Judicial Review of Conservation Orders

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JUDICIAL REVIEW OF CONSERVATION ORDERS

Introduction

The Office of Conservation within the Department of Natural Resources of the state of Louisiana exercises the functions of the state with respect to the regulation, conservation, and use of the state's natural resources. It prevents the waste of oil, gas, geothermal resources, and lignite and other forms of coal, through unitization and avoidance of unnecessary recovery operations. The Office of Conservation is directed and controlled by the Commissioner of Conservation, who serves as Assistant Secretary for Conservation of the Department of Natural Resources. All natural resources not within the jurisdiction of other state departments or agencies are within the jurisdiction of the Office of Conservation, and the Commissioner maintains jurisdiction and authority over all persons and property necessary to enforce effectively the laws relating to the conservation of oil and gas.

The Commissioner of Conservation is empowered with considerable authority, perhaps the most important of which is the power to make

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6. LA. R.S. 30:4(B) (Supp. 1981) provides that in the exercise of his powers the Commissioner has the following authority:
   to collect data; to make investigations and inspections; to examine properties, leases, papers, books, and records; to examine, survey, check, test, and gauge oil and gas wells, tanks, refineries, and modes of transportation; to hold hearings; to provide for the keeping of records and the making of reports; and to take any action as reasonably appears to him to be necessary to enforce the [provisions of title 30].

Whenever it appears to the Commissioner that any person has engaged in or is about to engage in any act constituting a violation of title 30 or of any regulation, rule, or order issued thereunder, the Commissioner may bring an action to enjoin such act and to enforce compliance with the applicable rule, regulation, or order. Further, upon a proper showing, a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. The Commissioner is authorized to seek relief which may include a mandatory injunction commanding the violator to comply with the violated rule, regulation, or order, and to make restitution of money received in violation of the rule, regulation, or order. Finally, the Commissioner may transmit evidence of the violations to the district attorney having jurisdiction over the violator for the institution of the necessary criminal proceedings. LA. R.S. 30:542 (Supp. 1973).
any reasonable rules, regulations, and orders necessary in the administration and enforcement of the provisions of title 30. 7 Delegating

7. LA. R.S. 30:4(C) (1950 & Supp. 1982) sets forth purposes for which the Commissioner may establish rules, regulations, or orders:

(1) To require the drilling, casing, and plugging of wells to be done in such a manner as to prevent the escape of oil or gas out of one stratum to another; to prevent the intrusion of water into oil or gas strata; to prevent the pollution of fresh water supplies by oil, gas, or salt water; and to require reasonable bond with security for the performance of the duty to plug each dry or abandoned well.

(2) To require the making of reports showing the location of all oil and gas wells, and the filing of logs, electrical surveys, and other drilling records.

(3) To prevent wells from being drilled, operated, and produced in a manner to cause injury to neighboring leases or property.

(4) To prevent the drowning by water of any stratum or part thereof capable of producing oil or gas in paying quantities, and to prevent the premature and irregular encroachment of water which reduces, or tends to reduce, the total ultimate recovery of oil or gas from any pool.

(5) To require the operation of wells with efficient gas-oil ratios, and fix these ratios.

(6) To prevent blow outs, caving and seepage in the sense that conditions indicated by these terms are generally understood in the oil and gas business.

(7) To prevent fires.

(8) To identify the ownership of all oil or gas wells, producing leases, refineries, tanks, plants, structures, and all storage and transportation equipment and facilities.

(9) To regulate the shooting and chemical treatment of wells.

(10) To regulate secondary recovery methods, including the introduction of gas, air, water, or other substance into producing formations.

(11) To limit and prorate the production of oil or gas or both from any pool or field for the prevention of waste.

(12) To require, either generally or in or from particular areas, certificates of clearance or tenders in connection with the transportation of oil, gas, or any product.

(13) To regulate the spacing of wells and to establish drilling units, including temporary or tentative spacing rules and drilling units in new fields.

(14) To require interested persons to place uniform meters of a type approved by the commissioner wherever the commissioner designates on all pipelines, gathering systems, barge terminals, loading racks, refineries, or other places necessary or proper to prevent waste and the transportation of illegally produced oil or gas.

(15) To require that the product of all wells shall be separated into so many million cubic feet of gaseous hydrocarbons and barrels of liquid hydrocarbons, either or both, and accurately measured wherever separation takes place.

(16) To regulate by rules, the drilling, casing, cementing, disposal interval, monitoring, plugging and permitting of disposal wells which are used to inject waste products in the subsurface and to regulate all surface and storage waste facilities incidental to oil and gas exploration and production, in such a manner as to prevent the escape of waste product into a fresh ground water aquifer or into oil or gas strata; and may require reasonable bond with security for the performance of the duty to plug each abandoned well or each well which is of no further use. . . .

(17) To regulate the construction design and operation of pipelines transmitting carbon dioxide to serve secondary and tertiary recovery projects for in-
this power to the Commissioner relieves the legislature of the responsibility of providing for all contingencies and recognizes the practical problems associated with growth and development in the state's oil and gas industry. Orders are issued by the Commissioner following a public hearing wherein testimony and evidence are presented supporting the respective positions of the various interested parties—all interested persons are entitled to be heard. After considering all available geological and engineering evidence, the Commissioner makes findings of fact and issues an order furthering any one of the numerous provisions of title 30.

Forms of Judicial Review

Because of their nature, orders of the Commissioner of Conservation necessarily affect various parties' rights in valuable natural resources, and the orders often involve immense sums of money. Consequently, a person unsatisfied with the Commissioner's determination may wish to dispute the Commissioner's order. Louisiana Revised Statutes 49:964, part of the Administrative Procedure Act, and Louisiana Revised Statutes 30:12, part of the Conservation Act, provide two parallel and coexisting forms of judicial review, each separate and dissimilar to the other. Differences existing between the two statutes may influence the strategy of a potential plaintiff. First, under the two statutes, different persons may be entitled to bring the action. Second, the relief sought under the two statutes differs—a
30:12 action seeks injunctive relief, while a 49:964 action seeks judicial review, i.e., it asks the court to reverse, remand, or modify an agency's decision. Third, the scope of review under 49:964 is confined to the

is no statutory requirement that all administrative remedies be exhausted; the aggrieved person is entitled to judicial review regardless of "whether or not he has applied to the agency for rehearing." Nonetheless, the exhaustion of administrative remedies doctrine has been applied to section 964, and the phrase "final decision" supports the argument that all administrative remedies must be exhausted. See Romero v. Stephens, 359 So. 2d 1061 (La. App. 3d Cir. 1978); Bonomo v. Louisiana Downs, Inc., 337 So. 2d 553 (La. App. 2d Cir. 1976). However, the authorities cited in Bonomo did not involve the statutory language contained in LA. R.S. 49:964, and they therefore are distinguishable. See McKart v. United States, 395 U.S. 185 (1969); Ecology Center v. Coleman, 515 F.2d 860 (5th Cir. 1975). Further, the statutory provision immediately preceding section 964, LA. R.S. 49:963, is contrary to section 964 and contains an express requirement of exhaustion of administrative remedies. Arguably, this reflects an attempt to exclude this requirement from section 964. See also, Force & Griffith, supra note 14, at 1276. Additionally, LA. R.S. 30:12 expressly requires the exhaustion of all administrative remedies. See Hunter v. Hussey, 90 So. 2d 429 (La. App. 1st Cir. 1956). The exhaustion of administrative remedies requirement supports the Commissioner's authority to make findings of fact. See O'Meara v. Union Oil Co., 212 La. 745, 33 So. 2d 506 (1947).

The provisions of LA. R.S. 30:12 grant the right to obtain judicial review to an interested person who has been adversely affected or threatened by a provision, rule, regulation, order, or act of the Commissioner of Conservation. LA. R.S. 30:3(3) (1950) defines "Person" to mean any natural person, corporation, association, partnership, receiver, tutor, curator, executor, administrator, fiduciary, or representative of any kind. In Hunter v. Hussey, 90 So. 2d 429 (La. App. 1st Cir. 1956), the court held that landowners who have refused to sign "Unitization and Unit Operations Agreements" and, thus are not affected by an order of the Commissioner of Conservation are not "adversely affected" within the meaning of LA. R.S. 30:12. No jurisprudence defines what makes a person "interested," but the provision may require that the person own some interest in the subject of the dispute. ("Interested owners" and "interested parties," as defined by Louisiana Comm'r of Conservation, Statewide Order 29-L (1976), reprinted in HANDBOOK FOR THE OIL AND GAS INDUSTRY 29L(1) (6th ed. 1981) which deals with the termination of units established by the Commissioner, require ownership of some interest.)

16. The form of relief provided under LA. R.S. 49:964 is judicial review of the agency decision. Immediate review is available only where a final agency decision would not provide an adequate remedy and irreparable injury would result. LA. R.S. 49:964(A). See generally, Force & Griffith, supra note 14, at 1276-87.

The reviewing court may affirm or remand the case. Additionally, in certain circumstances the reviewing court may reverse or modify the decision if substantial rights of the petitioning party have been prejudiced. LA. R.S. 49:964(G). Further, the statute permits the reviewing court to issue a stay of enforcement upon appropriate terms. LA. R.S. 49:964(C). In Division of Admin. v. Department of Civil Serv., 345 So. 2d 67 (La. App. 1st Cir. 1976), the court of appeal, in adopting guidelines pertaining to a stay of an administrative order, expressly adopted and applied the standards set forth in two federal cases. The first case was Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958), in which the court listed four factors to consider before granting or denying the request for a stay order: (1) Has the peti-
record, while the scope of review is expanded under 30:12 which authorizes review of all pertinent evidence.\(^7\) Despite their dissimilarities, the two statutes are not mutually exclusive, and relief may be sought under both.\(^8\)

**Burdens of Proof**

Another significant difference between the two statutes is their respective burdens of proof. Under 49:964, the plaintiff may demonstrate in a number of ways that his rights have been prejudiced by an agency's decision. Prejudice may be evidenced by a violation of a constitutional or statutory provision, by agency actions exceeding statutory authority, by unlawful procedure, or by an error of law.\(^9\) Further, the plaintiff may show that the agency's decision is arbitrary,
capricious, or characterized by an abusive or clearly unwarranted exercise of discretion.\(^2\)

Finally, under 49:964, a plaintiff may show that the Commissioner’s findings, inferences, conclusions, or decisions are “manifestly erroneous” in view of the reliable, probative, and substantial evidence on the whole record.\(^2\) The statutory language incorporates the “manifest error doctrine,” thereby giving great weight to factual conclusions reached by the trier of fact and leaving undisturbed his reasonable evaluations of credibility and inferences of fact, notwithstanding the possibility of other reasonable evaluations.\(^2\) The “manifest error doctrine” contained in section 964(G)(6) relates only to factual findings of the trier of fact; it has no application to conclusions of law or public policy.\(^2\) The doctrine is supported in the statutory language which requires that due regard be given to the agency’s determination of credibility issues where the agency has the opportunity to judge the credibility of the witnesses by firsthand observation of demeanor on the witness stand and the reviewing court does not.\(^2\)

Louisiana Revised Statutes 30:12 expressly places the burden of proof upon the plaintiff. Further, the provision, rule, regulation, or order challenged by suit under 30:12 is given a presumption of validity and taken as “prima facie valid” — a presumption not overcome by a verified petition or affidavit.\(^2\) In Mobil Oil Corp. v. Gill,\(^2\) an attempt to have an order of the Commissioner declared null failed because of the presumption of validity attached to the order. The court of appeal, quoting the trial judge, held that the presumption of validity given to the Commissioner’s order is appropriately applied “[w]here experts disagree, where proven facts show the existence of many variables, [and] where reaching a fair balance involves incausal variants.”\(^2\) Gill was cited recently in Dunn v. Sutton,\(^2\) wherein a claim

20. LA. R.S. 49:964(G)(5).
24. LA. R.S. 49:964(G)(6).
25. See Jordan v. Sutton, 401 So. 2d 389 (La. App. 1st Cir. 1981); Dunn v. Sutton, 378 So. 2d 485 (La. App. 1st Cir. 1979); Miller v. Menefee, 228 So. 2d 689 (La. App. 1st Cir. 1969); Mobil Oil Corp. v. Gill, 194 So. 2d 351 (La. App. 1st Cir. 1966).
27. 194 So. 2d at 355.
28. 378 So. 2d 485 (La. App. 1st Cir. 1979).
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for injunctive relief seeking to include the plaintiff's land within a unit previously established by the Commissioner was rejected because of the plaintiff's failure to carry his burden of proving the order to be arbitrary and capricious.

Even though the Commissioner is presumed as a matter of law to have acted in good faith, the order's presumption of validity is not conclusive. However, courts have refused to substitute their discretion or judgment for that of the Commissioner in the absence of evidence showing the Commissioner's action to be arbitrary. In addition to reducing congestion in the courts, this presumption allows an administrative officer, familiar with technical complexities, to provide a proper resolution of the dispute before him. The high burden of proof imposed by the order's presumption of validity has never been overcome, consequently making challenges few in number.

Theory of Laches

Perhaps the most significant difference between 49:964 and 30:12 is the time limit for review. Proceedings for review under Louisiana Revised Statutes 49:964 must be brought within thirty days after the mailing of notice of the final agency decision. Louisiana Revised Statutes 30:12, however, contains no similar provision—as a judicial response, the doctrine of laches has been applied to determine timeliness of review under this statute. Consequently, the absence of a time limitation on an action brought under 30:12 may mean that an order of the Commissioner of Conservation can be attacked at any time, subject only to the application of laches.

Recent Application of Laches to Louisiana Revised Statutes 30:12

The initial application of laches in a 30:12 action is found in Jor- dan v. Sutton, wherein under the authority of 30:12, the plaintiff-

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30. Monsanto Chem. Co. v. Hussey, 234 La. 1058, 102 So. 2d 455 (1958); O'Meara v. Union Oil Co., 212 La. 745, 33 So. 2d 506 (1947); Hunter v. McHugh, 202 La. 97, 11 So. 2d 495 (1942); Dunn v. Sutton, 378 So. 2d 485 (La. App. 1st Cir. 1979); Mobil Oil Corp. v. Gill, 194 So. 2d 351 (La. App. 1st Cir. 1966), writ denied, 250 La. 179, 194 So. 2d 738 (1967); see Miller v. Menefee, 228 So. 2d 689 (La. App. 1st Cir. 1969).
31. Hunter v. McHugh, 202 La. 97, 11 So. 2d 495 (1942); see also O'Meara v. Union Oil Co., 212 La. 745, 33 So. 2d 506 (1947).
35. 401 So. 2d 389 (La. App. 1st Cir. 1981). Notably, laches recently was applied
landowner sought to enjoin the enforcement of an order of the Commission establishing an underground gas storage area on his property. The Louisiana First Circuit Court of Appeal, on original hearing, found that it was "manifestly unjust or inequitable" to apply laches and overruled the exception. Although noting that laches had been applied in contexts other than the judicial review of conservation orders, the court expressly recognized the absence of any cases applying laches to actions for the review of orders of the Commissioner of Conservation under 30:12. However, on rehearing, the court reversed its position and held that the doctrine of laches was applicable in an action under 30:12. The court stated that laches served as a bar to a plaintiff's action when no set term for the appeal of an administrative ruling was required by statute and when the plaintiff failed to appeal within a reasonable time. The first circuit remanded the case to the trial court, where the judge determined sixty days to be the "reasonable" period of time in which a plaintiff could bring a suit under 30:12.

The exception of laches is based on the plaintiff's failure to bring an action for judicial review within a reasonable time—it is an equitable doctrine exercised within the court's discretion, with each case determination resting upon its particular set of circumstances and controlled by equitable considerations. Louisiana courts often have stated that laches is based on the injustice that might result from the enforcement to bar an action brought under the authority of La. R.S. 30:12. Carbello v. Sutton, No. 249,645 (19th Jud. Dist. Ct., Dec. 16, 1982). Relying on the authority of Jordan v. Sutton, the trial judge refused to set a precise time in which to institute a La. R.S. 30:12 action and simply held that the plaintiff's action, which was commenced within the 60 day period for devolutive appeals, was barred by laches. Defining the court's sole function to be to determine (1) whether there was unreasonable delay in bringing the suit, and (2) whether allowing the suit would result in injury, the trial judge expressed the following: "The fixing of a prescribed time for bringing an action is peculiarly and exclusively within the control and authority of the legislature."

36. Id. at 390.
37. 401 So. 2d at 393 (citing State ex rel Koehl v. Sewerage & Water Bd., 179 La. 117, 153 So. 533 (1934)).
38. 401 So. 2d at 393.
39. Id. at 393-94.
40. Id.
42. See Labarre v. Rateau, 210 La. 34, 26 So. 2d 279 (1946); Fontenot v. State Dep't of Pub. Safety, 341 So. 2d 80 (La. App. 3d Cir. 1976); Molero v. Bass, 322 So. 2d 452 (La. App. 4th Cir. 1975); Knight v. Louisiana State Bd. of Medical Examiners, 195 So. 2d 375 (La. App. 4th Cir. 1967).
of long neglected rights, the difficulty, if not the impossibility, of ascertaining the truth of the matters in controversy and doing justice between the parties, and on grounds of public policy, its aim being the discouragement, for the peace and repose of society, of stale and antiquated demands.\textsuperscript{43}

It should not be invoked to defeat justice; rather, it should be applied only where the enforcement of an asserted right would work injustice.\textsuperscript{44}

In \textit{Jordan},\textsuperscript{45} the court of appeal clearly defined two elements necessary to establish that a plaintiff has been "guilty" of laches.\textsuperscript{46} First, there must be unreasonable delay on the part of the plaintiff in filing suit. Second, it must be shown that a harm or prejudice will be suffered by either the defendant or a third party. This harm will result because the defendant or some third party has acted on the reasonable assumption, occasioned by the delay, that the plaintiff would not seek further legal redress.\textsuperscript{47}

"Unreasonable delay" was not defined in the court of appeal's opinion because the record was considered incomplete on the issue of laches.\textsuperscript{48} Although further testimony and receipt of evidence was permitted on remand, an apparent balancing by the court of appeal was evident in the opinion. On the one hand, the plaintiff had delayed for fifteen months. On the other hand, mitigating circumstances existed. First, the record contained testimony by the plaintiff that communications by the Commissioner had led him to believe that the contested order would be set aside without any need to bring an action. Additionally, the plaintiff's change of counsel during the fifteen month period may have accounted for some of the delay. What constitutes "unreasonable delay" remains unresolved, yet, notably, the trial court on remand determined that the Commissioner had not misled the plaintiff.\textsuperscript{49}

Similarly, the degree of harm or prejudice required to merit the application of laches was not defined by the court of appeal in \textit{Jordan}. The case was remanded to determine whether any prejudice had resulted to a third party, the intervenor constructing a gas storage area over the plaintiff's land. Whether the Commissioner individually

\begin{itemize}
\item \textsuperscript{43} Labarre v. Rateau, 210 La. 34, 51, 26 So. 2d 279, 285 (1946).
\item \textsuperscript{44} \textit{Id.}; Shirey v. Campbell, 151 So. 2d 557 (La. App. 2d Cir. 1963).
\item \textsuperscript{45} Jordan v. Sutton, 401 So. 2d 389 (La. App. 1st Cir. 1981).
\item \textsuperscript{46} \textit{Id.} at 393.
\item \textsuperscript{47} \textit{See State ex rel. McCabe v. Police Bd., 107 La. 162, 31 So. 662 (1902); Knight v. Louisiana State Bd. of Medical Examiners, 195 So. 2d 375 (La. App. 4th Cir. 1967).}
\item \textsuperscript{48} 401 So. 2d at 394.
\end{itemize}
could suffer prejudice was not addressed by the court of appeal,\(^5\) but the application of laches "in and of itself in view of the nature and effect of the orders of the Commissioner" was rejected.\(^6\)

On remand, the trial judge found that a variety of interests would suffer harm. First, lack of finality in the Commissioner's orders would place the Office of Conservation in disarray. Second, the trial judge feared that orderly operation of the oil and gas industry in the state of Louisiana would be damaged in contravention of the public interest. Additionally, prejudice would be suffered by a third party who had intervened in the case having undertaken a project with expenditures in excess of $100 million, a large portion of which had been spent based on the opinion of counsel that the Commissioner's order was final. Finally, the taxpayers would suffer harm in the form of loss of jobs and facilities and an additional loss if tax deductible losses suffered by the third party resulted in lower tax revenues.

Generally, because the applicability of laches is within the discretion of the court, each case should rest upon its own particular set of circumstances.\(^7\) Yet, the reasoning of the trial judge in Jordan indicates that sixty days would be an appropriate limit in all conservation suits because of the nature of the Commissioner's orders. The full import of this ruling is unclear; however, it appears that Louisiana now allows the application of laches in 30:12 actions.

**Procedural Characterization of Laches**

The potential use of laches in conservation practice makes evident the need for its procedural characterization. Conceived in common law courts of equity, laches is foreign to Louisiana courts of law. Understandably puzzled, Louisiana courts have characterized it as an affirmative defense\(^8\) and a peremptory exception\(^9\) and sometimes have

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50. Laches barred a suit by a tenured bus driver seeking to recover unpaid salary following the discontinuance of his school bus route. The delay in bringing the action was less than one year, and it was found to cause "disadvantage to public administration and the public fisc." Arrington v. Grant Parish School Bd., 130 So. 2d 443, 445 (La. App. 3d Cir. 1961). This decision supports the argument that unreasonable delay can prejudice the Commissioner of Conservation by impeding public administration and wasting public funds.

51. 401 So. 2d at 394.

52. See Fontenot v. State Dep't of Pub. Safety, 341 So. 2d 80 (La. App. 3d Cir. 1976); Molero v. Bass, 322 So. 2d 452 (La. App. 4th Cir. 1975); Knight v. Louisiana State Bd. of Medical Examiners, 195 So. 2d 375 (La. App. 4th Cir. 1967); Labarre v. Rateau, 210 La. 34, 26 So. 2d 279 (1946).

53. See cases cited in note 61, infra.

labeled it simply a plea, a defense, or an exception. Federal courts characterize laches as an affirmative defense, and failing to properly plead it may constitute a waiver. Likewise, most states characterize laches as an affirmative defense.

Despite this cloudy jurisprudence, Louisiana Code of Civil Procedure article 1005 has been interpreted to include laches within Louisiana’s list of affirmative defenses, which are waived unless specially pleaded. Further, references by Louisiana courts to the doctrine of “estoppel by laches” and references in other states to laches as a creature of estoppel support the inclusion of laches within the

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App. 1st Cir. 1976); Dunbar v. Griffin, 331 So. 2d 36 (La. App. 3d Cir. 1976); Albrighton v. Union Parish School Bd., 307 So. 2d 676 (La. App. 2d Cir. 1975).
57. For a discussion of laches as an exception, see Barnett v. DeVelle, 289 So. 2d 129 (La. 1974); Jordan v. Sutton; Molero v. Bass, 322 So. 2d 452 (La. App. 4th Cir. 1975); DeVillier v. City of Opelousas, 247 So. 2d 412 (La. App. 3d Cir. 1971).
59. FED. R. CIV. P. 8(c). But see Padgett v. Stein, 406 F. Supp. 287 (M.D. Pa. 1975), in which the court held that there had been no waiver of the defense of laches because one does not plead to a motion for enforcement of a consent decree and if no pleading is required or permitted, there is no waiver. See also LA. CODE CIV. P. art. 1005.
60. ALA. R. CIV. P. 8(c); ARIZ. R. CIV. P. 8(d); COLO. R. CIV. P. 8(c); IDAHO R. CIV. P. 8(c); ILL. REV. STAT. ch. 110, § 2-613(d) (1982); IND. R. TR. P. 8(c); KAN. CIV. PROC. CODE ANN. § 60-208(c) (Weeks 1976); KY. R. CIV. P. 8.03; ME. R. CIV. P. 8(c); MASS. R. CIV. P. 8(c); MINN. R. CIV. P. 8.03; MO. R. CIV. P. 55.08; MONT. R. CIV. P. 8(c); NEV. R. CIV. P. 8(c); N.J. R. CIV. P. 4:5-4; N.M. R. CIV. P. 8(c); N.C. R. CIV. P. 8(c); N.D. R. CIV. P. 8(c); OHIO R. CIV. P. 8(c); OR. R. CIV. P. 19(B); PA. R. CIV. P. 1030; R.I. R. CIV. P. 8(c); S.D.C.L. 15-6-8(c); TENN. R. CIV. P. 8.03; TEX. R. CIV. P. 94; UTAH R. CIV. P. 8(c); VT. R. CIV. P. 8(c); WASH. REV. CODE § 8.02(3) (1974); W. VA. R. CIV. P. 8(c); WIS. R. CIV. P. 802.02(3); WYO. R. CIV. P. 8(c).
62. LA. CODE CIV. P. art. 1005.
64. See Sears v. Berryman, 101 Idaho 843, 623 P.2d 455 (1981); McDaniel v. Messer-
"estoppel" language of Louisiana's list of affirmative defenses in article 1005. Additionally, laches may be included within the omnibus provision of the article ("extinguishment of the obligation in any manner"), as comment (e) provides:

Certain common law concepts enumerated as affirmative defenses in Fed. Rule 8(c), such as accord and satisfaction, laches, license, and waiver, have been recognized and adopted in varying degrees by the jurisprudence of Louisiana. They have not been expressly included in the enumeration although to the extent that these concepts are recognized in our jurisprudence they are included within the omnibus phrase "any other matter constituting an affirmative defense."

Laches has no legal basis as an exception of no right of action, and it is not based on prescription. As an affirmative defense, laches may be raised by the exception of no cause of action.

The laches exception may require a hearing on the merits. Jordan, the only reported authority for applying laches in 30:12 actions, was remanded to the trial court for consideration of further evidence, indicating that the question of laches should be determined at the trial and upon all the evidence.


68. In Labarre v. Rateau, 210 La. 34, 26 So. 2d 279 (1946), the laches exception sustained at trial was reversed on appeal because there had been no trial on the merits. The Labarre court noted that earlier cases considered all of the evidence that could possibly be produced by the proponents of the stale claim and applied the doctrine of laches after a hearing on the merits. See Kuhn v. Bercher, 114 La. 602, 38 So. 468 (1905); Wood v. Egan, 39 La. Ann. 684, 2 So. 191 (1887). While recognizing the apparent indication that a trial on the merits is required to sustain a plea of laches, the court in Molero v. Bass, 322 So. 2d 452 (La. App. 4th Cir. 1975), expressed some hesitation in following this requirement; nevertheless, it finally decided that a trial on the merits may be needed. Federal courts have exercised "caution" before applying laches on summary judgment. See Powell v. City of Key West, 434 F.2d 1075, 1080 (5th Cir. 1970); see also Ecology Center of La., Inc. v. Coleman, 515 F.2d 860 (5th Cir. 1975).
Criticism of Laches

Underlying Issue of Finality

For several reasons, laches is an unworkable solution to the problem of timeliness of review under 30:12. First, the doctrine fails to address the underlying need for finality in conservation orders. The focus of laches is upon two elements: (1) the actions of the complaining party, and (2) the prejudice which would result from disturbing an order of the Commissioner of Conservation.69 Because the time for seeking review is limited only upon demonstrating both unreasonable delay and prejudice, once it is shown that disturbing the order would result in prejudice, the unreasonableness of the plaintiff's delay becomes decisive. Unfortunately, this inquiry ignores the very essence of the problem, that is, the finality of conservation orders. To illustrate this point, assume the plaintiff in Jordan, rather than waiting 15 months to commence his action for review, had instituted his suit immediately upon discovering a condition which had silently continued for 15 months before manifesting itself. Under these facts, the degree of prejudice which would be suffered by someone relying on the order parallels that suffered in the original circumstances, yet the element of unreasonableness is absent. As laches is presently the only limitation on a 30:12 action, a conservation order can be attacked whenever it is shown that the plaintiff's delay in seeking review was not unreasonable.

If the aim of the Jordan court was to prevent prejudice to people relying on the Commissioner's orders, its use of laches will fail short of the mark. By examining both prejudice and the unreasonableness of the plaintiff's delay, orders issued by the Commissioner of Conservation may never become final, always being susceptible of judicial review, at least to the extent that the plaintiff's actions in delaying his suit for injunction were not unreasonable.

The fallacy of applying laches as a limitation on the time for seeking review of conservation orders lies in separating the inquiry into its two elements, unreasonable delay and prejudice to the defendant or a third party. It is submitted that in examining unreasonableness, the actions of the plaintiff should not be determinative; rather, the prejudice which would result from an untimely review of the order should be determinative. Indeed, in contesting an order, the element of prejudice, in and of itself, should make any delay unreasonable.

Anyone having relied on an order by the Commissioner of Conservation has little interest in whether someone now seeking to question that order was reasonable in delaying the appeal; instead his interests demand a definite answer to one question: "When can I rely on this order?"

Perhaps the ultimate inquiry should focus on the issue underlying the problem, specifically, whether a point in time can ever be established after which orders of the Commissioner of Conservation become final and unquestionable. In attempting to answer this query, a balancing of several interests is necessary. First, lack of finality emasculates the Commissioner's order, seriously undermining the purpose and function of the Office of Conservation. Conservation orders form the basis for legal opinions and business decisions; without finality, the orders become meaningless. So long as the possibility of court review exists, it remains seriously questionable whether anyone can reasonably rely on an order issued by the Commissioner. Moreover, conservation orders greatly impact land titles, and the public records doctrine mandates that clear title be ascertainable and that reliance on the public records be protected. Magnifying the problem even further are the large sums of money characteristically involved in the exploration for and development and production of minerals. In sum, lack of finality breeds instability in the all-important areas of property, oil, gas, and mineral law, thereby creating chaos and confusion, impeding industrial growth, and disrupting the economy.

Review of Court and Agency Decisions

Historically, laches has been applied to bar the untimely institution of an original action. An action under 30:12, on the other hand, is not an original action—it is in the nature of an appeal. Attaching finality to a conservation order does not deprive the plaintiff of a remedy because he already has received an administrative hearing. Granting finality to the order only serves to limit the time in which the plaintiff is permitted to seek judicial review of that agency's determination. Thus it is more consistent to apply the rules for appellate

72. However, State ex rel. Koehl v. Sewerage & Water Bd., 179 La. 117, 153 So. 533 (1934), applied laches to a suit for judicial review of an action of the New Orleans Sewerage and Water Board. See Jordan v. Sutton, 401 So. 2d at 393.
delays to 30:12, rather than limitations on original actions, such as prescription or laches. In comparison, the delay periods for appealing judicial decisions are based on the principle that there must be some point in time after which a party's failure to exercise his right of court review will result in the loss of that right. Parties are not permitted to delay indefinitely in the exercise of their rights. Our legal system requires that the issues be resolved and that, once resolved, they remain undisturbed.

If analogized to court decisions, conservation orders would require appeal within a similarly abbreviated period, with the failure to timely perfect an appeal making the administrative determination final. Despite the apparent temptation to view the two actions similarly, a conservation hearing is not a judicial trial, and the order issued by the Commissioner is not a judgment. In short, court decisions and conservation orders simply are not the same animal.

Nonetheless, a review of the statutes concerning other administrative agencies indicates a parallel favoritism in the law for short time periods for seeking judicial review of administrative decisions. For example, Louisiana’s Administrative Procedure Act provides that proceedings for judicial review must be instituted within thirty days after the mailing of notice of the final decisions of boards, commissions, agencies, and departments of the state’s executive branch. Additionally, Louisiana statutes provide similar time limitations for judicial review of rulings by numerous other bodies. These brief time periods reflect a consistent recognition by the legislature of a need for finality in administrative decisions.


74. See La. CIV. CODE arts. 2286 & 3556(31).

75. La. Code Civ. P. art. 2123 sets the period in which to bring a suspensive appeal at 30 days. La. Code Civ. P. art. 2087 sets the period in which to bring a devolutive appeal at 60 days.

76. La. R.S. 49:964(B).


Finally, the Louisiana Surface Mining and Reclamation Act\textsuperscript{79} and the Natural Resources and Energy Act of 1973,\textsuperscript{80} both contained in title 30, place thirty-day time limitations on actions for judicial review of orders of the Commissioner of Conservation.\textsuperscript{81} These statutes support the application of the standard thirty-day period for seeking court review of administrative decisions to actions for review under 30:12.

The absence of a time limitation within Louisiana Revised Statutes 30:12 could be the result of legislative oversight. The nature of relief provided by 30:12 is uniquely injunctive. Perhaps the legislature intended to allow the action to be brought at any time. However, the parallel statute in the Administrative Procedure Act provides immediate review when irreparable injury is sustained, rather than illogically extending the time for instituting the action.\textsuperscript{82} Arguably, 30:12 was intended to provide similar relief, \textit{i.e.}, relief of an exigent nature, and the time for instituting such an action should be limited.

On the other hand, 30:12 may have been intended to provide relief where the plaintiff is unaware of the injury during the standard thirty-day period for review. Even under that construction, however, the statute fails to limit the time in which the plaintiff must institute the action once the injury becomes apparent. Further, if it were truly the legislature's intent not to limit the time for seeking review, the statute could have expressly allowed the action to be brought at any time. Therefore, it is unlikely that the legislature intended to allow a 30:12 action to be brought at any time.

The underlying need for finality in conservation orders provides the justification for limiting the time for judicial review of such orders. However, these orders are not always final. Pursuant to the power delegated by title 30,\textsuperscript{83} the Commissioner of Conservation issued Statewide Order 29-L, creating rules and regulations regarding the termination of units established by order of the Commissioner.\textsuperscript{84} These rules, providing for the issuance of supplemental orders for the ter-

\begin{itemize}
\item \textsuperscript{82} LA. R.S. 49:964(A) (Supp. 1966). See note 16, \textit{supra}.
\item \textsuperscript{83} LA. R.S. 30:9.1 (Supp. 1975).
\item \textsuperscript{84} Louisiana Comm'r of Conservation, Statewide Order No. 29-L (issued and effective on February 4, 1976), \textit{supra} note 15, was issued by R.T. Sutton, former Commissioner of Conservation. A unit previously established by order of the Commissioner may be terminated under Statewide Order No. 29-L upon a showing that one year and ninety days have elapsed without production or the existence of a well capable of producing and drilling, reworking, recompleting, deepening, or plugging back operations to restore production.
\end{itemize}
mination of units previously established by order, apparently recognize a need for flexibility. Changes and developments occurring in the oil and gas industry may require a reevaluation of a previously established unit. Statewide Order 29-L gives the Commissioner of Conservation the ability to terminate such a unit.

At first blush, it appears inconsistent to say that a conservation order should be final for purposes of 30:12, but not final for purposes of Statewide Order 29-L. Nevertheless, the two provisions clearly are distinguishable. First, the application of Statewide Order 29-L is limited to the termination of units previously established by order, whereas 30:12 applies to all orders issued by the Commissioner. Not all conservation orders establish units; they may be issued for other reasons. For example, in Jordan, the disputed order established a gas storage area.

Moreover, court review of an order and a public hearing for the issuance of a supplemental order involve different procedures conducted for different purposes. Under 30:12, a reviewing court examines the validity of the order, judging the reasonableness of the Commissioner’s findings at the time of the hearing. The action is an appeal. On the other hand, when the Commissioner acts under the authority of Statewide Order 29-L, his original findings are not in dispute. Instead, the inquiry is whether, because of lack of production and operations, a supplemental order has become necessary to terminate the previously established unit. Unlike 30:12, a hearing conducted under the authority of Statewide Order 29-L is not an appeal. Analogized to court procedures, 30:12 provides an appeal and Statewide Order 29-L provides a new trial. Therefore, the possibility of a hearing pursuant to Statewide Order 29-L should not be interpreted as undermining the need for finality in conservation orders.

Limiting the Period for Judicial Review

Extending Laches

After accepting the proposition that conservation orders should at some point in time become final, the only remaining question is how to limit the period for seeking judicial review. Laches is an inadequate limitation on the time period for instituting a 30:12 action because it examines the reasonableness of the plaintiff’s delay, rather than focusing exclusively on the prejudice which could result from disturbing the order’s finality. However, laches could resolve the problem if a judicial determination were made establishing some period

of time after which any delay by a plaintiff would be unreasonable per se. The trial judge in Jordan, recognizing the necessity of finality, apparently employed this approach, stating that "anything in excess of 60 days would be unreasonable because there must be finality, particularly on orders such as this." This reasoning is consistent with the conclusion that the absence of a time limitation in 30:12 is the result of legislative oversight.

**Louisiana Revised Statutes 30:15**

On the other hand, perhaps the absence of a time limit in 30:12 is not merely the product of legislative oversight; arguably, the time limit may be governed by another provision within the chapter. A resolution of the problem may be found in the interpretation of Louisiana Revised Statutes 30:15, which provides:

> In *proceedings* brought under authority of, or for the purpose of contesting the validity of, a provision of this Chapter, or of an oil or gas conservation law of this state, or of a rule, regulation, or order issued thereunder, *appeals* may be taken in accordance with the general laws relating to appeals. In appeals from judgments or decrees in suits to contest the validity of a provision of this Chapter, or a rule or regulation of the commissioner hereunder, the appeals when docketed in the proper appellate court shall be placed on the preference docket of the court and may be advanced as the court directs.

It has been submitted that the word "proceedings" in the first sentence of 30:15 properly includes actions under 30:12. Arguably, to seek court review of an order by the Commissioner is to appeal the order. In short, this argument urges that 30:12 provides the right of review and 30:15 specifies the timing and further manner of an appeal to a court. Supporting this argument is the common usage of the words "appeal" and "review" by the legislature and the courts. If accepted, this interpretation of 30:15 would apply the general rules for appeals to 30:12 actions, i.e., thirty days for a suspensive appeal and sixty days for a devolutive appeal.

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89. *Id.* at 380-81.
90. LA. CODE Civ. P. art. 2123.
91. LA. CODE Civ. P. art. 2087.
However, 30:15 may be interpreted so as to reach the opposite conclusion. The last sentence of 30:12 provides: "The right of review accorded by this Section shall be inclusive of all other remedies, but the right of appeal shall lie as hereinafter set forth in this Chapter." Arguably, this language presents a clear distinction between two separate "rights": (1) the right to review under section 12, and (2) the right to appeal as set forth in section 15. It follows that 30:15 does not control the period for review under 30:12. Rather, 30:15 applies the general rules of appeal to the subsequent appeal of the reviewing court's judgment on the merits of the 30:12 action. This argument supports the proposition that the absence of a time limitation in 30:12 is the result of legislative oversight. In any event, the abbreviated periods for appeal supplied by 30:15 reflect the need for a final determination.

Legislative Correction

A legislative amendment to 30:12 would produce a preferable solution to the problem. Louisiana Revised Statutes 30:12 could be amended to provide either a definite period of time in which to seek court review or an expression of the legislature's intent to allow the action to be commenced at any time. The former would resolve present uncertainties and provide a definite period of time after which conservation orders would become final and nonappealable. Since the absence of a time limitation in 30:12 appears to be the result of legislative oversight, legislative correction of the problem is the most tenable solution.

Conclusion

Judicial review of orders issued by the Commissioner of Conservation presently may be sought under the authority of both Louisiana Revised Statutes 49:964 and Louisiana Revised Statutes 30:12. These statutes differ with respect to who may bring an action, the form of relief the reviewing court may grant, the scope of the evidence considered by the reviewing court, and the standards on the burden of proof. Further, while conservation orders are subject to judicial review under 49:964 for only thirty days, 30:12 is devoid of any express statutory period for review, review thereunder being limited only by the recent application of laches. The application of laches, however, is inconsistent with the definite delay periods provided for the review of decisions by courts and other administrative agencies, and it is unworkable to the extent that it ignores the underlying need for finality of conservation orders.
The successful functioning of the state's Office of Conservation depends to a large degree on the effectiveness of the Commissioner's orders. The continuing threat of subsequent court review destroys the credibility which these orders demand. In short, the growing need to conserve Louisiana's natural resources requires that a definite point in time be established after which orders issued by the Commissioner of Conservation become final.

Finality could be achieved under the present use of laches if a judicial determination established some definite length of delay to be unreasonable per se. Alternatively, the rules governing appeals under Louisiana Revised Statutes 30:15 could be interpreted to include court review under 30:12. However, the ultimate responsibility rests upon the legislature to correct the apparent oversight in 30:12 which has created such uncertainty.

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