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Protecting Operators Who Act In Reliance on an Order of the Commissioner of Conservation

The Commissioner of Conservation is the head of the Office of Conservation, a division of the Department of Natural Resources and the agency with primary regulatory responsibility for oil and gas operations in Louisiana. As the Office of Conservation is a state agency, actions taken by the Commissioner are subject to the usual rules and procedures of administrative law. Like many administrative statutes, the Conservation Act, Title 30, has its own set of administrative rules in La. R.S. 30:12, which is modeled, with some minor differences, after the comparable provisions of the Administrative Procedures Act.

One consequence of this regulatory scheme is fairly well-known—a unit order issued by the Commissioner may not be challenged for the first time in a lawsuit. Instead, under the doctrines of exhaustion of remedies and primary jurisdiction, any challenge to an order of the Commissioner must be raised first in an administrative proceeding before the Commissioner. Then, only if the Commissioner denies that challenge may the Commissioner's order be appealed under La. R.S. 30:12 to a Louisiana district court in East Baton Rouge Parish.

A related consequence is less well-known but can be extremely useful and important for oil and gas operators—the collateral attack doctrine. Under the collateral attack doctrine, a party may not indirectly, or "collaterally," attack or otherwise call into a question a Commissioner's order in litigation that is not an action for judicial review under La. R.S. 30:12. Plaintiffs often attempt to evade the doctrines of exhaustion of remedies and primary jurisdiction by portraying their challenge as something other than a direct attack on an order of the Commissioner and by explicitly disclaiming any intent to challenge the Commissioner's order. For instance, a plaintiff may claim that it is challenging not the order but the operator's violation of some other, independent obligation (such as that arising from a lease or other agreement) or that it is not challenging the order but instead is seeking only a declaration of the parties' rights under, again, an independent source of obligations (such as a contract or statutory law).

The collateral attack doctrine prohibits such suits. The prohibition against challenging an order of the Commissioner is not limited only to suits that would nullify or require a party to violate an

order. Instead, as the United States Fifth Circuit put it in *Trahan v. Superior Oil Co.*, the doctrine "extends to suits between private parties in which a particular order of the Commissioner is an operative fact upon which the determination of the parties' respective rights directly depends, even though all relief sought can be given, such as by money damages or lease cancellation", for "Louisiana decisions clearly reflect the principle that suit under [La. R.S. 30:12] is the exclusive means by which an order of the Commissioner may be called into question in a judicial proceeding." 700 F.2d 1004, 1014-16 (5th Cir. 1983).

Concretely, as the court put it in *Vincent v. Hunt*, this means that any suit that requires a court to do more than "accepting the Commissioner's order as valid … simply reading the order itself, with no effort at interpretation," is an impermissible collateral attack on an order of the Commissioner and must be dismissed. 221 So.2d 577 (La. App. 3 Cir. 1969).

The collateral attack doctrine provides important protection to oil and gas operators who act in reliance on an order of the Commissioner. The Commissioner's orders cannot be challenged either directly or obliquely. So, an operator generally can act in reliance on such an order without fear of facing a later suit for having done so.

Finally, this protection extends not just to unit orders, but also, under the broad language of La. R.S. 30:12, to any action taken by the Commissioner. However, it does not extend to actions taken by private parties under the Conservation Code, such as the formation of "voluntary units." This protection is an additional reason we generally counsel our operator clients to apply to the Commissioner for a "Commissioner's unit" instead of relying on a privately formed voluntary unit.