ORAL ARGUMENT – 01/09/02
01-0177
CONOCO V. WBD

WALKER: This is a case about finality of contested case orders. Generally about any contested case order, but specifically about one contested case order, the RRC that was adopted for specific panhandle fields in Docket 10-87,017.

The court cited 56 years ago in Corzelius v. Harrell that the RRC has exclusive jurisdiction to determine these matters, and that their field rules order, such as the one that's being challenged in this case, is not subject to collateral attack.

The administrative procedure act which became effective in 1976 did not change that law. In particular with respect to the requirement of exhaustion of administrative remedies, and the rules that ensure the finality of contested case orders of administrative bodies, this court recently stated in the Cash America case that exhaustion of administrative remedies remains a jurisdictional requirement for a direct challenge of an administrative order. So we apply the applicable APA provisions to what happened in this case. WBD received notice of a contested case hearing. It chose not to participate in the hearing.

HECHT: What if it hadn't?

WALKER: Then I believe that WBD could challenge, ask the RRC whether these filed rules are applicable to it as the oil company in Torch v. RR Commission did, and the commission can make a determination. And WBD certainly has process available to it.

HANKINSON: And what statutory authority would there be for WBD to do that?

WALKER: To ask the RRC whether that applies?

HANKINSON: Yes.

WALKER: Well I'm not certain for hearing what statutory authority goes to that. It's the same statutory authority that Goodrich Oil Co used when it went to the RRC. All of the RRC's actions involve notice and opportunity of some sort. Field rules hearing have the requirement under the APA that notice be given of hearing, but the RRC would entertain a hearing of that sort as it did with ______________, and as it does with all filed rules matters.

PHILLIPS: Approximately how many persons ___________ got this notice?

WALKER: I believe that the number of operators at the time was 1,200.

PHILLIPS: And how many of those made some kind of an appearance?

WALKER: I don't know how many made an appearance. The appendix that includes the proposal for a decision and final order that is included in our petition for review and incorporated in our brief gives the list. There were, I think, in the nature of a couple of dozen parties who actively participated in all of the discovery and presentation of evidence and otherwise. The commission recognizing the scope of the number of people who would be involved also allowed people to register their interests in receiving mailings throughout the conduct of the hearing, but who did not want to be officially designated as an active party.

O'NEILL: Has the commission ever acted pursuant to its rule making authority in enacting field rules?

WALKER: No.

O'NEILL: And is there a policy reason for that?

WALKER: There is a policy reason and I think also a legal reason. The policy reason is that the RRC regulation of oil and gas is essentially a three-tiered process. The first tier is the enactment of statewide rules - rules of general applicability that apply to everyone no matter where they are and what the field or how deep, whatever their operation may be. When a field is discovered the operator and sometimes more than one operator will come in and ask the RRC to design space and density, production and other requirements specifically for that accumulation of oil and gas. That is what the special field rules for digging is.

O'NEILL: But they could still do that pursuant to their rule-making authority if they chose to pursue that route is my understanding. That it is pretty much discretionary with the commission.

WALKER: The commission has discretion to choose which procedure. Now the CA in the ARCO case said that when correlative rights are involved, and the commission is exercising its jurisdiction to protect correlative rights, then that requires a trial type hearing. The commission contends that that requires a contested case proceeding. That allows the operators who are competing with each other for these valuable reserves all of the due process protections that are afforded in a contested case procedures, which include rules of evidence, application of the ex parte rule, a very defined order that has findings of facts and conclusions of law.

O'NEILL: Well I guess my question is, under the rule making authority, that same procedure is not contemplated right? Is evidence introduced? Can the operator still come in under the rule making authority and put on the same evidence, or is that just simply precluded?

WALKER: They can present information. I look at it is that parties, persons present information to agencies in rule makings.

O'NEILL: Well it's public comment.

WALKER: It's public comment. It's not sworn. I suppose it could be sworn. But the ex parte rule does not apply. There are other provisions in the rule making procedures that make it more of a general, informal informational activity.

O'NEILL: Is one of the reasons the commission chooses to go the contested case course so there will be finality to the field rules - appeal provisions?

WALKER: Certainly. And that's extremely important to the regulation of oil and gas industry. And as this court pointed out in the Alcoa case that is cited in our brief, to the community as a whole including taxing entities and all of the investors and owners of oil and gas minerals.

ENOCH: On the contested case hearing, can I send a notice to the Panhandle that I am going to consider whether or not I'm going to - the commission is going to consolidate all these separate fields up in the Panhandle, and send the notice, and then decide as to a particular field that I'm going to change the rules governing that field?

WALKER: Yes.

ENOCH: Did that person get notice that the commission was going to do that?

WALKER: Yes.

ENOCH: How is the notice to me that you're going to decide whether or not to consolidate fields notice to me that you're going to contemplate changing the rules on my field?

WALKER: The notice in itself speaks of that.

ENOCH: Well if the notice says that we're going to decide whether or not to consolidate the fields, and if we consolidate the fields we're going to decide what rules should apply to the field. If you decide not to consolidate the field, is that notice to me that as to my field you're going to decide whether or not my rule should be changed?

WALKER: I'm not sure I understood your question.

ENOCH: If notice is an issue, have I received notice from the commission that the commission will be considering changing my rules, if what the notice says is that they are going to decide whether not to consolidate my field with another field, and if they do that they will necessarily contemplate having rules for that field? Is that notice to me that they are going to consider changing my rules in the absence of the consolidation?

WALKER: I believe it is. And if there's any question about the notice, the APA and the notice provisions require a certain amount of specificity. It also provides the operators with the opportunity to request of the commission more specific information about the proceeding itself. In this particular case, we don't have a challenge as to the sufficiency of notice as I read the petitions. That is not an issue in this case that's before the court today.

Also I am confident that there was no confusion at all among any of the operators as to what the scope and nature of this proceeding was to be. It essentially centered on the issue of how corporations and the disputes and uncertainties and problems that existed in all of the Panhandle fields throughout that area.

ENOCH: But it makes a difference to your argument whether or not this is a contested case proceeding, or a rule making proceeding doesn't it?

WALKER: It does.

ENOCH: And if the issue is that this is a contested case proceeding, then it would seem to be that the notice must pertain to whatever is being contested.

WALKER: Yes.

ENOCH: And if what the result of the commission's activity is an item that's within their purview to do, but it's not directly related to what the contest was that was before them, then doesn't it look more like a rate making capacity than a contested rate case?

WALKER: It might in the abstract. But I don't think that changes the nature of the proceeding that occurred in this case. It started out as a contested case. It went through all of the procedures as a contested case, and it ended up with an order as a contested case order with findings of facts and conclusions of law.

ENOCH: But the order could be beyond the scope of the notice.

WALKER: It could be, but I don't think we have that in this case. And I think also that as the hearing proceeds, as in a TC, if issues come to the table and were not necessarily in the petition or were not necessarily in the notice, then the parties try it by consent. That is part of the process. All of the people who were involved...

ENOCH: Assuming parties before the court trying by consent.

WALKER: That's correct, and that is every individual's choice whether or not to appear and participate. And the final order was sent to all of the operators as well. So there was an opportunity for WBD as well as anyone else in the proceeding who got notice of the hearing and who was an operator in that field to challenge whatever the specifics of the final action that the

commission had taken would be as it applied to them. So once again, I think complete due process was afforded in this case.

JEFFERSON: WBD could have challenged the final order without having participated in those proceedings. Is that what you're saying?

WALKER: Yes. WBD could have filed a motion for rehearing to challenge any aspect, and should have got a motion for rehearing and challenged any aspect of the final order that the commission signed.

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ANADARKO

PATMAN: I would like to begin by explaining to you the difference between statewide rules and special field rules. This volume, relatively thin, holds the 100 odd statewide rules that as Mr. Walker said apply to every oil and gas field in the State of Texas. Those 20 loose leaf volumes hold copies of the 14,000 special field rules that are in effect for different fields in the state. Each one of those, some of them are more than 70 years old, was adopted after a hearing procedure, a contested case procedure since 1976 without exception.

Each of those actually is nothing more than an exception to one of these. And in fact, to only about 8 or 9 of them. The rules that are special field rules pertain as Mr.Walker said to dense field drilling on a tract to spacing of wells to allow the production from an oil well or a gas well. Those fields have each of them different provisions, not necessarily different from each other, but different provisions from the statewide rules. The statewide rules apply to every oil and gas operator. They apply to every field and every well in the State of Texas except those which have received exceptions.

Perhaps the court is familiar with the term "rule 37 exception", an exception to the spacing rule. These in fact should be viewed as a field by field exception to the statewide rules.

O'NEILL: But why as policy matter does the APA contemplate seemingly unlimited challenges to broader and smaller rules than it does through the contested case hearing to the declaratory judgment provisions? I don't understand the reason for setting it up that way.

PATMAN: Of course partly it's history, but in fact, the adoption of special field rules are decided by how far a well...

O'NEILL: I have no problem with that concept, that you've got the specific and the general. But why would the legislature through the APA allow the more general statewide provisions to be more liberally attacked through a declaratory judgment is what I'm having the trouble with?

PATMAN: Of course I can't speak for the legislature. But the point is, the statewide rules are general. They were not made and are not made by examining the engineering and geological and geophysical characteristics of a particular accumulation of oil or gas.

O'NEILL: So if there had been no special rules enacted for the panhandle field, and the panhandle field was being operated under the general rules, then WBD could maintain jurisdiction for this case?

PATMAN: Yes, I believe that to be correct.

O'NEILL: And you would say as a policy matter the purpose for that is they never had an opportunity to go put on evidence and witnesses to create an exception?

PATMAN: That's correct. The point is, each of those is tailored to the particular characteristics of a reservoir. It's decided by the commission after a contested case proceeding at which technical witnesses, almost all of them experts, appear and present differing views with respect to the geology and the engineering, the transmissibility of fluids through their reservoir, and based on that evidence the commission tailors an exception for this accumulation. The commission acts in a sense in rim(?). I hesitate to use that word. But the commission's regulatory authority as commanded by the legislature for 80-90 years now is to regulate each common source of supply of oil and gas so as to protect correlative rights and prevent waste. And those are specific questions that are answered only in the most general way in these rules because these rules were not adopted by tailoring prevention of waste and protection of correlative rights to the particular facts of a reservoir. And that's what those 14,000 rules do. And they are called rules only as a historical artifact. They've been called rules since 1930 in the panhandle. That's in the record. 70, years, 71, 72 up in other states if that is of interest to the court, the same kind of determinations are made by police power regulatory agencies, and they are called proration orders. They are called spacing orders. The only reason that those 14,000 are called rules is because they've been called rules since the 1920's. The ABA has two structures. One, for the general rules; and one for fact specific. And that's the way it should be and must be in order to protect correlative rights because of the essential fact questions that are decided when the commission determines that one particular common source of supply needs to be developed in a particular manner by placing wells so far apart, by placing so many wells on a tract, and by permitting such and such amount or volume of production.

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RESPONDENT

RAY: The issue correctly in this case is one of jurisdiction. Do the courts, specifically the Travis county DC's, have jurisdiction to determine whether final orders promulgated irrespective of labels can and are being applied validly, statutorily and constitutionally by the RRC? Finality is the issue...

HECHT: But then the question is whether they are a rule. Is that fair?

RAY: One question is whether they are rule. But we don't depend solely on the rule issue to establish jurisdiction. We believe that we have vested rights in property and other constitutional issues that vest jurisdiction in the Travis county DC's irrespective of Ch. 2001 of the APA.

HANKINSON: WBD does not contest that the proceedings held back in the 1980's were a contested case as a proceeding under the APA. Is that correct?

RAY: I cannot agree with that statement.

HANKINSON: That that was the nature of the proceedings given what others who had notice did in terms of challenges to the administrative relief that was granted, and so on. There's no complaint from WBD that was a contested case.

RAY: The complaint from WBD is that they used contested case or evidentiary trial type procedures, but the effect of the...

HANKINSON: So the answer to my question is that WBD does acknowledge that that was a contested case proceeding?

RAY: No. WBD acknowledges that they need contested case procedures to make a rule.

HANKINSON: I understand that. But they did use contested case procedures, and you're complaining about the fact that they did that. Is that right?

RAY: Actually that's not true either. What we're complaining is that they used a process to promulgate a rule and now they are construing it as something different, and they are applying it to WBD.

HANKINSON: I understand that. But if you look back at the record of what occurred back in the 1980's, that was a contested case proceeding as contemplated by the APA. Has WBD acknowledged that?

RAY: No. We acknowledged that there was a proceeding before the RRC that was noticed for a rule making that used evidentiary trial type procedures...

HANKINSON: Well didn't it walk, talk and look like a contested case proceeding? I know that you realize - you say that the result was rule making. But did the entirety of the proceeding follow the parameters of the APA for a contested case in terms of the procedural requirements that the commission and those who participated followed? Didn't it follow the procedures of a contested case proceeding?

RAY: I would disagree for this reason. Because the notice that they sent out was for something different. The order that they promulgated in the proceeding described what they did as something different. The order that they enforced in the rule in the Panhandle described something different.

HANKINSON: I understand that you say what they did was rule making. But I'm just talking about - I mean if you file the civil lawsuit and you go to the courthouse, you know that it walks, talks and looks like the civil proceeding under Texas procedural and statutory law. So my question is, didn't this all in terms of the way the proceedings were conducted follow the parameters set out in the APA for contested case proceedings?

RAY: I would agree with that.

HANKINSON: That was my question. I was trying to figure out if there was something about the way it was all conducted that put it outside those parameters. But you say no. It really fell within that.

RAY: No. We believe that what they ultimately did - walked and talked like a contested case - we don't believe that the result of what they did matched what they have intended.

HANKINSON: I understand that. But I'm looking back at the beginning and looking at the entirety of the record.

O'NEILL: It strikes me that the fundamental difference between the parties in this case is the way they reason through it. You start at the end and reason backwards. You start with, we got rules, let's go back to the hearing. It was adjudicated of a nature; therefore it should have been rule making. They start with, under the APA we can decide at the point we notice it which way we want to proceed, which route we want to take. And those are fundamental disagreements. It strikes me that the APA sort of contemplated that by setting out these two procedures, giving tremendous discretion to the commission to decide which way to proceed. And then once they made that decision to proceed a certain way, it would be up to WBD for example to come in and contest which avenue they choose to take and resolve it at that point. But once they've chosen an avenue to take, the rules are pretty standard or pretty set as to how you are going to proceed to attack anything that comes out of the proceeding. And so isn't our fundamental question here our starting point? I mean not what results from the hearing, because we can get into what's the rule generically and esoterically, and what's adjudicated. And clearly what happened at the end working your way back is a hybrid of these type functions. But it seems to me the starting point is where the commission chooses to proceed and the discretion they have to do that. And once they exercise that discretion how you characterize the proceeding or how you characterize what results is really irrelevant.

RAY: I appreciate the comment. And I've certainly heard that from the other side in this lawsuit. But I think that the starting point is important. And what I would like to look at is what the starting point really was. The starting point for us is that we already had vested rights in

rules as they existed for more than 50 years. In those rules were vested entitlements that WBD was entitled to rely upon for several reasons, not just because the well bores(?) and the minerals themselves represented vested rights. But also because the law, the statute at the time, HB 4, §481.141 to .143 of the gov't code said that WBD was entitled to rely on the fact that those rules would govern their well bores(?) during that period of time. That was the law.

O'NEILL: The statewide rule?

RAY: Yes, and the Panhandle field rules. Because one of the definitions of a rule under 2001...

O'NEILL: Again, you're starting at the end. I mean that's the fundamental difference is you're starting out with these ended up being rules rather than looking at the discretion the commission has at the beginning. So we've got to resolve that issue first off.

RAY: I think that that's probably true. And the only more fundamental issue would possibly be the jurisdictional aspect of the proceeding ________ the parties. What we would propose to the court is that they never acquired personal jurisdiction over WBD. And so if it were a contested case proceeding...

HANKINSON: In what _________ of a notice deficient did WBD receive?

RAY: I provided for the court a copy of the notice that was sent out. The notice describes a hearing for the purpose of repealing filed orders and looking into establishing a consolidation of several fields into a single field. And the condition on that, the establishing of field rules it would be appropriate if such an activity occurred, neither of which did. This notice is not adequate under due process considerations. If rights vested under the constitutional protections of this state...

HANKINSON: Why did all these other people who participated know what was going on and _______ to participate?

RAY: I think that if you look at the list of the participants, what you are going to find is they more merely align with the business interests that were promulgating the change than they did with the folks whose interests were adversely impacted.

OWEN: What about paragraph 6? It says parties attending this hearing may propose other rules and, or, alternative field rules and should submit evidence to support any proposed rule as it relates to waste prevention, oil and gas conservation, and the protection of correlative rights. Doesn't that put you on notice that not only is consolidation - yes or no - but they are also to be talking about alternative field rules and that's up for grabs.

RAY: I would disagree with that, because we believe that you have to read the notice

like you would you a statute. We have to look at it in its entirety. We believe that this was more like what you would call notice and comment: We invite your participation in a public event; we're considering doing this consolidation of large fields; we're considering making new rules. The proposed rules that they considered were starting at no. 5, that moved over to page 5 and page 6. None of that happened. The notice, however slight about the possibility of amending field rules for the existing field, we believe would be constitutionally and statutorily inaccurate. But it certainly wouldn't go the jurisdiction. That would seem to be to the merits of the case.

O'NEILL: This wasn't published in the Texas Register.

RAY: No.

O'NEILL: So clearly they were not contemplating it as a rule making procedure, because they would have to publish it in the register if they did.

RAY: It's my understanding that under the ad hoc entitlements of an administrative agency like the RRC, they can either proceed by a case-by-case adjudication, which is what this would be, or they may receive by notice and comment rule making, which does require publication in the Texas Register.

O'NEILL: And because they didn't, you knew which way they were proceeding?

RAY: No, because either one is under the ________ of law of this state and this court as I read them. They are both deemed to be rules. We've dealt with that at least three times of this court: The Lone Star case. Recently in the Rodriguez opinion. There are several cases that have looked in to the PUC and RRC conducting matters of this nature, utilizing ad hoc evidentiary trial type procedures.

I think it's important for us to understand that WBD had absolutely no duty to intervene in a contested case proceeding. If this is truly a contested case...

HECHT: But it's hard to understand when you say you have such important constitutional and property interests that you get this kind of notice and you just decide not to go, I take it. You read the notice and thought well we don't have to do that. And then for 6 years after the order issues nothing happens. If the rights are so important that they deserve that kind of protection, why didn't you show up and do something sooner?

RAY: For a very simple reason. Just as you would in any position, if you found out about a lawsuit that was not a class action, it hadn't gone through the certification process, Texas law does not impose upon you to intervene in that proceeding. The second thing is, we had unique rights that are different than most of the rights that are described in this contested case proceeding of rule making...

HANKINSON: But the order came out in 1989. Then you knew what they had done.

RAY: That's correct.

HANKINSON: And nothing happened then either.

RAY: No, because they never enforced these rules for more than 2 years. It was not until 1993 that the RRC brought their first enforcement or challenge of these rules against certain operators.

HANKINSON: But was WBD aware when the order became final with the rules contained in it?

RAY: Yes.

HANKINSON: At the time that it happened, you were put on notice of that too?

RAY: We were put on notice, and I attached as an exhibit to our brief on the merits, the type of notice that people got. All operators were told they had to follow the field rules. Now then the field rules, a definition of a rule under 2001.038 in the definitional section that follows from that, also includes the repeal of a rule. That's one of the core definitions. Assuming for the sake of argument that the state's position is correct, that only a statewide rule would be a rule subject to challenge, if you go down their path of argument these are exceptions or repeals or revisions, wholesale changes or exceptions to the statewide rules. And under the definitions, as clear as they can be, they would constitute rule subject to challenge that way I believe.

HECHT: The amici are unusual perhaps in their volume and unanimity if this opinion brings down the administrative state. What is your response to that?

RAY: Having been on both sides of the amicus problem, I can tell you that aligned with this table are large monied interests and large associations and there's remarkable similarity in many of the amicus briefs. The PUC wrote its own brief and I think it was the more compelling probably. I didn't believe, however, that there was that much difference between our position and their's, and the finality is our objective also. Our belief is that it is a core legal position. The rules that apply to us are the rules upon which our rights vested. These Panhandle field rules made a wholesale revision. They rescinded and they repealed over 70 field rules that had their inception in over ½ century worth of experience.

OWEN: How were those original rules adopted? Weren't they adopted in the contested case proceeding?

RAY: No, because the contested case proceeding never even existed at this point in time. And that's an interesting point, because the RRC is one of the most progressive agencies in

the history of our experience. What they have done predates the APA. They didn't recognize the difference in their process between a field rule hearing and a contested case proceeding until the ______, the precursor to the APA came out in the late 70's. They have always proceeded under a trial type evidentiary format.

O'NEILL: And what's wrong with that?

RAY: Nothing.

O'NEILL: Because it allows greater investigation, greater voice from the participants, greater comment, evidence. It's a more intensive fact searching procedure. And it would seem to me that that would be the better procedure that all of the parties would want, is a more thorough vetting that is not really contemplated in the rule making process.

RAY: And I couldn't agree with you more. The problem is, when you get through doing that more formalistic approach to problem solving to inquiry, you still end up with a rule. All we want to know is whether or not that rule is valid as it applied to us. We believe that we have substantial constitution and statutory basis to challenge the rule. We're not at this point in time trying to determine whether or not the rule is good, whether it's lawful, unconstitutional or otherwise. We simply are asking the court to allow us to go forward.

HECHT: One point that the amici make is that if we take that position it allows similar challenges to all of the other rules.

RAY: And those similar challenges I believe are available to every state law that's on the books as well. And there's no floodgate of litigation over that. When someone applies a statute to you or a rule which has the effect and it's construed as such, you are entitled to challenge its statutory applicability or its constitutionally as applied to your unique facts. And that's what we did.

What happened is this created such wholesale chaos in the Panhandle, that a whole cottage industry of litigation occurred. People were out buying wells in the middle of oil fields like our clients own so that they could bring suit for damages under the natural resources code for violating rules that didn't exist when the wells were completed. That is the nature. That is the essence of what we don't allow in this country. That is an impermissible retroactive aberration of the law. We were sued like that. We were sued for money damages, not by the RRC, by somebody who used to work for us that didn't like us anymore. They went and paid $7,000 for a well and bought it...

O'NEILL: Is this in the record?

RAY: Yes. It's in the affidavit of WBD's president, ______ Watkins. The problem here, and everybody has been accused of getting a little into the facts, is I contested the validity of

applicabilities rules because we were sued, not by the RRC for noncompliance, we were brought to task by a competitor. He just wanted to seek an economic advantage by a loophole in the law. That's all.

And there's another problem here, and that is, they want to apply res judicata principles to this contested case order, and we were not a party. If this is truly a contested case and if this is truly following contested case procedures, then our rights could not have been adjudicated because we were not parties to it. A contested case proceeding by its definition only adjusts rights between parties.

O'NEILL: But you could have been.

RAY: That's correct.

O'NEILL: And isn't that critical that you could have been?

RAY: It is critical because Texas has never adopted anything like a requirement to intervene in someone else's litigation.

O'NEILL: But this is not someone else's litigation. This is your litigation because you are an operator.

RAY: I respectfully disagree. It is not my litigation because my rights, I believe, legally had already vested under a wholly different regiment, a wholly different regime, a wholly different set of rules and statutes that apply to me. We didn't care whether they took 5 or 6 previously identified as separate fields and combined them into one, because all of our production comes out of the same stratum. We don't have all of the complex issues that seem to be asserted here. Our rights were certainly not represented.

RODRIGUEZ: In making a special field rule has the commission ever named a party in a contested care hearing?

RAY: Not in any hearing that I've been a party to. I don't know the answer to that. I would suspect not. If there's an enforcement proceeding, they would say, Justice Rodriguez, you must attend because your rights are going to be affected. If there's a contest between Conoco in northern for example, one that is pending, the parties were actually named. In this particular situation, you were just invited to give your opinions as to what would be a good thing to do. And we think that simply meets the definition of a rule. It's something that implements or interprets or prescribes law or policy. We think it is fallacious argument to say that they adjudicated the legal standards for lawful compliance in the Panhandle field. And then to apply an adjudication of the legal standard to operators using preclusive effect, whether it's called res judicata or collateral estoppel, that is a foreign concept to me, and I've not been able to find any case authority for that.

This has also come up in the federal form(?) before. And we've cited a couple of cases in our brief for that. The _______ did the same thing that the RRC has done, and many agencies have done. And I don't think it's open to discussion that they are not entitled to do it. But due process according to the 5th circuit in other cases that I have read entitles a nonparty to challenge the validity of the rule if they were not a party. And I think that that fits the paradigm here. And all we are asking is that we be afforded that opportunity.

ENOCH: You say you're not a party here. And some of the concern is you got notice and maybe there was some sort of obligation for you to come forward. Maybe you were by that notice made a party to this contested case. You've got an interest in a field, and you've got some current rules that are in existence that allow you to drill wells within 500 ft of each other. And you get a notice from the commission that it is considering changing rules applying to the Panhandle, that the wells will have to be 750 ft apart. Now do you think you've got an obligation to appear before them based on that notice to participate in that, or do you think you are not a party to that litigation and if they pass a rule that says it's now going to be 750 ft, you can sit back and not do anything until the RRC marches out on your property and says, plug that well, it's too close? Are you a party to that contest that's coming in, or are you not a party to that contest that's coming in?

RAY: I think that goes to the heart of the matter. The question is, if they sent a letter to Jim Ray and they said, irrespective of your constitutional rights or your vesting or any other thing, we're going to plug a previously valid and lawful well. I think that I would have to right to challenge it two different ways. One is, I can go directly to court and say the RRC is acting in excess of its statutory and constitutionally conferred powers, and we need an injunction. The second thing is, I could participate in that hearing because I would be made a party under those circumstances. I think clearly what you've described would make me a party. If I was made a party, then I think I would be constrained to follow the contested case procedures to appeal it.

ENOCH: So what makes you not a party in this case is because the notice that the rule changes were conditioned upon the commission making one large field as opposed to keeping the fields out?

RAY: That's correct. Our position is that this notice right here would not support a default judgment. If I was standing before you or someone else was standing before you in a default judgment situation, I think that what we would be saying is under the Maleney(?) case, the Manzo(?) case and all the cases that this court has written on due process issues, and due process clearly attaches here, I think everyone would concede that.

OWEN: Let's suppose that all of a sudden an operator came and filed a complaint against you, and asked for relief - didn't ask for specific relief - but said you know I'm being drained, I want you to mend the special rules to protect me. You couldn't enter a default judgment on that petition, but you could certainly grant relief and you would be bound by that wouldn't you?

RAY: That's correct, because they have named me as a party.

OWEN: What's the difference?

RAY: Because they've named us as a party. I looked at this as in-depth as I knew how with the meager skills that I have at research. You either are brought into and made a party of a proceeding, or you intervene and join. If you're not, then under the decisional laws of the nation, under the SC authority that I see, under the case law of this court, it's my belief that due process does not attach unless the notice is adequate. And we don't think this notice was adequate to tell us that our due process, our vested rights would be adjudicated in __________. I want to ask y'all in conference to read this notice carefully and see what it says. I think it is a conditional document, and I don't think it would support a default judgment.

OWEN: That's my point. When an offsetting operator sues you or asks for an adjudication in front of a contested case hearing, you can't necessarily hold up their complaint and render a default judgment on it, because it's asking for open ended relief. So that shouldn't be the test should it?

RAY: Wouldn't the test be whether or not the tribunal had acquired personal jurisdiction? We're not going to contest that they have subject matter jurisdiction.

OWEN: And how do they get personal jurisdiction over you in that _______?

RAY: They serve us.

OWEN: With what?

RAY: With a complaint. There's a notice pleading requirement at the RRC just like there is in courts. It's titled differently, but you still have to be served with a piece of paper and due process notice attaches.

OWEN: But how is the notice that you get in that kind of case different from the notice that you get in this case?

RAY: My name would appear somewhere on the face of that document, and I would be commanded under the authority of the State of Texas to appear at a date certain to answer a complaint that's been filed by a specific person, under authority of a specific set of rules that aprises me of the conduct that I'm accused of and provides me with an adequate opportunity to present my objections.

OWEN: So you're saying when the commission on its own decides it's going to hold a contested case hearing and let's everybody say come on and bring your evidence because we're going to set rules that's different and cannot any set of circumstances be a contested case hearing?

RAY: For this reason. When they say we're going to make rules, that would be like

calling an assembly of the legislature in saying, everybody come to Austin, we're going to set a new law about a matter - pick a topic. You're not obligated to hire a lobbyist. You're not obligated to intervene in some sort of hearing. You're not obligated to present testimony. And you're certainly entitled to come before this court and any other one and say that the rule of law that was promulgated by that legislature is deficient in some legally significant way either it's outside of the authority granted to the body, in this case the RRC...

O'NEILL: Yeah but if the local zoning board said we're going to zone this area of this community and you have an opportunity to appear before our hearing to talk about that, that's a different scenario. Because one's statewide, and one applies just locally and maybe are exceptions to a statewide provision. I mean that seems like the closer analogy.

RAY: I like that analogy, and I'll tell you why I like that. Because prorating, apportioning the product of oil and gas is much like zoning. It's the right to use your property under what circumstances and how and the intensity. And that is a legislative undertaking. However, if that same city council or group of city fathers grants you a building permit and you go out and you pay that fee and you build a two story house, you are entitled to rely on that building permit, and they cannot come out to you three years or 75 years later, or in this case 50 years later, and say, we've rethought the idea and two story houses just aren't pretty, and you're going to have to saw off that top floor because rights had vested that are protected under due process. It's the act of government that defines the activity that you're entitled to complain about. One is the right to use property. The other is a property interest itself. Here we have vested rights in property themselves that have attached due process.

And Justice Jefferson, no you could not appeal what they are talking about because under the APA if you don't file a motion for rehearing, then you're not entitled to appeal.

OWEN: If you don't file a motion for rehearing. But you could have filed a motion for rehearing.

RAY: You could if you were a party. But in ________ the RRC denied the people party status once they found out that this was a trick, that this was a defective notice.

SIDE B. TAPE GOES BAD FOR A COUPLE OF MINUTES ON RESPONDENTS LAST COMMENTS.

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REBUTTAL

PUTMAN: ________ amicus brief represents in the very beginning that they are filing that on behalf of the producers and owners of more than 90% of all oil and gas production in Texas. This isn't the big guy verses little guy type of case. That last argument of denying party status, no one was denied party status in this case. I don't know what that referred to and how that applied.

In reference to federal cases, the Shell case is one that WBD cited. Shell was not given notice of the prior adjudicative proceeding that they were challenging a statement of law that the agency that _______ cited in that case that's distinguishable from this. WBD did receive notice.

Justice O'Neill, I think you asked a question at one point about why the APA, why the legislature provided a more general type of review of rules than it did for contested case. It's because the procedures that lead to the adoption of a rule are more general. The type of judicial review I think is tailored for the type of procedure at the agency. In comparison the type of judicial review for a contested case is much more specific. It's confined to specific findings of facts and conclusions of law. The order, even looking backwards at what happened here and trying to figure out what the law is that was entered in Docket 1087017 was a contested case order. It had findings of fact that were specific to geologic conditions in the field that were determined and intended for all of the operators to be able to rely on and to go through that contested case process so that finality would be reached, and not reached within 2 years for procedural challenges as available under the APA for challenging a rule or indefinitely for constitutional statutory authority problems that is available for challenge of a rule. But final within 30 days after the order is entered, which is what the APA requires a petition in the DC to be filed for challenging a contested case order

HECHT: Under what circumstances could the commission itself reconsider these rules?

PUTMAN: If there are changed conditions in the field. There is case law. I think the Magnolia Petroleum case is one. It can do it if new evidence comes in.

HECHT: Somebody files a proceeding or the commission initiates it?

PUTMAN: Typically it's when somebody files a proceeding. This proceeding was initiated by the oil operators in essence. It was not initiated by the gas operators. It was initiated by a letter to _______ and some other matters that were going on. Another way that it happens and it is also pertinent to the facts in this case is that WBD can go to the RRC and seek an exception to these field rules based on any unique conditions under its lease. That's what rule 37 exceptions do. That's what WBD could do in regard to where it can perforate its well. Since in the Panhandle field gas operators and oil operators are separate property owners in the same lease, the location of the perforation is the same in essence as lease lines are where operators own both oil and gas. So we have that correlative right on a vertical plane as well as on a horizontal plane. So WBD has all of those processes and procedures available to it and it did not choose any of those.

If the court looks at the notice it is sufficient. But that was not challenged in WBD's petitions. They did not challenge the sufficiency of the notice. Also we don't have a default judgment. We have a judgment on the merits of the case. So it's not a judgment that says we accept all of the allegations of fact as true in the petition. That's like a default judgment would do. It goes through and it makes numerous findings of facts and conclusions of law. It sets out numerous standards for when a well is properly completed. And that gets to the point where WBD is talking about its vested rights. The vested rights that WBD has must be acquired in conformance with the

statutes. The critical statute in the question of perforations is Natural Resources Code 86.097. It was adopted in 1899. It provides that an operator may not produce gas from an oil well when the gas is in a stratum that's not associated with the oil. That was adjudicated. Whatever rights they might have are dependent on compliance with the law. The Harrington case which is cited in my reply brief has a similar circumstance when an East Texas field operator completed his well in a slant hole under another operator's lease even though the operator reported to the RRC that his well was within the 3% deviation. Whether WBD's perforations are compliant are not is a matter for the RRC to determine.

O'NEILL: If we were to decide that the declaratory judgment piece of the APA does not vest jurisdiction in the DC here, what then?

PUTMAN: I believe the court has two options. What we ask the court to do is to render judgment that the courts do not have jurisdiction to determine the validity of the order in 1087017.

O'NEILL: I guess my point is, there's been a lot of other bases raised for jurisdiction that the CA didn't address. And I don't get the impression there are very thoroughly briefed here. I realize they are mentioned but it appears the bulk of the briefing from the amicus briefs and everything else is focused on the rule-making verses contested case.

PUTMAN: Yes. And that frankly is our predominant concern. However, every single one of those issues should have been raised in a direct appeal of the order itself. The APA in 2001.174 includes as bases for reversal challenges to constitutional problems, challenges to statutory problems and everything else.

O'NEILL: So if we were to decide that this was a contested case, then it would be they didn't exhaust administrative remedies by bringing all of those questions within 30 days and we wouldn't have to deal with those other issues here. Is that correct? It would be a preservation exhaustion of remedies point.

PUTMAN: That's correct. WBD has not challenged action of the RRC. WBD has not sought an exception as it applies to their particular lease. Should those occur, WBD would again have the opportunity for judicial review of any and all of these issues, but the order itself will be valid going into that proceeding. And that's our concern is to have this order determined valid because it is final. It should be considered conclusive.