec. 29, 2018).

46. *See* Scurlock, *supra* note 12, at 321, 327.

law and oil and gas—also known as "specialized knowledge" of the industry.[47]

## III. THE GREAT BARRIER (REEF): THE CURRENT SYSTEM FOR CONTAMINATION CLAIMS

There are several great barriers to promulgating legislation to address the concerns of landowners and oil and gas companies. This Part addresses those barriers, illuminates the background and development of primary jurisdiction, and investigates the advantages and disadvantages of primary jurisdiction and specialized courts designed and implemented to adjudicate highly technical suits. It also discusses three southern states' interaction with primary jurisdiction, including the Texas Supreme Court's interpretation, legislative acts, and a summary of the effects each state has experienced due to its adoption or rejection of these concepts.

### *A. Addressing the Badlands Associated with Primary Jurisdiction*

Where government agencies and courts of general jurisdiction overlap, a judge may retain the right to remove a case from his or her docket to a state agency in order to settle the dispute.[48] This overlap frequently occurs, and it is within the discretion of a judge to decide the appropriateness of removal.[49] This "bad land" is the doctrine known as primary jurisdiction and gives some judges and litigants great heartburn.[50] Scholars note that this bad land is "allied in its basic function and concept to the doctrine of exhaustion of administrative remedies. Each rests on the premise that an agency has the exclusive authority to make certain decisions deemed relevant to the determination of a controversy, but the terms come into play under different circumstances."[51]

The concept of primary jurisdiction was established in 1907 in *Texas and Pacific Railway v. Abilene Cotton Oil Co*.[52] The dispute in that case revolved around the reasonableness of a shipping rate, and the parties did not

47. *See generally* Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377 (1990).

48. Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1037 (1964) (discussing the overall concept and scope of primary jurisdiction, including the benefits and disadvantages associated with allocating jurisdiction to state agencies); *see also The Doctrine of Primary Jurisdiction and the* T.I.M.E. *Case*, 27 U. CHI. L. REV. 536, 541 (1960) ("The doctrine of primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.").

49. Jaffe, *supra* note 48, at 1037–38.

50. *Id.* at 1037.

51. *Id.*

52. *See generally* Tex. & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

agree on who should decide whether a rate was reasonable according to industry standards: the courts or the Interstate Commerce Commission (ICC).[53] Ultimately, the United States Supreme Court decided the ICC alone had the competency to determine the outcome of the case because the ICC was created to establish a uniform rate and abolish preferences and discrimination among the jurisdictions.[54] Courts later expanded the scope of primary jurisdiction and explained that the determinations of agencies are "reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts."[55]

This type of jurisdiction, when given to the agencies, is a form of exclusive jurisdiction because it essentially strips a court of its subject matter jurisdiction and requires resolution to occur solely within the agency.[56] Sometimes a party may pursue resolution of a dispute through both the agency and the courts.[57] The doctrine of primary jurisdiction is different from exclusive jurisdiction because a judge must decide to grant primary jurisdiction to an agency alone to hear the case in the former.[58] If this occurs, the parties must settle their dispute through agency proceedings.[59]

Judges retain the decision making power "to allocate power between courts and agencies when both have the authority to make initial determinations in . . . dispute[s]" with primary jurisdiction.[60] Exclusive jurisdiction, though, does not require a judge's determination to remove the case to the agency because the legislature already mandated the agency will have the sole discretion and authority to hear those cases.[61] In other words, "If the legislature has vested an agency with exclusive jurisdiction to hear the dispute, the courts have no subject-matter jurisdiction until all administrative proceedings are complete."[62]

The doctrine of primary jurisdiction is supposed to be a flexible feature affording an option to judges to allocate authority among themselves and agencies.[63] The doctrine is to function as a balancing tool when a judge believes it is appropriate to remove the case from her jurisdiction and allow

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53. *Id.* at 430–31.

54. *Id.* at 448.

55. Great N. Ry. v. Merchs.' Elevator Co., 259 U.S. 285, 291 (1922); *see also* Jaffe, *supra* note 48, at 1043.

56. Jaffe, *supra* note 48, at 1038; F. Trowbridge vom Baur, *Prerequisite to Judicial Relief – Exhaustion of Administrative Remedies: Primary Jurisdiction*, FED. ADMIN. L. 190, 190 (1942).

57. Jaffe, *supra* note 48, at 1038.

58. *Id.*

59. *Id.*

60. 2 Nancy Saint-Paul, *West's Texas Forms: Administrative Practice* § 4:4 (4th ed. 2017).

61. *Id.* § 4:6.

62. *Id.*

63. Jaffe, *supra* note 48, at 1039.

agency experts to resolve the dispute.[64] An alternative to this resolution of cases is merely allowing the agency to testify during the trial phase in order to provide the expertise but keep the case within the purview of the judicial system.[65] The court may also postpone or abate the proceedings until an agency has made a final determination within its jurisdiction and use those findings in the courtroom.[66]

Avoiding sole agency determinations also attempts to address the problem of agencies having limited authority to provide remedies to cases.[67] Allowing courts to keep the cases within their authority can make up for an agency's lack of power to award relief in certain situations.[68] The factors a judge considers, and the test they apply to determine the appropriateness of primary jurisdiction, vary from circuit to circuit.[69] In Texas,

> trial courts should allow an administrative agency to initially decide an issue when: (a) an agency is typically staffed with experts trained in handling the complex problems within the agency's purview; and (b) great benefit is derived from an agency uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations.[70]

However, if a party successfully challenges a judge's decision to allocate the dispute to an agency in a court of appeals, the agency order will be vacated and court proceedings will continue or begin at the trial stage.[71]

Courts may decide to grant primary jurisdiction because the dispute requires technical determinations that are better decided by the agency with concurrent jurisdiction.[72] The most common justification for removal of a case is that agencies can offer expertise and in-depth knowledge when hearing complex cases or cases that involve complex legal concepts.[73] The broad purpose of primary jurisdiction is to promote efficiency in the judicial

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64. *Id.*; *see also* Gary P. Gengel et al., *Use of the Primary Jurisdiction Doctrine to Defend Litigation Involving Contaminated Sites*, IN-HOUSE COUNS. COMMITTEE NEWSL. (Apr. 2014), https://www.lw.com/thoughtLeadership/use-of-the-primary-jurisdiction-doctrine-to-defend-litigation-involving-contaminated-sites.

65. Jaffe, *supra* note 48, at 1047.

66. *Id.*

67. *Id.* at 1059.

68. *Id.*

69. Diana R. H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 OHIO ST. L.J. 541, 569 (2017).

70. 2 Nancy Saint-Paul, *West's Texas Forms: Administrative Practice* § 4:4 (4th ed. 2017); *see also* Michael Penney, *Application of the Primary Jurisdiction Doctrine to Clean Air Act Citizen Suits*, 29 B.C. ENVTL. AFF. L. REV. 399, 406 (2002) ("[P]rimary jurisdiction and agency expertise are significantly linked because, as the issues become more complicated and as the technical expertise of the agency becomes more essential, courts should grant the agency primary jurisdiction.").

71. Trowbridge vom Baur, *supra* note 56, at 202.

72. Jaffe, *supra* note 48, at 1040.

73. *Id.*

system and in agency operations.[74] The doctrine is predominantly applicable to regulated industries, but clear legislative intent must permit courts to remove cases to specialized agencies acting as the trier of fact.[75] This process has the potential to be extremely beneficial; however, specialized-knowledge agencies, like the Commission, present both advantages and disadvantages when determining the effectiveness of removing a case from a court's jurisdiction.[76]

### *B. The Great Divide: Both Sides of Specialized Courts*

The judicial system has been inundated with cases to resolve and has limited resources to alleviate this court-docket crisis.[77] One solution is adding specialized courts to hear cases and decide issues more effectively and efficiently.[78] There is a great divide among scholars of whether this solution is an appropriate resolution to the crisis because of the positive and negative consequences associated with special adjudication. Such an influx of cases exacerbates the problem of judge-made law, which conflicts with other judge-made law within a legal field or facet.[79] Creation of specialized courts obviously assists and complicates the judicial system.[80] While specialty courts and state agencies are not synonymous in their entirety, the concepts, benefits, and problems associated with them are comparable.[81] The same analysis of specialized adjudication can be applicable to state agencies and can be used to promulgate policies that account for and reconcile the pros and cons of each.[82]

Specialized courts create several benefits.[83] First, creating another avenue to resolve disputes alleviates the quantity of cases at the trial court

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74. Barry S. Port, *Primary Jurisdiction*—Danna v. Air France*, 462 F.3d 407 (2d Cir. 1972)*, 39 BROOK. L. REV. 790, 790 (1973).

75. *Id.* at 792 (reasoning that "[d]ecisions of this nature seemed to recognize that courts are inadequately equipped to make determinations of reasonableness when administrative regulations are involved. The courts do not have the facilities to make extensive investigations into diverse areas of administrative regulation, nor do most judges have enough technical knowledge or experience to make a competent determination"); *see also* Jaffe, *supra* note 48, at 1040 (explaining "the doctrine seems to be primarily applicable to controversies concerning the so-called regulated industries").

76. *See infra* Section III.B (discussing the advantages and disadvantages of specialized courts and agencies).

77. *See* Dreyfuss, *supra* note 47, at 377.

78. *Id.*

79. *Id.* (emphasizing that "as more judges write opinions on the same issues, the law becomes occluded with inconsistencies that breed yet more lawsuits and give rise to opportunistic litigation strategies that further aggravate the workload problem. Specialization could . . . enable the judiciary to meet the nation's adjudication needs effectively, and may even produce benefits of its own").

80. *Id.*

81. *See infra* text accompanying notes 83–103 (analyzing the advantages and disadvantages of specialty courts and state agencies).

82. *See* Dreyfuss, *supra* note 47, at 377.

83. *Id.* at 377–79.

level.[84] This allows courts of general jurisdiction an opportunity to spend more time hearing cases that do not require specialized knowledge of the intricacies of some fields of law.[85] This alleviation can even include legal questions pertaining to environmental contamination and site remediation.[86]

Second, creating specialized courts allows for greater consistency within a complex field of law.[87] By siphoning an entire facet of law into a specialized adjudicatory system, the administrative law judges hearing the cases may use their expertise to create greater consistency within a particular area of the law, and, therefore, greater guidance to individuals litigating cases in that field.[88] The trier of fact in these cases would provide a singular voice on how parties should handle specific and complex matters.[89]

Third, the individuals hearing the cases in the specialized setting would have an abundance of knowledge and expertise on the matters at hand.[90] This knowledge and expertise allow for a true application of the law and require results unpersuaded by irrelevant factors.[91] This knowledge and expertise also allow for an expedited process because the parties do not have to explain every technical aspect of their case—the judge is well versed in the lingo of that field.[92]

Finally, this would allow for judges to craft better opinions on the problems, further providing greater guidance to parties.[93] The refined competency of specialized courts and agencies enable them to understand the real effect their decisions have on society at large and encourage the development of a particular field.[94]

Conversely, specialized courts come with several disadvantages.[95] For instance, requiring only experts to hear cases on this limited field would reduce the "[c]ross-pollination" of ideas, legal theories, and legal minds.[96] These blank-slate, innovative problem-solvers of general jurisdiction, who are not bogged down by the technicalities of a field, are removed from even having an opportunity to address these issues.[97]

Next, the possibility of bias and the chance of politicization increase dramatically because there is a limited opportunity for the disputing parties

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84. *Id.* at 377.
85. *Id.*
86. *Id.*
87. *Id.* at 378.
88. *Id.*
89. *Id.* The author also explains that a consequence of this consistency is a reduction in the need for judicial intervention, thereby enhancing the efficiency of specialty courts and agencies. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 378–79.
95. *Id.* at 379–82.
96. *Id.* at 379.
97. *Id.*

to influence the development of the law.[98] This possibility increases because "[p]ercolation of ideas cannot occur in a court that has exclusive jurisdiction over its field."[99] Elected officials appoint members of state agencies, like the Commission, which are subject to the ebb and flow of the wants of their constituents.[100] They must appease their voters in order to ensure reelection, which could isolate the issues to a necessarily biased agency and prevent the advancement of the industry.[101] Consequently, even if there are other avenues that parties may seek outside of a state agency, using the findings of fact could cause jurors or judges to simply defer to the experts of that field and ignore their obligation to make findings of fact based on the case presented and not on the agency results.[102] This reality not only results in unfair trials for some litigants but can also result in a high degree of finality for agency decisions because of the weight individuals assign to agency findings.[103] Despite these negatives, Congress has consistently utilized specialized courts because of the vast benefits they provide.[104]

Specialized courts have been a part of American history dating back to at least 1855 with the Court of Claims.[105] Since then, Congress has continued to create and utilize specialty courts to effectively and efficiently resolve disputes.[106] For example, Congress created the Court of Customs Appeals and the Court of Customs and Patent Appeals in 1890 when it was concerned with creating a uniform area for these areas of law.[107] The courts successfully handled the case load directed to them and effectuated the mission of Congress.[108] They created a uniform set of standards that participants within those areas of law could receive guidance from and abide by.[109] The courts were eventually merged with other specialty courts and retained specialized authority.[110] Specialty courts address more than this area of law alone: the Commerce Court, the Emergency Court of Appeals, the Tax Court, Juvenile Court, and more.[111] While some have failed to carry forward the mission of Congress, most have been helpful and successful.[112]

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98. *Id.* at 379–80.
99. *Id.* at 380.
100. Scurlock, *supra* note 12, at 321.
101. *See id.*
102. Dreyfuss, *supra* note 47, at 380.
103. *Id.*
104. *Id.* at 409–14.
105. *Id.* at 384.
106. *Id.* at 384–406.
107. *Id.* at 389.
108. *Id.*
109. *Id.* at 390.
110. *Id.* at 391.
111. *Id.* at 394–406. *See generally* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991); Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745 (1981).
112. Dreyfuss, *supra* note 47, at 394–406.

It is apparent that creating a specialized docket, whether with courts or in agencies, presents advantages and disadvantages.[113] It is also apparent that specialization is "neither always good nor always bad."[114] However, scholars believe it is possible to maximize the benefits and minimize the disadvantages discussed above by taking certain factors into account when deciding whether an area needs a specialized avenue to address a problem.[115] Analyzing the complexity of a facet of the law, determining the ability to segregate the issue targeted for special treatment, and understanding the public consensus on the field of law are all factors to consider to determine the appropriateness of specializing through an agency like the Commission.[116]

First, it is important to determine the extent of the complex nature and intricacies associated with a field of law.[117] A common justification, if not the most common justification, for specialized courts is "the need for adjudicators with technical expertise in mastering complex subject matter" provides a common-sense approach to handling challenging material in case law.[118] As the intricacies of law increase, so does the likelihood that judges will promulgate precedent that conflicts with other case law or even make errors in determining the holdings of cases.[119] By separating these more challenging fields of law, the time it takes to decide a case correctly should decrease because of the expertise and understanding of the judge.[120] While this is an important factor for determining whether to create a specialty hearing process it is neither dispositive nor alone indicative, of whether such a process could maximize the benefits and minimize the disadvantages.[121]

The next factor legislatures should consider when deciding whether specialty adjudication is appropriate is the ability to segregate the issue targeted for special treatment.[122] This consideration means that the legislature must determine "the extent to which that issue presents itself to the judicial system in cases raising other questions."[123] If the court or agency is going to be slowed down by having to abate a claim, because it commonly occurs with other claims that would not fall within the realm of the specialty court's jurisdiction, then the efficiency benefit is severely undermined.[124] A legal

113. *Id.* at 407.
114. *Id.* at 383.
115. *Id.*
116. *Id.* at 409.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 412.
123. *Id.*
124. *Id.* at 412–13.

field's ability to remain isolated indicates a stronger possibility of success within a specialized system for adjudicating those issues.[125]

The last major factor to consider is the contemplation of the general public's consensus on that field of law.[126] Scholars believe this portion of the analysis is important because it indicates the likelihood of public support or public concern.[127] Where there is little consensus within a field of law, or theory behind the law, public concern is likely to be high.[128] Because of that, a specialty court could lose public support and undergo immense scrutiny.[129] Conversely, if there is at least some public consensus, and a somewhat rich history of development within an industry, the likelihood that the masses understand what is being decided increases, as does, in theory, public support.[130] Using these factors, legislatures, including the Texas Legislature, can try to maximize the benefits associated with specialized agencies hearing and deciding environmental contamination cases while minimizing the disadvantages at the same time. Because the Texas Legislature has been unwilling to promulgate laws granting primary jurisdiction to the Commission, the Supreme Court of Texas is also unwilling to grant it to the agency.[131]

### *C. Remember the Alamo but Forget About Primary Jurisdiction*

This Section will discuss the Texas Legislature's only attempt at promulgating a law and starting an educated discussion concerning the topic of primary jurisdiction. This Section will also explore a recent Supreme Court of Texas decision regarding the Commission's authority to hear environmental contamination claims before a trial court.

#### *1. House Bill 2881*

On April 13, 2005, former-Representative William Keffer formally laid out his proposed bill before the House Energy Resources Committee (the Committee) during the 79th Legislative Session.[132] The Committee afforded him an opportunity to address the purpose of the bill and articulate the

125. *Id.* at 412.

126. *Id.* at 414.

127. *Id.* at 416 ("Since specialized tribunals take less time than other courts to resolve open controversies definitively . . . consensus is even more important.").

128. *Id.*

129. *Id.*

130. *Id.*

131. Forest Oil Corp. v. El Rucio Land & Cattle Co., 518 S.W.3d 422, 428 (Tex. 2017).

132. *Hearing on Tex. H.B. 2881 Before the House Comm. on Energy Res.*, 79th Leg., R.S. (Apr. 13, 2005) (statement of Representative Keffer) (video available from the Texas House of Representatives' 79th Session Committee Broadcast Archives) [hereinafter *Hearing on House Bill 2881*].

problems that it tried to address.[133] Representative Keffer explained his belief that an injustice could occur if the Texas Legislature allows plaintiffs in oil and gas site remediation disputes to recover through the judicial system *and also* through state agencies, like the Commission.[134] While Representative Keffer admitted there was not a current problem in Texas with this situation, it since has been a problem, occurring in 2017.[135] He urged the Committee to use this bill as a mechanism to avoid his prediction that this type of situation would occur in the future.[136]

House Bill 2881, and its revised substitute, required landowners seeking remediation of their land to begin their dispute with the Commission.[137] The bill required plaintiffs to exhaust their available administrative resources before pursuing a claim in the judicial system.[138] Representative Keffer reasoned that, because landowners were still afforded an opportunity to resolve their claims during an original hearing after landowners completed the hearing process at the Commission, the landowners' right to a trial was not abridged.[139] The bill sought to fix the failure of some plaintiffs to address the actual basis of their claims in an efficient manner by using the experts in the field as a substitute for judges with limited background in environmental contamination.[140]

Representative Keffer expressed his willingness to revise the bill further and add a timetable requirement so the Commission must resolve the problems quickly, ensuring that a landowner's claim is not buried and forgotten in the administrative agency's timeline.[141] It was a bill designed to address and respond to the alleged environmental injuries.[142] If the landowner or the Commission was unhappy with the results of the hearing, either party could remove the case from the Commission and bring an original hearing before a judge.[143] The findings of the Commission would be offered into evidence, but the judge or jury would afford them deference only if desired.[144] Evidence excluded from the Commission's hearing could not be introduced during the trial, and settlements among parties that awarded damages to the plaintiffs were unenforceable because the Commission did not participate in its creation.[145]

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133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. Tex. H.B. 2881, 79th Leg., R.S. (2005).
138. *Id.*
139. *Id.*
140. *Id.*
141. *Hearing on House Bill 2881*, *supra* note 132.
142. Tex. H.B. 2881.
143. *Id.*
144. *Id.*
145. *Id.*

As with all proposed bills, after Representative Keffer explained the premise and effect of the legislation, opponents and proponents testified before the Texas Legislature.[146] Both sides were well represented, and the Committee listened to around two hours of testimony.[147] Every individual wishing to testify on behalf of themselves or another entity gave insight into their position and allowed the Committee and Representative Keffer to understand some of the perceived practical effects of the bill.[148]

The proponents of the bill echoed the positive outlook Representative Keffer articulated when laying the bill out at the beginning of the hearing.[149] Concern over double liability for oil and gas companies and operators played a large part in generating support for the bill.[150] This concern, coupled with a desire for experts to formulate better solutions for the alleged environmental contamination, made it apparent that there are serious policy concerns with how these situations are currently handled.[151] Further, one proponent explained that this bill can actually enhance the financial compensation a landowner can receive because Texas courts cannot mandate remediation of property and are capped at the amount of damages they may award at the value of the property.[152] By requiring property remediation to begin with the Commission, plaintiffs could receive a greater amount in damages because the cost of remediation is often higher than the value of the property.[153] Despite these benefits, not all of the individuals testifying before the Committee supported the proposed bill or its substitute.[154]

Opponents felt strongly that the bill abridged the right of landowners to receive a fair and quick trial to remedy their lands.[155] A common theme in the negative testimony was that the bill would result in ineffective remediation.[156] This concern stems from the fact that the Commission may not be an unbiased avenue for parties to settle their disputes because it could lean more on the side of defendant-oil and gas companies.[157] Opponents feared this potential bias could skew the findings that are required to be admitted into evidence at the original trial following the exhaustion of the

146. *Id.*
147. *Id.*
148. *Id.*
149. *Hearing on House Bill 2881*, *supra* note 132 (statement in support of House Bill 2881 from Texas Oil and Gas Association). Other proponents of the bill that did not wish to testify include Texas Association of Business, Texas for Lawsuit Reform, and Texas Civil Justice League. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* (statement in opposition of House Bill 2881 from King Ranch, Petty Ranch Company, Texas and South Texas Cattle Raisers, and several historic ranches throughout the Texas panhandle).
156. *Id.*
157. *Id.*

agency resources.[158] Courts and jurors could potentially give great deference to these findings, and the requirement that no new evidence be introduced during this portion of litigation struck a negative chord with many landowners.[159] At the time, and even now, the Commission cannot award monetary damages.[160] It is only allowed to require site remediation in environmental contamination disputes.[161] Because of this, opponents argued it would be unnecessary for landowners to present evidence of damages they believe they are entitled to because the discussion would be fruitless without the authority to award those monetary damages, like at the Commission.[162] If a party decided to pursue a judicial remedy after the Commission gave its formal decision of a case, the bill precludes the introduction of new evidence pertaining to damages, and plaintiffs would be left without the possibility of monetary damages.[163]

Another issue with the bill was an overall consensus that this is a non-issue in Texas, and, furthermore, even if it was an issue, the bill would inhibit landowners' ability to timely resolve their problems.[164] When environmental contamination occurs, the primary goal for landowners is to clean up the area so normal operations can continue as quickly as possible.[165] Opponents of the bill explained that mandating the start of a dispute with the Commission requires landowners to spend large quantities of money to begin investigations into the contamination, a step that would be required in litigation through the trial court also, and imposes extra steps that stand in the way of achieving swift justice and timely action in courts.[166] Landowners were concerned with the cost and time required to actually remedy the environmental contamination as a result of the proposed legislation.[167]

Finally, rivals of the bill took great concern with the portion of the proposed legislation that invalidated settlement agreements made outside the purview of the Commission.[168] They explained that if parties approved terms that the Commission could not enforce, like monetary damages, then the entire settlement agreement would be void.[169] This portion of the proposed bill tried to address a concern that parties will settle their disputes outside of either the Commission or the trial court and undermine one purpose of the

158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*

bill: to keep the damages parties are seeking realistic so that defendants are neither double penalized nor overburdened by extremely high damages.[170]

Clearly, there are positives and negatives to the proposed bill, and while a large portion of the hearing testimony indicated apprehension over the terms of the legislation, one opponent conceded that House Bill 2881 seemed to be a sincere attempt to rectify a *real* problem.[171] He believed the bill was attractive when looked at broadly; however, the problems began to arise when the details of the bill were applied and parties were forced to endure the challenges added by the proposed legislation.[172] Despite the acknowledgement by some that the issue the bill is trying to resolve exists, the bill did not pass, and the problem came to fruition in Texas just last year.[173]

### *2. Forest Oil*

In April 2017, the Supreme Court of Texas unanimously decided an environmental contamination case and addressed the issue of whether the Commission has, or should have, primary or exclusive jurisdiction.[174] The dispute involved parties that had worked together under an oil and gas lease for over thirty years.[175] The plaintiff, James A. McAllen, owned over 27,000 acres, and the defendant, Forest Oil Corporation, leased around 1,500 of those acres.[176] The parties resolved a separate dispute in the 1990s and, as a result, created an amended agreement.[177] The parties stipulated that Forest Oil would not bring hazardous material on the acreage owned by McAllen and would remediate the land if any such material actually contaminated the land.[178] The agreement also provided that Forest Oil would neither store nor dispose of any such material on the property.[179]

In 2004, a former employee of Forest Oil informed McAllen that the company had not only donated contaminated material to him but also contaminated the property contrary to their 1990 settlement agreement.[180] McAllen had to amputate a portion of his right leg due to a diagnosis of sarcoma and attributed the need to amputate to the naturally occurring radioactive material (NORM) contaminating his property.[181] McAllen sued

170. *Id.*
171. *Id.*
172. *Id.*
173. *See generally* Forest Oil Corp. v. El Rucio Land & Cattle Co., 518 S.W.3d 422 (Tex. 2017).
174. *Id.* at 425.
175. *Id.* at 426.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* The settlement agreement also contained the parties' intent to settle all future litigation using an alternative dispute resolution method in an arbitration provision. *Id.*
180. *Id.*
181. *Id.*

Forest Oil in arbitration and was awarded "$15 million for actual damages, $500,000 for exemplary damages, and some $6.7 million for attorney fees; the panel also awarded McAllen . . . $500,000 for personal injury actual damages."[182]

Forest Oil asserted that the arbitration panel, and the judicial system as an entire entity, lacked subject matter jurisdiction to hear its case.[183] The company's theory rested on the presumption that the Commission had primary or exclusive jurisdiction to hear this type of case and that such jurisdiction precluded the arbitration to occur.[184] The Supreme Court of Texas explained that "[a]n agency has exclusive jurisdiction when the Legislature gives the agency alone the authority to make the initial determination in a dispute."[185] The Court reasoned that, because the Texas Legislature has not clearly demonstrated an intent to give the Commission such authority, it would be inappropriate to grant it exclusive jurisdiction through the judiciary.[186]

The Court refused to remedy Forest Oil's apprehension that plaintiffs, like McAllen, can double recover from a system that allows harmed parties to sue and recover in a trial court and at the Commission.[187] Although the Supreme Court of Texas acknowledged Forest Oil's public policy concerns, the Court still reasoned that addressing that issue is a job of the Texas Legislature, not the Court.[188] Forest Oil explained that landowners can seek, and win, remediation claims in a trial court and can refuse to use the damages won to remediate the land.[189] This lack of cleanup then transfers the responsibility back to the Commission to restore the land.[190] At that point, the Commission can further require the defendant, who has already paid an exorbitant amount of damages to the landowner (say, for example, $15 million), to actually clean up the contamination.[191]

The Court also refused to accept Forest Oil's argument that the Commission had primary jurisdiction.[192] It reiterated that the primary jurisdiction doctrine dictates that "trial courts should allow an administrative agency to initially decide an issue when: (1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly

182. *Id.* at 427.
183. *Id.*
184. *Id.*
185. *Id.* at 428.
186. *Id.*
187. *Id.* at 429.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 429–30.

interpreting its laws, rules, and regulations . . . ."[193] The Court reasoned that when claims are judicial in nature primary jurisdiction is inappropriate.[194] Here, the Supreme Court of Texas held that some of McAllen's claims required judicial remedy and, therefore, giving the Commission primary jurisdiction would be inappropriate given the circumstances.[195] Ultimately, the Supreme Court of Texas affirmed the holding of the lower court and established that the Texas judicial system is unwilling to create primary or exclusive jurisdiction in the State of Texas for the Commission.[196] The justices left that job to the Texas Legislature.[197] Texas is not the only state involved with the oil and gas industry to address primary jurisdiction.

### *D. The Rebels: Mississippi's Frontier with Primary Jurisdiction*

As indicated above, courts in the United States have already implemented the idea of granting primary jurisdiction to a state agency in order to avoid the challenges associated with exclusive jurisdiction.[198] These states have managed to avoid such challenges while still resolving issues with judge-like individuals who are more knowledgeable of site contamination in oil and gas disputes.[199] Mississippi is the first state to rebel against the trend of shying away from specialized agencies deciding environmental contamination disputes. Mississippi has a state agency called the Mississippi Oil and Gas Board that operates similarly to the Commission—both are administrative agencies given power from the state legislature to regulate oil and gas operations.[200] The stated goal of Mississippi's Oil and Gas Board is:

> [T]o promulgate and enforce rules to regulate and promote oil and gas drilling, production[,] and storage so as to protect the coequal and correlative rights of all owners of interests; and to promulgate and enforce rules to regulate the disposal of non-hazardous oil field waste in an environmentally safe manner consistent with federal and state regulations.[201]

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193. *Id.*
194. *Id.* at 430.
195. *Id.*
196. *Id.* at 432.
197. *Id.* at 429.
198. MISS. CODE ANN. § 53-1-17 (West 2018) ("The board shall have jurisdiction and authority over all persons and property necessary to enforce effectively the provisions of this chapter and all other laws relating to the conservation of oil and gas."). *See generally* Chevron U.S.A., Inc. v. Smith, 844 So. 2d 1145 (Miss. 2002).
199. *See generally Chevron*, 884 So. 2d 1145.
200. *Compare* TEX. NAT. RES. CODE ANN. § 81.052 (2017), *and* 56 TEX. JUR. 3D *Oil and Gas* § 738 (2018), *and History of the Railroad Commission 1866–1939*, *supra* note 31, *with* MISS. CODE ANN. § 53-1-17, *and Chevron*, 844 So. 2d 1145, *and* MISS. ST. OIL & GAS BOARD, http://www.ogb.state.ms.us (last updated Dec. 5, 2018).
201. MISS. ST. OIL & GAS BOARD, *supra* note 200.

In 2002, the Supreme Court of Mississippi upheld its state precedent in *Chevron U.S.A. Inc., v. Smith* and required plaintiffs to preliminarily seek remediation for oil and gas contamination cleanup through the Mississippi Oil and Gas Board.[202] In that case, the Smiths knowingly purchased a fifty-five acre tract of land subject to an oil and gas lease on a portion of the property.[203] Eventually, it was brought to their attention that the formations on their property may have produced NORM.[204] This pollutant was "present in the water solution that was produced along with oil" on their property and in the saltwater pipelines and storage tanks as well.[205] The court recognized that "[s]mall amounts of NORM can build up over time and can eventually lead to radioactive levels, which is what happened in this case."[206]

The Smiths rejected any offer from Chevron to remediate, or clean up, the oil and gas site on their property.[207] Most of the other individuals affected by NORM contamination accepted Chevron's offer to clean up the equipment and soil contaminated by the pollutant; however, the Smiths ignored state precedent by failing to resolve this matter through the Mississippi Oil and Gas Board and instead sought damages from a trial court.[208]

The State of Mississippi had, and still has, a requirement that individuals seeking to have any byproducts from oil and gas operations cleaned up by the operator must take preliminary steps to remediate the area through the Mississippi Oil and Gas Board—the state agency specifically designated to handle these kinds of matters.[209] The court explained that "Where an administrative agency regulates certain activity, an aggrieved party must first seek relief from the administrative agency . . . ."[210] This step is required before a court can "properly assess the appropriate measure of damages."[211] By failing to take their cause of action to the Mississippi Oil and Gas Board before the judicial system, the Smiths ignored the precedent outlined in *Donald v. Amoco Production Company*, which states that "where private plaintiffs are seeking clean up of oil production byproducts, the Oil and Gas Board 'remedy is adequate and should . . . [be] exhausted prior to filing a private suit.'"[212]

The purpose of creating the Mississippi Oil and Gas Board was to "protect the general public from the dangers inherent in the production of oil

202. *Chevron*, 844 So. 2d at 1146.
203. *Id.* at 1147.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 1147–48.
209. *See id.* at 1148; Donald v. Amoco Prod. Co., 735 So. 2d 161 (Miss. 1999).
210. *See Chevron*, 844 So. 2d at 1148; State v. Beebe, 687 So. 2d 702, 704 (Miss. 1996) (citing NCAA v. Gillard, 352 So. 2d 1072, 1082–83 (Miss. 1977)); Everitt v. Lovitt, 192 So. 2d 422, 426 (Miss. 1966); Davis v. Barr, 157 So. 2d 505 (Miss. 1963).
211. *Chevron*, 844 So. 2d at 1148.
212. *Id.* (alterations in original) (citing *Donald*, 735 So. 2d at 177).

and gas."[213] This protection runs to all citizens of the state because environmental pollution has the possibility of affecting all citizens of the state: it can contaminate drinking water in very large areas that these citizens inhabit.[214] The reasons the Mississippi Oil and Gas Board maintains the authority to decide these matters is because it possesses a "specialized knowledge of the dangers presented by oil and gas exploration and drilling, and its collective expertise in such areas as the proper disposal methods for radioactive waste is the best asset available in developing an effective disposal plan for the NORM" in contaminated areas.[215] The court further explained that "[t]he Board is more suited than the average juror to understand the broad scope of the regulations and the factual scenarios presented by each case of environmental pollution."[216] Mississippi recognized and took advantage of the agency's specialized knowledge.

Because the plaintiffs and the court system failed to adhere to this policy of requiring administrative relief to solve issues prior to the judicial system, the Supreme Court of Mississippi reversed the judgment awarding the plaintiffs $2,349,275.[217] The Supreme Court of Mississippi required the Smiths to seek remediation through the Mississippi Oil and Gas Board in order to first exhaust their options for administrative relief.[218] The case was dismissed without prejudice.[219] Mississippi courts have repeatedly enforced the precedent set forth in this case when the Oil and Gas Board has proper jurisdiction to hear a case.[220] In 1995, this precedent was codified by the Mississippi Legislature; however, it is not the only state that has attempted to delegate this authority to a state agency.[221]

### *E. The French Quarter's Take on Primary Jurisdiction*

Courts in Louisiana have also considered the question of whether to allow primary jurisdiction for a state agency for site remediation issues in order to combat the state's long period of high damages awarded against oil

213. *See* MISS. CODE ANN. § 53-1-17 (West 1995).
214. *Chevron*, 844 So. 2d at 1147–48.
215. *Id.*
216. *Id.*
217. *Id.* at 1146, 1149.
218. *Id.* at 1149.
219. *Id.*
220. *See generally* Howard v. TotalFina E & P USA, Inc., 899 So. 2d 882 (Miss. 2005) (explaining that the Mississippi Oil and Gas Board does not have exclusive jurisdiction over all claims arising out of oil and gas cases if they pertain to common law causes of action); Ga.-Pac. Corp. v. Mooney, 909 So. 2d 1081 (Miss. 2005) (articulating that causes of action can be severed so that common law claims progress through the judicial system and oil and gas site-remediation claims progress through the Mississippi Oil and Gas Board); Bolton v. Chevron Oil Co., 919 So. 2d 1101 (Miss. Ct. App. 2005) (reinforcing that plaintiffs are required to exhaust administrative relief before filing a claim in a trial court).
221. MISS. CODE ANN. § 53-1-17 (West 1995).

and gas companies.[222] The state has only addressed a fraction—a (French) quarter if you will—of the problem but is making strides at fixing the problem in its court system.[223] Because the legislature and courts lacked the authority to require plaintiffs to utilize the high damages awarded to actually remediate the land, "the Louisiana legislature enacted Act 1166 in 2003."[224] This legislation requires plaintiffs to notify the Louisiana Department of Natural Resources and the Louisiana Department of Environmental Quality whenever damages are sought for groundwater contamination.[225]

Later in 2006, the Louisiana Legislature enacted Act 312 to reinforce the requirement that plaintiffs must use the damages won during a dispute over contamination to actually remediate the land at the heart of the dispute.[226] Now, plaintiffs must address the basis of their claim with the damages won.[227] While the implementation of these statutes in Louisiana has not been entirely smooth, the state has at least recognized the benefits of primary jurisdiction and is attempting to incorporate it into its judicial system, unlike Texas.[228] This change occurred because of the exorbitant damages awarded in the judiciary.[229]

For example, in 2003, the Supreme Court of Louisiana upheld a jury verdict to return an inordinately large reward of damages to restore contaminated property (over $33 million) against an oil and gas company despite the fact that the value of the land totaled to a little over $100,000.[230] In this case, the oil and gas lease terminated in 1991.[231] Despite the expiration of the lease, the oil and gas company continued to dispose of saltwater on the property—even after it was given written notice from the plaintiffs to provide notification of the breach.[232] The parties attempted to settle the issue privately, but instead, the plaintiffs eventually sought relief through the trial court.[233] Following the trial, the jury awarded the plaintiffs $927,000 for failure to leave the land once the lease expired, $33 million to restore the contaminated land, and $16,679,100 for trespassing on the land following the lease expiration and disposing of saltwater on the premises.[234] Additional

222. LA. STAT. ANN. § 30:2015.1 (2018). *See generally* Corbello v. Iowa Prod., 850 So. 2d 686 (La. 2003). This case "opened the floodgates of potentially significant liability for oil companies." Keffer, *supra* note 21, at 4.

223. LA. STAT. ANN. § 30:2015.1.

224. *Id.*; Keffer, *supra* note 21, at 4.

225. LA. STAT. ANN. § 30:2015.1.

226. *Id.*

227. *Id.*

228. *Id.*

229. Corbello v. Iowa Prod., 850 So. 2d 686, 691 (La. 2003).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

damages for fees were awarded as well.[235] Scholars believe that this verdict "opened the floodgates of potentially significant liability for oil companies."[236]

This fear of the flood of litigation was also emphasized in a 2001 case in which a jury awarded $1 billion in punitive damages against an oil and gas company under similar circumstances.[237] The defendant operated a pipe-cleaning facility on a piece of property.[238] Due to the operations being conducted on the land, the plaintiff's property was contaminated with NORM.[239] The jury awarded the plaintiffs $56,145,000 in general damages and $1 billion in punitive damages.[240] Because of this trend, oil and gas companies were highly discouraged from actively exploring the state's natural resources and to support the state's economy.[241] As mentioned before, these high damages encouraged the members of the state's legislature to respond to, and clarify their disdain for, how the state's courts addressed environmental contamination claims.[242]

The Louisiana Legislature responded to *Corbello*, and similarly situated cases, in 2003 by enacting Act 1166.[243] This law mandates notification to, and oversight from, the Louisiana Department of Natural Resources and the Louisiana Department of Environmental Quality for lawsuits dealing specifically with contamination.[244] One purpose of this mandated oversight from the state agencies is due to their specialized knowledge and ability to review and approve remediation plans and the costs associated with them.[245] While Louisiana is still ironing out the kinks in how it addresses primary jurisdiction and environmental contamination claims, it is evident that the state is on track to be as successful as Mississippi in implementing these policies.[246] Texas, however, is still struggling.

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235. *Id.*

236. Keffer, *supra* note 21, at 4 (explaining the impact this decision had on prior precedent in Louisiana: "Up until *Corbello*, Louisiana law on the measure of damages in property cases had remained, in general terms, diminished value . . . .").

237. *See* Grefer v. Alpha Tech., 901 So. 2d 1117 (La. Ct. App. 2005).

238. *Id.* at 1128.

239. *Id.*

240. *Id.*

241. Keffer, *supra* note 21 ("[T]he problems of an explosion in litigation and excessive jury awards were wreaking havoc among the oil-company members of the industrial core of the state's economy.").

242. LA. STAT. ANN. § 30:2015.1 (2018).

243. *Id.*

244. *Id.*

245. *See id.*; Keffer, *supra* note 21.

246. *See* Keffer, *supra* note 21, at 7.

## IV. CLEARING THE ROCKY MOUNTAINS: FINDING A SOLUTION THROUGH SEQUENTIAL JURISDICTION

*Forest Oil* made it abundantly clear that the Supreme Court of Texas is unwilling to recognize that the Commission has primary jurisdiction despite the Court's acknowledgement that there are serious public policy problems with allowing plaintiffs to pursue two avenues of remediation.[247] The Court admitted that this process could result in defendants being charged with environmental contamination twice and could require providing double recovery—one in the state agency adjudication process and one through the judicial process.[248] However, the Supreme Court of Texas specifically suggested that the problem should be left to the legislature to address.[249]

It is imperative that the Texas Legislature address this problem and provide recourse for oil and gas companies that are being penalized twice, a concept that is odious to the judicial system the nation utilizes.[250] Doing so would allow defendants to clear the rocky terrain and uphill hike associated with litigating claims involving alleged pollution.[251] When plaintiffs are awarded damages because of contamination that occurred on their property, it logically follows that the money should be used to address the basis of their claim—remediating the land. If not, the Commission could require defendants to pay for the cleanup again, allowing plaintiffs to pocket the funds that were allocated to address the contamination problem in the first place.[252]

Former-Representative Keffer tried to address this problem with House Bill 2881 in the 79th Legislature.[253] Unfortunately, the bill did not pass through the legislature, and the issue remains relatively untouched.[254] This reality is increasingly worrisome because the exact result the bill sought to prohibit occurred in *Forest Oil*.[255] The Energy Committee heard testimony explaining the positive consequences and negative implications of the bill and provided insight as to how to accomplish the goals of both oil and gas operators and landowners.[256] An adaptation of House Bill 2881 that imposes sequential jurisdiction could harmonize the concerns of both parties and provide an efficient alternative to the judicial mechanism currently in place.

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247. *See* Forest Oil Corp. v. El Rucio Land & Cattle Co., 518 S.W.3d 422, 430, 432 (Tex. 2017).
248. *Id.* at 429.
249. *Id.*
250. *See generally* Keffer, *supra* note 21, at 6.
251. *See id.* at 5–6.
252. *See Forest Oil*, 518 S.W.3d at 429.
253. *See* Tex. H.B. 2881, 79th Leg., R.S. (2005).
254. *Id.*
255. *See Forest Oil*, 518 S.W.3d at 426–27; Tex. H.B. 2881.
256. *Hearing on House Bill 2881*, *supra* note 132.

Sequential jurisdiction is a reasonable reconciliation of interests to relieve the tension that landowners and operators have with the bill.[257] The new version would still require plaintiffs seeking damages for environmental contamination on their property to preliminarily seek adjudication of their issues before the Commission.[258] Taking away a judge's discretion to remove a case from the judicial system to an agency would be counterbalanced by the parties' ability to remove the case to an original hearing if the results of the Commission are less than satisfactory.[259] Legislatures would effectively be promulgating a hybrid version of primary and exclusive jurisdiction to the agency while retaining the benefits of having a court of general jurisdiction hear a case.[260]

The Commission would conduct investigations as usual and make factual findings about the circumstances and extent of the contamination. It would ultimately determine the best plan of remediation, if one exists. The Commission would be subjected to a time table requiring the completion of the hearing at the agency within eighteen months. Of course, the new bill would still allow plaintiffs to reject these findings and pursue an original hearing before a trial court in the typical judicial system.[261] The findings of the Commission would still be entered into the trial record and available for the judge and jury to utilize at their discretion; however, new evidence could be introduced pertaining to the damages a plaintiff believes she is entitled to receive as a result of the alleged contamination.[262] Finally, the parties would be allowed to settle their dispute using an alternative dispute resolution, like mediation or negotiations, subject to limiting language being included in the final decree.

The new bill would address the concerns expressed by landowners before the House Energy Committee during the 79th Legislative Session.[263] The primary concerns were the following: ineffective remediation due to a potential bias, the extension of the time required to remediate the problem, and the invalidation of settlement agreements made outside the presence of the Commission.[264] The first concern from landowners, that the bill would allow for ineffective remediation due to a potential bias and deference given to the Commission's findings, is addressed because the sequential jurisdiction still provides the parties with an opportunity to pursue an original hearing in a trial court.[265] This new provision should dissipate concerns of

257. *Id.* (statement in opposition of House Bill 2881 from King Ranch, Petty Ranch Company, Texas and South Texas Cattle Raisers, and several historic ranches throughout the Texas panhandle).

258. *See* Tex. H.B. 2881.

259. *See id.*

260. *See Hearing on House Bill 2881*, *supra* note 132.

261. *See* Tex. H.B. 2881.

262. *Id.*

263. *Hearing on House Bill 2881*, *supra* note 132.

264. *Id.*

265. *Id.*

potential bias because parties may introduce new evidence during the trial portion of the dispute. Any concern associated with a jury giving unsubstantiated deference to the Commission can be combatted with new expert testimony and any other evidence the landowner, or the Commission, deems necessary for the adjudication of the claim.

The second concern of timing is addressed because the new bill requires the dispute to be resolved within a specified amount of time from the outset.[266] This addition allows for parties to ensure their case is heard within a reasonable time, which will often result in faster adjudication than the process of litigating a claim before a judge.[267] This process traditionally can take years, even decades, to complete. Eighteen months, by comparison, is minimal and ensures a timely resolution for all parties. Again, if the parties are not satisfied with the findings of the Commission, then they may pursue a claim in a trial court and will have only added a small portion of time. The Texas Legislature could also include statutory language to toll the statute of limitations if a party is complying with the other requirements of the new bill. This process ensures that administrative agency resources are being exhausted, a fair hearing is being conducted in a timely manner, and a landowner is not losing standing to have the alleged environmental contamination claim heard before a judge if that option is utilized.

The final, major concern of voided settlement agreements can easily be remedied by removing this clause in its entirety.[268] It stands to reason that parties will not enter into settlement agreements that are extraordinarily exorbitant or non-advantageous to their own interests. Parties should be able to resort to alternative dispute resolution mechanisms to settle disputes. However, in order to address one of the purposes of sequential jurisdiction, to avoid double recovery, all agreements should include language that by agreeing to settle the dispute, the landowner retains the responsibility to remediate and restore the land. This would obligate landowners to address the basis of their complaint and deal with the Commission, should they opt out of cleaning up the property and pocketing the money. The agreement should not be entirely void; the legislature should just mandate compliance to certain conditions to ensure the purpose of the new bill is carried out.

Additionally, the proposed bill accommodates for the advantages associated with specialized adjudication.[269] These benefits include the following: alleviating the court dockets, providing greater consistencies and guidance to consumers of the environmental contamination law within oil and gas operations, and providing experts to accurately and efficiently decide

266. *Id.*
267. *Id.*
268. *Id.*
269. *See supra* Section III.B (investigating several scholars' interpretations of the advantages and disadvantages of specialized courts and specialized agencies).

cases.[270] Sequential jurisdiction would also alleviate the negatives associated with specialized adjudication of courts.[271] The new bill attempts to find a resolution to these issues by supplementing the Commission's determination with a possibility of parties utilizing the judicial system. This resolution fixes the problems previously discussed.[272] The problems that are addressed by sequential jurisdiction include the following: discouraging cross-pollination of ideas, bias and politicization, and fear of the great deference others may accord to the agency findings.[273]

Specialty courts may aid in bias and in the reduction of cross-pollination of ideas.[274] The new bill accounts for, and should dispel, all of those fears because it does not provide the Commission with exclusive jurisdiction.[275] The Commission would not be the final voice and adjudicator of the dispute if either party wishes to create an original case before a trial court.[276] This would provide a check on the bias concern because parties may take the case away from the Commission and be judged by their peers if they believe bias is influencing the final result.

Additionally, the three commissioners have the final say as to how a case will be decided within their regulatory agency.[277] They are also elected positions and are subject to reelection every six years.[278] This provides a unique opportunity for constituents to lobby against potentially biased decision makers and to vote for new representatives if they detect bias. Allowing the parties to take the case away from the Commission also addresses the cross-pollination fear because the cases are not solely left to the discretion of the Commission. As stated before, the parties could have a trial court hear their case and make a final determination in the judicial system after administrative resources are fully exhausted.[279]

The fear of the amount of weight a trier of fact would afford to the Commission's determinations was echoed not only in the analysis of specialized courts but also from the landowners opposed to House Bill 2881.[280] Sequential jurisdiction would require plaintiffs seeking remediation to start the adjudication process with the Commission. If the plaintiff is still unhappy with the results after the investigation, and the hearings have been conducted within the time allotted, she may reject those findings and seek

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270. Dreyfuss, *supra* note 47, at 377–79.
271. *Id.* at 379–82.
272. *Id.*
273. *Id.*
274. *Id.* at 379.
275. *See id.* at 381.
276. *Id.* at 380.
277. Scurlock, *supra* note 12, at 327.
278. *Id.*
279. *See supra* notes 263–65 and accompanying text (laying out the content of the new bill proposing the Texas Legislature grant sequential jurisdiction to the Commission).
280. *See supra* notes 263–64 and accompanying text (explaining the content of the new bill proposing the Texas Legislature grant sequential jurisdiction to the Commission).

assistance from a trial court.[281] The findings of the Commission are made available to the judge or jury and they may, within their sound discretion, choose to afford them deference.[282] However, the new bill would eliminate the requirement that no new evidence be introduced, and plaintiffs would be able to use new expert witnesses and conduct their own investigations to support their allegations of environmental contamination.[283] Sequential jurisdiction is by no means a perfect solution to rectify all of the fears of opponents and proponents of this type of law; however, it attempts to compromise the parties' interests in order to reach a fair resolution that will enhance the current system.

## V. AT THE END OF ROUTE 66: A BRIEF CONCLUSION

In conclusion, granting pure primary or exclusive jurisdiction to the Commission for environmental contamination cases is not the end of the road that landowners and oil and gas companies desire. Many positives and negatives are associated with the specialization of courts and state agencies and, given the rich history and pervasive nature of the oil and gas industry in Texas, it is important that legislatures craft policies that balance the interests of all parties involved in litigation. Legislation that includes sequential jurisdiction as a mechanism to reconcile parties' interests may be an avenue that legislatures should pursue. The Texas Legislature would create a policy that addresses the basis of the claim being brought before trial judges, preclude double recovery from defendants, and ensure the environment is protected and maintained—because, after all, "it is the one thing all of us share."[284]

281. *See supra* text accompanying note 265 (explaining that parties may seek adjudication in a trial court).

282. *See supra* text accompanying note 262 (explaining that juries may afford any deference to the Commission's findings they see fit).

283. *See supra* notes 263–65 and accompanying text (permitting plaintiffs to retain a right to introduce damages when it shows the Commission's findings were insufficient).

284. LADY BIRD JOHNSON, http://www.ladybirdjohnson.org (last visited Jan. 8, 2019).