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Primary Jurisdiction in Environmental Cases Suggested Guidelines for Limiting Deferral

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PRIMARY JURISDICTION IN ENVIRONMENTAL CASES SUGGESTED GUIDELINES FOR LIMITING DEFERRAL

Primary jurisdiction is a doctrine that was created to resolve the jurisdictional dilemmas resulting when original jurisdiction over certain questions resides in both a court and an administrative agency.[1] The doctrine developed within the context of rate regulation and antitrust litigation.[2] More recently, primary jurisdiction has been applied to environmental controversies. This note analyzes the extent to which traditional notions of primary jurisdiction are suitable in the environmental context and evaluates judicial application of the doctrine in this area.

DEVELOPMENT OF THE DOCTRINE

Primary jurisdiction had its inception in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*[3] The Interstate Commerce Act[4] provides that charges for interstate shipments be at just and reasonable rates.[5] Abilene alleged that the railway charged more than a just and reasonable rate and sued to recover the excess charges. The railway argued that the district court could not hear the case because the Interstate Commerce Commission had not yet determined whether the rates were reasonable and because such a determination was necessary under the Interstate Commerce Act.[6] Justice White, writing for the Court, said:

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1. The doctrine of primary jurisdiction should not be confused with the doctrine of exhaustion of remedies. Primary jurisdiction arises when a claim is originally cognizable in a court and determines who should make the initial decision. Exhaustion arises from a claim originally cognizable in an agency and governs the timing of judicial review. *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1901, at 2 (1958) [hereinafter cited as DAVIS].

The question of primary jurisdiction is also distinguishable from the question of jurisdiction per se. In a case involving primary jurisdiction it is given that the court has original jurisdiction. The challenge raises only the question of whether the court will retain its jurisdiction or defer to concurrent agency jurisdiction. *Id.* at 3.

The procedure of judicial deference to an agency can take one of two possible forms. A court may defer certain questions to an agency but retain jurisdiction over the cause of action, or a court may dismiss the action. In the latter case, the opportunity for subsequent judicial review of the agency decision may exist. *Id.*

2. *See* Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations,* 65 YALE L.J. 315 (1956); Jaffe, *Primary Jurisdiction,* 77 HARV. L. REV. 1037 (1964); Jaffe, *Primary Jurisdiction Reconsidered: The Anti-Trust Laws,* 102 U. PA. L. REV. 577 (1954).

3. 204 U.S. 426 (1907).

4. Interstate Commerce Act ch. 104, 24 Stat. 379 (1887), *as amended,* 49 U.S.C. §§ 1-27 (1970).

5. Interstate Commerce Act § 1, ch. 104, § 1, 24 Stat. 379 (1887), *as amended,* 49 U.S.C. § 1(5) (1970).

6. Interstate Commerce Act § 15, ch. 104, § 15, 24 Stat. 379 (1887), *as amended,*

> [I]f without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question.[7]

Thus, the clash of concurrent jurisdiction was resolved giving the agency primary jurisdiction predicated on the necessity for uniform rate regulation.

Uniformity remained the basis of primary jurisdiction until 1922 when the Supreme Court decided *Great Northern Ry. v. Merchants Elevator Co.*[8] The action was brought by the elevator company, the shipper, to recover charges made in violation of the carrier's tariff.[9] The validity of the charges turned upon whether the body of the railway's tariff rule or its exception applied.[10] The carrier asserted that the extra charge was valid under the exception and, further, that the district court lacked jurisdiction until the Interstate Commerce Commission construed the tariff. The carrier's argument for I.C.C. jurisdiction was based upon

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49 U.S.C. § 15(1) (1970).

7. 204 U.S. at 440.

8. 259 U.S. 285 (1922).

9. For definitions and discussions of tariffs see Pacific S.S. Co. v. Cackette, 8 F.2d 259, 261 (9th Cir. 1925); Bernard v. United States Aircoach, 117 F. Supp. 134, 138 (S.D. Cal. 1953); Ft. Worth & D.C. Ry. v. Cushman, 92 Tex. 623, 624-25, 50 S.W. 1009, 1010 (1899); 49 U.S.C. § 6(1) (1970). *See generally* 83 C.J.S. *Tariffs* (1953).

10. 259 U.S. at 289. Rule 10 of the carrier's tariff read:

> Diversion or reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned, or reforwarded on orders placed with the local freight agent or other designated officer after arrival of car at original destination, but before placement of unloading, . . . a charge of $5.00 per car will be made if car is diverted, reconsigned, or reforwarded to a point outside switching limits of original destination.

259 U.S. at 289.

The exception known as exception (a), as amended by supplement 1, provided that rules (including Rule 10) shall not apply to:

> (a) Grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.

Id. The lower courts held that the exception meant

> cars of grain are exempted from Rule 10 if held on track at billed destination for inspection and for 'disposition orders' incident to such inspection [and] the disposition order may be an order to make disposition by way of reconsignment to another destination . . . .

Id.

uniformity.[11] However, Justice Brandeis, writing for the Court, refused to decide on that ground, denying that in all circumstances uniformity could be attained only through preliminary resort to the Commission:

> Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly reserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured.[12]

A new basis of primary jurisdiction stressing the distinction between questions of law and questions of fact was applied. The resolution of a question of law was held to be a matter for the courts. It was recognized that the resolution of questions of fact raising complex technical issues or involving standards of future practice requires preliminary resort to an administrative agency. Since the Court deemed the construction of a tariff to be a question of law, the Interstate Commerce Commission was not given primary jurisdiction. The lesson of this case is that primary jurisdiction may be used by a court as a discretionary device to decline the exercise of jurisdiction in deference to agency expertise.

Problems Associated with Deferral in the Environmental Context

The policies and standards developed in these early cases were designed to delineate the situations warranting deferral.[13] However, two aspects of present day litigation demonstrate that current guidelines for primary jurisdiction are generally inadequate and are particularly ill-suited to environmental controversies. First, courts have sometimes strictly adhered to these guidelines,[14] but at other times have given them only cursory consideration.[15] As a result, many marginal cases are deferred where there is little real advantage from agency consideration of issues.[16] One possible explanation for this result is that the boundaries of judicial discretion to defer are not sufficiently defined. Second, the question of deferral in environmental controversies involves identifica-

11. *Id.* at 290.
12. *Id.* at 290-91.
13. Professor Davis discusses in detail these policies and their development in 3 Davis, *supra* note 1, § 19.01, at 1-7.
14. *E.g.*, New Mexico v. Arizona Public Service Co., 5 E.R.C. 1385 (Sup. Ct. N.M. 1973); Houston Compressed Steel Corp. v. State, 456 S.W.2d 768 (Tex. Civ. App. 1970).
15. *See* Lichten v. Eastern Airlines, 189 F.2d 939 (2d Cir. 1951).
16. *See* note 14 *supra*.

tion and analysis of many interrelated factors, only one of which is factual complexity. By concentrating on "complexity," the present test ignores numerous other considerations vital to the issue of primary jurisdiction in environmental disputes. As a result of these inadequacies, a need emerges for a revised standard for primary jurisdiction in environmental cases.

On a broad level, the problem of primary jurisdiction raises the question of who is the better decisionmaker, *i.e.*, which institution, court or agency, is better equipped and more suited to resolve certain types of problems.[17] In the midst of the currently popular debate over this question, many arguments have been raised which apply generally to all questions of agency versus court competence. In the environmental context, much of this discussion takes on unique significance.

Many arguments are available in support of deferring to agencies on environmental issues. First, environmental decisions, probably more than any other area of the law, have wide-reaching ramifications, both for present day living conditions and, particularly, for the living conditions of future generations.[18] Traditionally, courts confine themselves to decisions on the particular issues at hand, binding only parties before the court, and based largely on past facts. Agencies, on the other hand, have an inherent "planning" function which looks to the future and considers an individual case within the broad scheme of implementing a legislatively determined goal-policy. Second, some argue that to be truly effective, environmental regulations demand uniform formulation and application.[19] Repeatedly in recent times Congress has been urged to set forth a clear policy for the environment.[20] The National Environmental

17. An interesting approach for resolving this apparent conflict has been adopted by California.

> No provision of this . . . [act] or any ruling [of the agency] is a limitation: . . . (e) on the right of any person to maintain at any time any appropriate action for relief against any private nuisance as defined in the Civil Code [§§ 3479-81] or for relief against contamination or pollution.

CAL. WATER CODE § 13002 (West 1969). To the extent that primary jurisdiction is a limitation on the right to maintain an action for relief from pollution, this provision could be interpreted as abolishing primary jurisdiction in California.

An alternative approach would be to provide for exclusive agency jurisdiction. Both approaches are extreme. Therefore, a decision favoring one approach over the other is one of policy for a legislature. However, in the absence of a legislative determination, a court confronted with primary jurisdiction issues must decide for itself who is the better decisionmaker.

18. Environmental decisions are often irreversible; therefore, any decision that may affect future generations must be made with extreme caution, following a thorough investigation.

19. Hickel, *Administrative Law and the Environment: National Fuels Policy—Preface*, 47 IND. L.J. 603-04 (1972).

20. *Id.*; Caldwell, *A National Policy for Energy*, 47 IND. L.J. 624-25 (1972).

Policy Act seems a definite step in this direction.[21] Piecemeal judicial determinations may frustrate this attempt to achieve uniformity.[22] Lastly, environmental questions often involve a high degree of technical complexity which may demand more familiarity and expertise than a court can offer.

Despite their initial appeal, these arguments are faulty and unpersuasive. Probably their most glaring defect is that, until now, agencies have simply not done the job of protecting the environment.[23] Some predicate this failure on the so-called "capture" theory which dictates that agencies are politically controlled by the very industries they were designed to regulate.[24] Even if "capture" is too strong a term, it must be admitted that agencies are subject to such political and economic pressures[25] that there is a "need to maintain some sort of politically balanced position among the constituencies with which [an administrator] regularly deals."[26] This need works to compromise the public interest.[27] A court, on the other hand, is relatively independent of political and economic pressures in hearing and deciding an environmental controversy.

In addition to political pressures, agencies are unresponsive to the pubic interest because they, like all bureaucracies, "tend to become somewhat ingrown, attached to their own concepts of policy. . . ."[28] In the environmental context, this inflexibility and "insider perspective"[29] is undesirable in the sense that no agency solution or plan is sufficiently perfect so as to never warrant modification. A court, however, is not subject to the factor of "insider perspective." Rather, "the very diversity

21. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970). *See also* Tarlock, *Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 47 IND. L.J. 645, 657-70 (1972).

22. Regulations set by environmental agencies will obtain little success if polluters realize that, despite compliance, they are still vulnerable to a damaging lawsuit, based on judicial standards stricter than the administrative guidelines. *See generally* Note, *Water Quality Standards in Private Nuisance Actions*, 79 YALE L.J. 102, 107-09 (1970).

23. Tarlock, Book Review, 47 IND. L.J. 406, 415 (1972).

24. Jaffe, *The Federal Regulatory Agencies in Perspective: Administrative Limitations in a Political Setting*, 11 B.C. IND. & COM. L. REV. 565, 565-66 (1970) [hereinafter cited as Jaffe].

25. J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZENS ACTION 56 (1971) [hereinafter cited as SAX].

26. *Id.* at 110.

27. Jaffe, *The Administrative Agency and Environmental Control*, 20 BUF. L. REV. 231, 235 (1970) [hereinafter cited as *Environmental Control*].

> Either because [the agencies] are unduly responsive to special interests or have become insulated from their constituencies, the agencies in many cases do not adequately reflect the interests of unrepresented or unorganized groups.

Id.

28. Jaffe, *supra* note 24, at 569.

29. SAX, *supra* note 25, at 56.

of the judicial role and the large numbers of judges among whom . . . [environmental] cases will be divided"[30] negates the possibility of unimaginative and unvarying decisions.

Whatever the rationale for administrative failure, it is apparent that courts, not agencies, have led the way in environmental protection.[31] Notable accomplishments, particularly in requiring a fuller administrative record and expanding standing to sue, have been achieved.[32] Moreover, courts have proven themselves capable of contributing significantly to the planning process. Courts cannot engage in large-scale planning. However, by inquiring into national and state policy, "the courts help promote the sort of continuous review and reevaluation that any large scale program needs . . . ."[33]

A complement to judicial activism is the emergence of citizen participation as an effective tool in policing the environment. Congress,[34] and the courts,[35] spurred on by the commentators,[36] have given explicit recognition to the need for public participation at all levels of environmental decisionmaking. Such participation is considered vital to properly express and protect the public interest.[37]

If citizen participation is to be favored, legal doctrines which impose burdens on that participation should, it seems, be narrowly limited in their application. Primary jurisdiction, as presently applied, potentially engenders unnecessary burdens of expense and delay[38] for the citizen litigant. Most public interest groups and individuals engaged in environmental litigation are ill-equipped financially to withstand the hardships of deferral. Moreover, the broad health, aesthetic and economic interests of the general public may be adversely affected or irreparably injured while the case is shuttled from court to agency.[39]

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30. *Id.* at 109.

31. Jaffe, *supra* note 24, at 568.

32. Sierra Club v. Morton, 405 U.S. 727 (1971); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

33. SAX, *supra* note 25, at 154.

34. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970).

35. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

36. SAX, *supra* note 25; *Environmental Control*, *supra* note 27; Ruckelshaus, *The Citizen and the Environmental Regulatory Process*, 47 IND. L.J. 636 (1972); Note, *Public Interest Right to Participate in Federal Administrative Agency Proceedings: Scope and Effect*, 47 IND. L.J. 682 (1972) [hereinafter cited as Note].

37. Note, *supra* note 36, at 688.

38. Schwartz, *Primary Jurisdiction and the Exhaustion of Litigants*, 41 GEO. L.J. 495 (1953). This article focuses on the problem of delay as an undesirable consequence of the misapplication of primary jurisdiction.

39. Defendants in these actions are often large corporations and there may be a great disparity in the economic resources available to each of the parties. This might make it impossible for the plaintiff to bear the expense of protracted agency action and judicial review. This may be contrasted with those situations where a state

The foregoing considerations indicate that the analysis required to resolve a primary jurisdiction question is exceedingly complex. There may be considerable adverse consequences associated with deferral. Yet, these are justified in cases where there is a legitimate need for agency expertise and planning. However, it is difficult for a court to distinguish such cases from those where injury to the interests of plaintiffs and the public outweighs the utility of deferral. This distinction is made even more difficult by the fact that the burdens of deferral are imposed not at the urging of the administrative agency, the public or the plaintiff, but rather at the urging of a defendant asserting an affirmative defense. Thus, a misapplication of primary jurisdiction represents a decision in favor of a defendant's interests. In order to achieve a desirable balance between the adverse effects of deferral and the utility of primary jurisdiction in environmental controversies new guidelines must be devised to narrowly define the limits of the application of primary jurisdiction.

PROPOSED GUIDELINES

The doctrine as it presently exists recognizes that questions of law are for the court and utilizes complexity as the standard to determine what factual questions should be deferred. However, since courts regularly resolve some complex questions of fact,[40] complexity alone should not be the sole criterion for judicial deference, but only the initial standard that must be met. Beyond this, the state of agency involvement in the problem must be considered.

If the agency has not yet studied the problem, courts should not defer. In the absence of agency planning, this conclusion prevents unnecessary expense and delay to the litigants, as well as potentially evoking a legislative or administrative response in terms of future planning. Similarly, if the agency has already studied the problem, courts should not defer. Rather, the court should hear the matter relying on the results of agency planning and investigation. Otherwise the agency would be required to repeat and duplicate its efforts at the expense of the litigants. Deferral of a complex factual issue is warranted only when the agency is in the process of considering the problem.[41] This result accommodates the need for planning and reduces the possibility of un-

attorney general initiates an action on behalf of a state environmental agency and with antitrust or rate regulation litigation where the economic disparity between parties is not so apparent.

40. For example, courts may use masters to resolve complex factual problems. *See* 30A C.J.S. *Equity* §§ 513-28 (1953).

41. Such simultaneous consideration may occur when the agency is involved in setting standards or is investigating a particular problem looking to the possibility of an enforcement action.

necessary expense and delay.

These guidelines reduce the potential for irreparable harm, encourage citizen participation by minimizing the undesirable consequences of expense and delay, and protect the interests of the public. At the same time courts are not required to duplicate agency work already in progress, thereby resulting in a workable allocation of functions between courts and agencies. Also, uniformity is preserved since, under this model, courts would not be setting standards inconsistent with agency guidelines. Finally, the range of judicial discretion is narrowed, thereby avoiding deferral of the marginal cases.

Analysis of Court Use of Primary Jurisdiction and Application of Proposed Guidelines

A recent environmental case involving primary jurisdiction is *White Lake Improvement Association v. City of Whitehall.*[42] This was a nuisance action in which the plaintiffs sought an injunction against the municipality for the discharge of improperly treated sewage into White Lake. The court denied that the Water Resources Commission had exclusive jurisdiction to provide relief against municipalities. It found that the Act establishing the Commission[43] did not abrogate existing common law remedies.[44] The court resolved the concurrent jurisdiction problem by applying primary jurisdiction, saying:

> To rule on the plaintiff's cause of action would require a court to duplicate the efforts of the water resources commission. . . . In order to achieve uniformity and consistency in this vital area, we think it would be wise for the courts to refrain from ruling on the merits of the association's claims at this time.[45]

The court denied injunctive relief and dismissed the suit, suggesting that

> [t]he association may administratively challenge the water resources commission's orders and then, if dissatisfied with the commission's disposition of its claims, it can obtain judicial review through the administrative procedure act.[46]

The court's analysis is problematic for two reasons. First, it is questionable whether an agency can always produce more consistent and

42. 22 Mich. App. 262, 177 N.W.2d 473 (1970).
43. Water Resources Commission Act, Mich. Comp. Laws Ann. § 323.1-.12(a) (1949).
44. 22 Mich. App. at ——, 177 N.W.2d at 478-79.
45. *Id.* at ——, 177 N.W.2d at 482.
46. *Id.*

uniform results than a court in a given set of circumstances.[47] Therefore, the need for consistency and uniformity should not necessarily lead a court to apply primary jurisdiction. Second, it indicates a departure from the complexity test. If that test had been applied in this case, the court might have retained jurisdiction and decided the case under either a state statute or the common law.[48] Under the statute, the only question of fact would be whether there was a discharge at all.[49] If the case were heard as a nuisance action the court would have to balance the harm from the discharges against the harm from issuing an equitable decree. Under either theory of action the factual inquiries involved would be the kind that a common law court is accustomed to making.

Admittedly, however, an injunction against a municipality may involve more complex considerations than an action against a corporate defendant.[50] Therefore, the court's application of primary jurisdiction may have been appropriate because subsequent to the plaintiff's complaint in this action, the Water Resources Commission entered into an agreement with the city under which an improved sewage treatment facility would be completed.[51] The existence of the agreement gives an indication that the Commission was considering the very issue raised in the lawsuit. Hence, on these facts it appears that the invocation of primary jurisdiction was warranted under the guidelines set out in this note.

In *Wisconsin v. Dairyland Power Cooperative*,[52] the plaintiff sought

47. *See* note 12 *supra*.

48. The Water Resources Commission Act provides that:

> The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of the violation of section 6(a) of this act unless said discharge shall have been permitted by an order, rule or regulation of the Commission. Any city, village or township which permits, allows or suffers the discharge of such raw sewage of human origin into any of the waters of the state by any of its inhabitants or persons occupying lands from which said raw sewage originates, shall be subject only to the remedies provided for in section 7 of this act.

MICH. COMP. LAWS ANN. § 323.6(b) (1949).

The court inquired whether municipalities were subject to actions under this statute or whether only landowners in the municipality were covered. No answer was given to this question, but the court clearly stated that even if municipalities were not covered by the act they were still subject to common law liabilities. 22 Mich. App. at ——, 177 N.W.2d at 478.

49. The statute makes any discharge prima facie evidence of a violation. MICH. COMP. LAWS ANN. § 323.6(b) (1949).

50. In addition to the economic consequences of an injunction, a court would have to consider the health hazards produced by enjoining a municipality's sewage treatment facilities, the state of technology, and the availability of alternative methods of treatment. In sum, the problem is whether a municipality's sewage treatment facilities could ever be enjoined.

51. 22 Mich. App. at ——, 177 N.W.2d at 475.

52. 52 Wis. 2d 45, 187 N.W.2d 878 (1971).

abatement of defendant's power plant as a public nuisance alleging that it emitted fumes, smoke, gases, soot and other particles in such quantity as to threaten the public health. The defendant demurred on the ground that the State Department of Natural Resources had primary jurisdiction. The trial court overruled the demurrer and the defendant appealed. The appellate court discussed whether it could adequately consider the facts before it:

> A substantial portion of appellant's brief is devoted to an exposition of the complex nature of the pollution problem and the technological difficulties involved in discovering methods of abating the particular kind of pollution appellant is charged with emitting. Appellant contends that there is no way, given the present state of the science, that it can effect substantial reductions in the emissions of sulphur oxides and still continue to operate. If that is true, then the fact questions in this case are relatively simple.[53]

The court did not explain any of the facts concerning the state of pollution abatement technology. This omission makes impossible a detailed analysis of the complexity of this particular problem. However, defendant's allegations raise the spectre of complexity, especially since the plaintiff-appellees made no admissions on the "impossibility" issue. Even though the court in approaching the complexity issue should have engaged in a deeper analysis of the problem, the denial of primary jurisdiction in this case was appropriate since there was no simultaneous agency consideration.[54]

Two recent cases that exemplify proper application of primary jurisdiction are *Houston Compressed Steel Corp. v. State*[55] and *New Mexico v. Arizona Public Service Co.*[56]

In *Houston Compressed Steel,* the plaintiff alleged that the defendant was violating the Clean Air Act[57] by outdoor burning of wood from old boxcars. The Texas Air Control Board had not granted the defendant a variance nor did the defendant come within an exception to the Board's regulatons. The trial court granted a temporary injunction, and on appeal the defendant presented several points of error, one of which was that primary jurisdiction should have been invoked. The Texas

53. *Id.* at 56, 187 N.W.2d 883-84.
54. *See* note 40 *supra* & text accompanying.
55. 456 S.W.2d 768 (Tex. Civ. App. 1970).
56. 5 E.R.C. 1385 (Sup. Ct. N.M.1973).
57. TEX. REV. CIV. STAT. ANN. art. 4477-5 (1971). Pursuant to § 3.09(a) and § 3.10(c) of the Act, the Texas Air Control Board had passed Regulation II, which limited outdoor burning to specifically named purposes. 456 S.W.2d at 771.

Apellate Court affirmed the trial court and rejected the contention that this was an appropriate case for the application of primary jurisdiction.[58] The court strictly applied the law-fact test finding:

> There was little, if any, dispute as to the facts for determination by the trial court in the instant case: did the appellants come within an exception to the prohibition against outdoor burning or had they obtained a variance from the Board? Neither question involved "technical and intricate matters of fact" . . . .[59]

If the Texas Air Control Board had been in the process of developing a regulation with respect to outdoor burning, or if the Board had been in the process of granting a variance to the defendant, then the resolution of the factual issues before the court would not have been so simple. In such a situation, the court could properly defer to prevent an inefficient allocation of functions because the court would have to duplicate the agency's extensive evaluation of scientific data to detemine the harmful effects of outdoor burning. However, that was not the situation in this case for the Board had already promulgated regulations and was not considering an application for a variance. Therefore, as the court noted, the factual issues of whether the defendant's activity violated the law was relatively simple. It is the type of question courts must answer in almost every case.

The second case, *New Mexico v. Arizona Public Service Co.*,[60] was a public nuisance action to enjoin emissions of several substances, including mercury, from five coal burning power plants. The defendants, electric utility companies, moved to dismiss on several grounds, one of which was primary jurisdiction. The trial court denied application of primary jurisdiction, finding that its expertise was sufficient to determine all factual questions involved.[61] However, the trial court did recognize that the question of excessive emissions was also within the purview of the State Environmental Improvement Agency,[62] but noted that the Agency had not yet established regulations proscribing the components

58. 456 S.W.2d at 771.

59. *Id.* at 772.

60. 5 E.R.C. 1385 (Sup. Ct. N.M. 1973).

61. The court said: "No personal expertise is required of the court or its staff in any of the fields to reach findings of fact." State v. Arizona Public Service Co., 3 E.R.C. 1617, 1620 (Dist. Ct. San Juan City, N.M. 1972).

It was also noted:

> That the Court might have to administer its decree should it impose one is no deterrent to its affording relief if proper. Masters, receivers and marshalls or sheriffs are the traditional arms of the Court when appropriate.

Id.

62. N.M. STAT. ANN. § 12-19-4 (1971).

of the defendant's smokestack emissions.[63] Upon the facts recognized by this court, the refusal to apply primary jurisdiction was proper.[64]

The New Mexico Supreme Court reversed the order of the trial court refusing to dismiss the complaint.[65] The Supreme Court took a different view of the facts. Although the Agency had not established proscriptive regulations, the court considered that

> [t]he affadavits establish that the agency has been and is presently engaged in research study and investigation of mercury, the contaminate identified in the fourth claim of the complaint, and that it will propose the adoption of a regulation governing the emission of mercury if the results of the studies indicate the need therefor.[66]

Because the Agency was proceeding with a determination of the factual issues involved in the case, the court properly applied primary jurisdiction.[67]

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63. 3 E.R.C. at 1619.

64. If that agency could equally afford the relief sought and was going forward with such a determination, then there might be good reason for the court to defer until the agency results could be viewed. This would thus prevent the court from launching into an inquiry for which the agency might be better equipped.

Id. at 1620.

65. 5 E.R.C. at 1390.

66. *Id.* at 1388.

67. The guidelines proposed in this note will be of no use to a court if there is no real primary jurisdiction issue. An example of such a case is Ellison v. Rayonier Inc., 156 F. Supp. 214 (S.D. Wash. 1957). Plaintiffs sought to recover losses from their oyster bed operation allegedly caused by water pollution from defendant's pulp mills. The defendant moved to dismiss on the ground that the Pollution Control Commission had exclusive jurisdiction. However, it was held that the common law right to damages had not been abolished. Consequently there was a situation of concurrent jurisdiction.

In his opinion, Judge Boldt discussed the doctrine of primary jurisdiction, but did not indicate how he would have decided that issue. He noted that the plaintiffs failed to make any allegations of standards set by the State Water Pollution Control Commission or action taken by the Commission to abate or control the pollution of which the plaintiffs complained. He further stated that

> dismissal of the complaints will not be granted pending application for their amendment by allegations concerning administrative action warranting further judicial process in this court.

Id. at 220. Thus, the result appeared to be premised on the plaintiffs failure to plead properly, rather than on an application of primary jurisdiction.

Seven years later in Olympia Oyster Co. v. Rayonier Inc., 229 F. Supp. 855 (S.D. Wash. 1964), Judge Boldt was confronted with the *Ellison* case only under a different name. He wrote: "This case is one of a group of related cases to which the doctrine of primary jurisdiction was held applicable in *Ellison v. Rayonier Incorp.*" *Id.* at 856. Surprisingly, one learned that Judge Boldt felt that he had applied primary jurisdiction in *Ellison,* though that opinion gave no indication that primary jurisdiction was the basis of the decision. The rationale for applying the doctrine was that

> [u]nder primary administrative jurisdiction principles held applicable in

CONCLUSION

These last two cases demonstrate the benefits which result from following the theoretical guidelines set forth in this note. The requirements of factual complexity and simultaneous agency evaluation lead to the most efficient allocation of time and resources of both courts and agencies. These requirements place an effective limit on deferral to agencies which prevents a needless burden on the administrative process. Yet deferral is permitted where these burdens are minimal and the agency may be particularly well suited to contribute to the decisionmaking process.

Most importantly, the proposed guidelines encourage citizen participation in the environmental decisionmaking process by limiting the expense and delay of unnecessary deferral. If citizen participation is truly the watchword of environmental protection, then these guidelines are another step in achieving the ultimate goal of a clean environment.

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Ellison, plaintiff has the burden of proof to show one or more violations of the permit conditions applicable to the operation of the Shelton Mill.

Id. at 858.

Ellison illustrates the extent to which primary jurisdiction can be misconceived. There was no need to discuss primary jurisdiction. The court could have compelled the plaintiffs to amend their complaint pursuant to FED. R. CIV. P. 15 without reference to the doctrine of primary jurisdiction. The court invoked the doctrine as an indirect means to accomplish a result that could have been reached directly.