BEFORE THE

Oil Conservation Commission

SANTA FE, NEW MEXICO

IN THE MATTER OF:

CASE NO. 903

TRANSCRIPT OF PROCEEDINGS

ADA DEARNLEY AND ASSOCIATES

COURT REPORTERS

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ALBUQUERQUE, NEW MEXICO

BEFORE THE
OIL CONSERVATION COMMISSION
STATE OF NEW MEXICO
Santa Fe, New Mexico

May 18, 1955

IN THE MATTER OF:

Application of the Commission upon its own motion for an order establishing rules and regulations with regard to hearings to be conducted before examiners (as provided in Chapter 235, Laws of 1955). Case No. 903

Before: Honorable John F. Simms, E. S. (Johnny) Walker, and William B. Macey.

TRANSCRIPT OF HEARING

MR. MACEY: The next case is 903. Does anyone have a statement or testimony they wish to give in regard to Case 903? Mr. Woodward.

MR. WOODWARD: At the risk of wearing out our welcome, we would like to make a very brief statement as to the types of orders which we think should be adopted in supplementing this statute. Pursuant to Senate Bill 229, we think the Commission should issue a procedural order that would make some provision for the following matters.

We are not prepared to make any recommendation, but based on the examiner system in other states, I think it would be appropriate to cover the following things. Of course, the Commission is working within the framework set up by the statute and must exercize its powers with reference to those provisions.

The first of these provisions that I think the Commission has to deal with in the statute is the clause that authorizes them to provide for the appointment of one or more examiners to be members

of the staff of the Commission. Pursuant to this authority we think an order should be issued providing for the appointment of the examiners and specifying in a general way their qualifications. It must be a member of the staff, and we think a member with engineering or geological training should be qualified to serve as an examiner.

The second provision would deal with this sentence in the statute, "The Commission shall promulgate rules and regulations with regard to hearings to be conducted before examiners and the powers and duties of the examiners in any particular case may be limited by order of the Commission to particular issues or to the performance of particular acts." That appears to be a permissive power to specify the kinds of cases that the examiner can hear. I think it would be extremely desireable in a general way to indicate the types of matters that the examiner is expected to hear. Ordinarily a general or state-wide rules are appropriate for the consideration of the Commission. Short of that I would see no necessity to limit by a procedural order, the types of matters the examiner could hear.

There is also a question concerning the time sequence of the examiners for the time of hearings. The statute provides that "no matter or proceeding referred to an examiner shall be heard by such examiner where any party who may be affected by any order entered by the Commission in connection therewith, shall object thereto within three days prior to the time set for hearing". In view of that time limitation we would suggest that by this order the Commission require those applicants that wanted their case heard by the examiner, to so state in the application, and that would appear

in the notice. It would serve both as a general notice of the hearing and also that the applicant wants it heard by the examiner. That would then permit the people affected, that might be affected by the application and order, to make known any objections they would have to the examiners hearing.

There is also a question about scheduling the examiners hearing during the middle of the month. For example, if such a hearing is scheduled during the middle of the month and shortly before the hearing is to be held sometime prior to the three-day limitation, an affected person asked that it be heard by the Commission, the matter would then be deferred until the next hearing date. That might work something of a hardship insofar as the preparation of cases and people traveling long distances, I realize that. I don't know what might be done about it unless it is possible to clear up these examiner hearings three days before the regular hearing date. Then you know at the time the hearing is scheduled that it will either be heard within the three-day period or at the next Commission hearing.

The disadvantage to that, of course, is that it concentrates your hearing and might interfere with the presentation of some of these things at Hobbs which may be a very desirable feature.

The last recommendation would not be based on any specific language of the Act, but I think it is implied that the examiner may publish his findings and recommendations. It has eliminated in some cases and some states, unnecessary hearings by the Commission itself where the examiner's findings and recommendations are submitted to the parties appearing sometime prior to the issuance of the order. That would give an opportunity to those adversely affected

to make known their exemptions.

There appears to be nothing in the Act that would prohibit the Commission if it agreed with the exceptions, from remanding the case to the examiner, or setting it up for hearing on its own motion, and if it agreed with the findings of the trial examiner, of course, it could make that fact known by order.

In the absence of such machinery, a party disagreeing with the examiner has no other choice that he ask that his case be heard de novo before the Commission itself, in a thirty-day period. It may seem cumbersome, but it has in the past eliminated some unnecessary hearings before the Commission. The request for a re-hearing before the examiner in fact.

Beyond those recommendations I think the Act itself spells out in some detail the procedure, and undoubtedly the order would reiterate a number of the features of the features prescribed by the statute.

MR. MACEY: Thank you, Mr. Woodward. Off the record.

(Discussion off the record.)

MR. MACEY: On the record. I have a suggested five man member committee with one of the members being Mr. Kitts of the Commission staff. I would like to appoint Mr. Kellahin as Chairman, Mr. Couch, Mr. Woodward, and Mr. Campbell to serve on that Committee and come up with some recommendations.

MR. WOODWARD: If I may suggest another name, Mr. Sellinger has had a lot of experience with this system in Texas and Oklahoma.

MR. MACEY: I wasn't aware of that and we would be glad to have you serve.

MR. KELLAHIN: I am happy to serve on a Committee and I am not trying to dodge any duties, but I think it would be more

appropriate if a representative of the Commission rather than an individual be Chairman of the Commission. I would suggest that Mr. Kitts be designated. I am perfectly happy to work on it, but I think it would be better to have a Commission member as the Chairman and he could coordinate it a little better.

MR. MACEY: I think you have a good point. Mr. Kitts, you are the Chairman. Does anyone have anything further? We are going to continue the case to the June hearing. If no one has anything further we will consider the case continued.

C E R T I F I C A T E

I, ADA DEARNLEY, Court Reporter, do hereby certify that the foregoing and attached transcript of proceedings in the matter of Case 903 was taken by me on May 18, 1955, that the same is a true and correct record to the best of my knowledge, skill and ability.

Ada Dearnley
Reporter

BEFORE THE

Oil Conservation Commission

SANTA FE, NEW MEXICO

June 28, 1955

IN THE MATTER OF:

CASE NO. 903

TRANSCRIPT OF PROCEEDINGS

ADA DEARNLEY AND ASSOCIATES

COURT REPORTERS

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ALBUQUERQUE, NEW MEXICO

BEFORE THE
OIL CONSERVATION COMMISSION
Santa Fe, New Mexico
June 28, 1955

IN THE MATTER OF:

Application of the Commission upon its own motion for an order establishing rules and regulations with regard to hearings to be conducted before examiners (as provided in Chapter 235, Laws of 1955).

Case No. 903

BEFORE:

Honorable John F. Simms
Mr. E. S. (Johnny) Walker
Mr. William B. Macey

TRANSCRIPT OF HEARING

MR. MACEY: The next case on the docket is Case 903. In connection with Case 903, the Commission appointed a Committee to suggest some rules pertaining to the examiner system, and it was the recommendation of the Committee that the entire Section N of our rules and regulations, which is entitled: Rules on Procedure, be amended. Due to this recommendation it has been necessary to re-advertise the case to include the complete revision of Section N, and, therefore, the case can not be concluded at this time by any means. The case will be re-advertised for the July 14th hearing.

Mr. Kitts, you may have some comments you wish to make on the recommendations of the Committee.

MR. KITTS: Mr. Secretary, various members of the Committee met on June 13th, 14th, 15th. The main meeting was the afternoon of June 14th, where we had four members present. At various other

times we had three or four members present. We had five members present on the afternoon of June 14th. Therefore, not every member of the Committee was in on each and every draft of the recommendations here. I think it shows pretty much of an agreement of the Committee. I hope that all of you have copies of this which were placed on the table at back of the hall.

The underlined portions constitute new language. You will notice that all of these portions pertaining to hearing examiners are merely incorporated in the standard rules of procedure. Mr. Campbell has one thing that he wants to bring to your attention, one thing that he is not satisfied about, as a member of the Commission. I will call on him in a minute.

I have one matter that the Committee wanted me to mention. Over on the last page of the rules, Rule 1220, under de novo hearing before the Commission; down about eight lines where it begins with this sentence. "In such hearing before the Commission, the Commission shall be entitled to receive and consider the record of the hearing conducted by the Examiner in such matter or proceeding." On Wednesday morning, June 15th there were four Committee members present, we were split right down the middle, two and two, as to whether or not this should be included. We decided to include it with the understanding that this would particularly be brought to your attention, this language, so that you may think about it and July 14th when we have a full hearing on this matter --

It was the feeling of those who were against this language, that the feeling was that they did not feel that the statute providing for a de novo hearing permitted the inclusion of such language as was incorporated in this sentence. I want to point that out to you speci-

fically. Undoubtedly there will be many other questions on other of our suggestions and recommendations. You will have plenty of time to look those over and raise your recommendations and objections at the July 14th hearing.

Mr. Campbell, you have one thing you wanted to specifically point out.

MR. CAMPBELL: Mr. Secretary, as a member of the Committee that suggested these rules, there is a matter that I would like to ask the attorneys, particularly to consider. The Statute is pretty restrictive insofar as timing is concerned on these Examiner's hearings. The Statute specifies the number of days, for instance, prior to which a disqualification can be entered in a hearing before an Examiner, which must be not less than three days. My question is one of jurisdiction for the Commission, in the event that an Examiner is disqualified. I can visualize the situation where four days before a hearing is set before an Examiner, somebody disqualifies him. The rules then provide, as they are here written, that the matter will then be heard either before another Examiner or at the next regular hearing of the Commission, which may be two or three days after it was originally scheduled before the Examiner.

I am wondering whether in order for the Commission to have jurisdiction in a hearing where somebody changes their mind about having it heard before an Examiner, four days before an Examiner's Hearing, whether a new notice must be published before the matter can be heard at a different time and place before the Commission. In other words, whether, if I file a case and ask it be heard before an Examiner, under the Rules and Statute, I can, four days before the hearing, change my mind and decide I want it heard before the

Commission. Under the rules, as written, if the next regular hearing is five days after that it goes on the docket for that hearing after mailing notice to interested parties, and persons who are supposed to have entered an appearance won't have appeared and the Commission won't know who to notify by mail. I wonder if we are going to have to set it down at the next regular hearing of the Commission, where it has been properly published, notice has been given as required by the regular statute.

I would like to call that to the attention of the attorneys to get their reaction as to whether that would need to be changed in these rules.

Also, I think you will find that Rule 1214, though not underlined, is a new section.

MR. KITTS: The matter that Mr. Campbell mentioned, of course, we can't argue it out today, but I do want to give you the Committee's thought on it, that is, the members of the Committee that were present when this particular language was adopted. It was subject to a great deal of discussion, the very problem that Mr. Campbell raised, and he and I and a couple of the other members of the Committee discussed it previously. We finally came to the conclusion, as incorporated in our recommendation of the rule, that if the matter were actually called before the Examiner and continued, that jurisdiction requirements would be met. I think it is subject to some argument. It was the feeling of the members who were present at that time that certainly merely taking it off the docket without having the matter continued by the Examiner would be subject to those objections that Mr. Campbell raised. But, if it was actually called and continued by the Examiner, we believe in that way the

jruisdictional requirements would be met. That is just giving you the feeling of those who recommended this language.

MR. CAMPBELL: May I ask a question? As you indicated, I wasn't present when the final draft was prepared. Do I understand that in the Rule 1209, where it provides that "any person who may be affected by any order entered by the Commission in connection with such hearing shall have filed with the Commission, at least three days prior to the date set for such hearing, a written objection to such hearing being held before an Examiner. In such event the matter of proceeding shall be placed on the regular docket of the Commission for hearing, and the Secretary of the Commission shall promptly give a supplemental notice of such continuance to the applicant or petitioner and to each person who has entered an appearance in such matter or proceeding."

My point was, if you decide not to have an Examiner's Hearing before it is held, there is no appearance. The supplemental notice is not authorized by the Statute, of course, and my question was whether this contemplated the publication of a new notice for the hearing, the only hearing then that would be held before the Commission instead of the Examiner?

MR. KITTS: What particular language are you quoting?

MR. CAMPBELL: Where you say " At least three days prior-- Rule 1209. Suppose I file that objection, then in such event the matter is placed on the regular docket of the Commission, it doesn't say at the next hearing. It simply provides for supplemental notice to parties that have entered an appearance in the case. Up to that point no appearances will have been entered. My question is, whether or not the Commission, where there is never a hearing called before the Commission, the objection is made before the three days time

then whether the notice that they had published previously for an Examiner's Hearing will carry jurisdiction to the Commission for an initial hearing in the case? My point is that you will have to republish as to the hearing before the Commission. I believe you are correct if you go before the Examiner and the hearing is held at the time that the notice said, that he may in order there continue the matter to a Commission Hearing, but where you never reach the Examiner there is a serious question as to whether you have to republish notice for Commission Hearings.

MR. KITTS: The second paragraph of Rule 1209, I believe this is intended to cover all cases, where we state: "Any matter or proceeding set for hearing before an Examiner shall be continued by the Examiner to the next regular hearing of the Commission following the date set for the hearing before the Examiner if any person who may be affected by any order entered by the Commission in connection with such hearing shall have filed with the Commission, at least three days prior to the date set for such hearing, a written objection to such hearing being held before an Examiner. In such event the matter or proceeding shall be placed on the regular docket of the Commission for hearing, and the Secretary of the Commission shall promptly give a supplemental notice of such continuance to the applicant or petitioner and to each person who has entered an appearance in such matter or proceeding."

I believe that was the intent, that the matter would have to be called by the Examiner and continued at that time. That was the understanding I had when I agreed to this language, personally.

MR. MACEY: Mr. Woodward, do you have a statement?

MR. KITTS: He would be required to continue, that is manda-

tory.

MR. WOODWARD: I think there is a way around this situation. If the Examiner's hearing has been set, say, five days before the regular meeting of the Commission, and the Statute requires to hold the hearing before the Commission in the event of objection, at its next regular meeting, there would scarcely be time to get out a published notice before the next regular meeting when the Statute requires the hearing before the Commission.

On the other hand, if the hearing is never held before the Examiner, nobody has appeared, and consequently no one can be said to have notice of the matter before the Commission. I think the solution to the dilemma, that everybody has notice of the law, if it is not heard before the Examiner due to an objection that is interposed, it will be heard by the Commission; consequently, if your notice initially reads that this matter is going to be set before the Examiner on such and such a date, subject to objection by an interested party, in whic h event it will be held at the next regular hearing of the Commission. That supplies all the notice you are capable of giving under the law. Then, if an interested person shows up at the hearing and after all due process requires that he be afforded an opportunity to be heard, and he wants to be heard, and shows up at the Examiner's meeting and checks on it and finds that the thing has been continued until the next meeting of the Commision, he has had actual notice of the time and place where the thing will be heard. If he doesn't check with the Examiner, he has had due notice that they are going to consider that matter, for all he may know the Examiner would have heard it, and his opportunity has passed.

I don't see that you are prejudicing the rights of anyone to give a notice in that form. It simply states what the law implies. It will be held before the Examiner, or requested that the matter be heard before the Commission, and in any event heard at the next regular hearing day. I think that is all the notice you can give. If they do appear before the Examiner and find it is going to be continued they have actual notice.

MR. MACEY: Judge Foster, do you have a statement?

MR. FOSTER: Is it the purpose of the rule here to disqualify an Examiner because he has knowledge and fact?

MR. KITTS: First paragraph of Rule 1217.

MR. FOSTER: "No Examiner shall conduct any hearing in any matter or proceeding for which the Examiner has conducted any part of the investigation." In other words, if he has acquired any information about what he is going to hear he is disqualified?

MR. KITTS: The intent was to disqualify any Examiner who had been conducting a project or study of those particular -- say a particular well or area in question, so that he might come into the hearing with a preconceived notion. I think even more particularly it was intended to take care of those cases where the Examiner had, or a particular member of the staff had investigated the case so that in preparation for hearing, I mean such as members of the staff who sit over here at the side table, obviously conduct some investigation of the case and the matter before it is heard. That is what we are trying to --

MR. FOSTER: It is obvious to me that the longer the Examiners stay on the more informed they are going to be, so that obviously

they won't be qualified to hear anything.

MR. KITTS: I think that language could be susceptible to some clarification.

MR. FOSTER: It is clear enough.

MR. MACEY: Anyone else have any questions they would like to ask? Mr. Stanley?

MR. STANLEY: Shouldn't it be the duty of the chosen Examiner to study the data so that he may be qualified to hear the case?

MR. MACEY: Don't ask me the question, ask the Commission. What was the intention --

MR. KITTS: Not anymore than a Judge in a personal injury case would go out and make the accident report, make some sort of predetermination of where he thinks the merits might lie.

GOVERNOR SIMMS: You could get yourself in the position with the same man being the prosecutor and the Judge. That is what they are trying to get away from. It is easy for a member of the staff to go out on behalf of the Commission, who may be taking a definite stand in the thing, and then end up as Judge of the thing when he is one of the litigants. I think that is what they are trying to keep from doing. I don't think they have said that.

MR. WALKER: The people concerned can object to that Examiner at the time so that would take care of that, if he feels like he is going to appear before an Examiner that is going to be a prosecutor and judge both.

GOVERNOR SIMMS: I am not comparing this to the flow of liquor in New Mexico, but the Supreme Court has ruled that I can't send a man out to investigate a bar violation and let him decide on

whether or not that license is revoked. I think that is the kind of thing that is worrying Bill. It is not truly analogous, but I think that is what he is shooting at.

MR. WOODWARD: The language here clearly states that, "Any examiner who cannot accord a fair and impartial hearing and consideration to the parties in any matter or proceeding referred to such Examiner, or who is otherwise disqualified to conduct the hearing and consider the matter or proceeding, shall so advise the Secretary of the Commission and shall withdraw from such matter or proceeding."

I don't construe the words "fair and impartial" to mean that the thing. I think an informed person is capable of a fair and impartial hearing. It is only when his information or previous activities have placed him in a position where he has either a personal interest in the results of a hearing, or he has a preconceived notion by reason of his precious investigation, wherein, as an incident to some enforcement consideration, he has made an investigation. But, where he is simply well informed about conditions, I think he is in the best position, probaly, of all, to give the kind of fair and impartial hearing that you want. I see no necessary conflict there, or any reason why the inference should be drawn that if a fellow knows anything about the application at all he should be disqualified. I think the matter is a subjective thing any way.

MR. FOSTER: How does one get informed except through investigating?

MR. KITTS: It may well be that the balance of the paragraph takes care of it, that the first sentence may very well be surplus.

In other words, the provisions, bias or prejudice or unable to accord a fair and impartial hearing takes care of what we are trying to get at.

MR. MACEY: Unless the Examiner disqualifies himself it is going to be on the motion of somebody else. Suppose they ask the Examiner to disqualify himself and he says, "I won't do it, I can give you an impartial hearing". That happens more often than you think. Is there a hearing on the disqualification?

MR. KITTS: No, we provide for automatic disqualification, similar to the application in District Court.

MR. RIEDER: I would like to interject a thought that it would be difficult for any member of the staff to say that he didn't have some opinion in some way, but that in no way alters his ability in the majority of the cases to hear them freely and without bias, but it would be difficult to say that we are not informed on it, and that at one time or another we had not taken a position contrary to the applicant.

GOVERNOR SIMMS: What do your rules provide for alternate disqualification?

MR. KITTS: The rules provide that there should be no more than four Examiners at any one time. I think it would automatically go before the Commission then. We don't specifically so provide.

MR. FOSTER: What would you do if you had a case where the Examiner had considered the matter and made a rule and then six months later the same kind of case came before that Examiner again, would you disqualify him?

MR. KITTS: Would I disqualify him?

MR. FOSTER: Would he be disqualified under the rules?

MR. KITTS: Who conducted any part of the investigation?

MR. FOSTER: You have the same question again before the same Examiner on a matter that he decided six months ago. He gets pretty well along in his knowledge by hearing the first case. Would that disqualify him?

MR. KITTS: I don't think so.

MR. FOSTER: I don't think it would either.

MR. MACEY: Mr. Gurley?

MR. GURLEY: In considering this thing, the terms "matter or proceeding" as we interpreted meant that particular matter or proceeding. It is like any case, it may be on the same subject, but certainly not the indicidual case that you have to rehear. That was the purpose behind that. In other words, if a man had been sent out to investigate a certain case and we brought up the point that the original Examiner might not be able to hear it, then the other Examiner who had investigated it could not be appointed to hear the thing because he had been part of the investigation team. That was behind the thought. The matter or proceeding means that particular case.

MR. FOSTER: Why would information gained disqualify a person from hearing the case?

MR. GURLEY: As the Governor mentioned when he brought up the point of the liquor situation, with which I have had some experience, it is difficult to go out and build the case and then come in and hear it.

MR. FOSTER: That is what the Commission does.

MR. GURLEY: The Examiner can't go out and build a case and have people come in and give an impartial hearing on it. That was the thought behind this phraseology.

MR. WALKER: Who is going to assign the Examiner to these cases?

MR. KITTS: The Secretary of the Commission. An Examiner must be appointed by the Commission, but once appointed he may be assigned to any individual case by the Secretary of the Commission.

MR. WALKER: Don't we naturally suppose that any Examiner he appoints is going to take an impartial attitude toward the Case?

MR. KITTS: That is the initial assumption.

MR. WALKER: I would suggest that it be that way.

MR. KITTS: This is more or less directed language.

MR. WALKER: In other words, that the Secretary is going to appoint an Examiner, we are going to assume that he will give an impartial hearing and his decision will be in accordance, then it is automatically up to who is interested in the case to disqualify him or disqualify himself. I don't know what we are arguing about.

MR. KITTS: I think this is more or less helpful language to the Secretary. No Examiner should be appointed who has such an interest or has conducted such an investigation along the lines we are discussing. That is all it is.

MR. WALKER: I am automatically going to assume, as a member of the Commission, that everybody is going to get a fair hearing.

MR. KITTS: I think that is a natural assumption. The Examiner is not going to have to act, it is going to have to be turned over to the Commission.

GOVERNOR SIMMS: Any report he makes is necessarily going to

reflect his opinion or suggestion or recommendation.

MR. KITTS: I think it should, his study of the facts.

GOVERNOR SIMMS: We don't have to go along with him.

MR. KITTS: You sure don't, there are three of you. One may go one way and two the other.

MR. LYONS: It appears that we have two matters under consideration here. The majority of these cases are going to be brought on the application of an operator. It isn't up to the Commission to build a case for him, it is up to the operator to build his own case. If the Commission brings the matter up on its own motion, any case brought up on the Commission's motion should not be heard by a staff member who has done the investigation. I think that is proper. I see no reason --

GOVERNOR SIMMS: That would be particularly true in enforcement matters which were not an application by an operator.

MR. LYONS: Yes, sir.

MR. MACEY: Do these rules provide anything for the Commission's application on its own motion?

MR. KITTS: I don't think so.

MR. MACEY: I don't think it was the intent that the Commission's cases called on its own motion would be heard by an Examiner.

MR. LYONS: In that event there would be no reason for the Commission to build a case. All they need to do is to get a background on the facts behind it and let the operator build his own case.

GOVERNOR SIMMS: And the protestant tear it down, the Commission just listens.

MR. LYONS: That is right.

MR. MACEY: Mr. Hiltz, did you have something?

MR. HILTZ: Not being a lawyer, some of the language confuses me in Rule 1217, the last few words reading, "nor shall any Examiner perform any prosecuting function." It may be, a naive question. Does that preclude an Examiner from asking any questions that might bring facts to light, whether the applicant be an applicant or protestant?

GOVERNOR SIMMS: No, I don't think so. They don't want him to take one side or the other and beat the drum.

MR. MACEY: Does anyone else have anything further in this matter?

MR. WOODWARD: I would like to comment on this Rule 1220, concerning a hearing by the Commission after the case has been heard by the Examiner. It states: When any order has been entered by the Commission pursuant to any hearing held by an Examiner, any party adversely affected by such order shall have the right to have such matter or proceeding heard de novo before the Commission, provided that within 30 days from the date such order is rendered such party files with the Commission a written application for such hearing before the Commission. If such application is filed, the matter or proceeding shall be set for hearing before the Commission at the next regular hearing date following the expiration of fifteen days from the date such application is filed with the Commission. In such hearing before the Commission, the Commission shall be entitled to receive and consider the record of the hearing conducted by the Examiner in such matter or proceeding."

I think that is an important provision and will have a very important practical consequence. It is awfully easy to get before the Commission, as the Statute reads: "Knowing that in advance there may be a tendency on the part of the applicant where they suspect that they will have any reason to seek the Commission's review, to simply ask for a Commission hearing and by-pass the Examiner".

Now, in a great number of cases, even where the Commission review may be contemplated, the basic facts are uncontroverted, the inferences to be drawn from the facts may vary, or the application of the conservation facts may vary, but those are matters that the Commission can pass on by reviewing a record taken before an Examiner.

One of the benefits to be derived from the Examiner's system isn't the handling of the few uncontested matters, but the saving in time on the part of the Commission, and everybody that shows up, which would result by eliminating two and three hours of taking evidence about which there is no contest whatever, the basic facts are the same. Let us assume, in the hearing before the Examiner and the hearing before the Commission, the time of everybody that shows up here is taken, and would be taken by simply reiterating those facts and putting into evidence again those exhibits. Now, of course, the trial before the Commission is de novo, but I think very appropriately one of the exhibits which might be introduced into evidence at that time is the record at the previous hearing. That wouldn't prejudice anyone's rights to add additional testimony or to contest anything in the record. In probably a majority of the cases, the argument before the Commission would involve the inferences to be

drawn from these uncontraverted facts, or some argument dealing with the law applicable to the facts.

If you are going to make the thing work, and, of course, I think it is the spirit in which it is administered, and the spirit in which the industries participate that will make it work. Consequently, I think it is extremely important for each operator to take the responsibility of eliminating as much unnecessary testimony given before the Commission as they can. In other words, go before the Examiner and put the basic facts in and then if you want to argue about what they mean before the Commission you are not going to take the time of 50 people who have no interest in the case whatever.

So, I think with that in mind the sentence should be left in the rule and, more important perhaps, when the orders are circulated if they are to be circulated, they be accompanied by a policy statement from the Commission, indicating the spirit of which these things are offered, and the purpose they are expected to achieve. I don't believe there is any denial of due process or disregard of the Statute calling for trial de novo. The party gets that even though the old record goes in as an exhibit.

GOVERNOR SIMMS: They are certainly going to have to cooperate voluntarily. Many Commission's practices develop into--it is an important enough matter that they know there is going to be an appeal to the Commission from the Examiner, so they withhold maybe controversial evidence and facts for the purpose of surprise, or something else, knowing there is going to be an appeal anyway. They don't bring it out when they are before the Examiner, and spring it on them at the last minute when it comes to the Commission.

I hope the Commission will adopt a policy statement urging it,

and the industry will cooperate by making a full disclosure, as much as possible, at the Examiner level. If they don't we won't save the time, they will wait until they get up to the Commission.

MR. WOODWARD: The net practical result of those tactics would be that you would waste a couple of times, before the Examiner and you would get before the Commission with a surprise; the other side asks for a continuance and instead of saving time you multiply it by about three.

GOVERNOR SIMMS: Exactly. It is going to be largely up to representatives of the industry who litigate these issues before the Examiner, to make as full a disclosure, and get as much stuff out of the way for the special matter, feature of the Examiner's report, if you want to put it that way.

MR. WOODWARD: I don't think that kind of cooperation will serve and it is a courtesy that every other operator ought to appreciate, it would be just a needless waste of time.

MR. MACEY: Mr. Gurley?

MR. GURLEY: In considering this particular Statute again, and that particular part of the paragraph, whether or not the original transcript of the hearing could be entered into evidence, or whether it could be entered on the review, there is some question as to whether the question would so provide. This particular Statute, it says that the matter shall be heard de novo before the Commission. In comparing it with other Commission Statutes, in practically all of them it goes ahead to say that such transcript of the original hearing may be entered into evidence and considered. Mr. Couch and I, in this last session that we had, both felt there was some question as to whether it would be legal under the Statute to allow the

transcript of the original hearing to be considered in evidence, in that it says de novo -- to get back to the definition of the term "de novo", but the thing that stopped us on that was the fact that the other Commission's statutes, when the transcript was to be considered, it was so mentioned in the Statute. I question whether it would be legal under this particular Statute to allow the transcript for review.

MR. WOODWARD: We did some research on that point sometime back to see. If they set up the trial examiner system on its own, a lot of people come in and make a statement -- Unless you know affidavits and sworn statements can be introduced in evidence at any trial de novo, as a matter of fact, a great many of the hearings held before this Commission are based, are heard on the basis of affidavits and sworn statements, and go into the record. Comsidering the record before the Examiner, in that light, with the opportunity afforded for additional evidence, objections to the introduction of that evidence, if someone feels that is a particularly unreliable evidence, that testimony taken before the Examiner; they have the opportunity to object; they have an opportunity to refute, or add additional testimony. While the cases are not harmonious on this point, you are absolutely right there, I think that the weight of authority would permit this introduction as an item of evidence.

What the Commission could not do, I feel certain, is to exclude any other fact of evidence and act solely on the basis of that position that the trial examiner has taken. I think, considering that as an item, if both parties want to rest and rely on it, then I think there is a sufficient body of evidence for the Commission to make a rule that would not be arbitrary and unreasonable if it could

be supported by substantial evidence.

MR. GURLEY: Is it your feeling that if one party objects to the transcript being in the record, it could not be considered?

MR. WOODWARD: No, I think the Commission ruling on that would be similar to the objection directed at any other affidavit or sworn statement. It would be a matter of credence whether or not they would let it in. If, for example, the reason the review is shown is for some bias that the Examiner has shown during the course of the proceedings, and some right of cross examination has been deprived, for example, and the printed record is a distortion of the factual situation, and the objection is entered on that ground, like, perhaps, the Commission has a basis for keeping it out entirely. But that is purely a matter of discretion with the Commission to decide whether it has sufficient probative value to let it in or keep it out, just as they would in the form of any other sworn statement.

MR. GURLEY: The cases that you investigated, were they built around such a de novo statute as this is or not?

MR. WOODWARD: Some of them dealt with term and other due process requirements as to what was required as a constitutional matter. I think that custs two ways, the legislature would presume to have a proper, an act that was constitutional, or at least it would not have an act that was unconstitutional. That de novo before the Commission after the objection, there have also been cases that satisfied the de novo requirement. They are really not satisfactory, but what the Commission did was to include all other kinds of evidence and --

MR. KITTS: (Interrupting) Mr. George Selinger and I are

the ones that wanted to include that language. It was our feeling that first of all there is no mandatory provision that it should be considered by the Commission, and that in introducing the transcript or offering the transcript, certainly the other party would not, by this language, waive any objection it would have to the introduction, or any grounds it might have similar to the objection of any other type of evidence.

Also we felt that the Statute, although it does say that the party may have the right to have the matter heard de novo, I think it is fairly flexible in that regard also. It doesn't mean every case. We felt that you start from the beginning and go right through the case again. Although, there is certainly that right.

MR. FOSTER: Why shouldn't the Commission be entitled to hear sworn testimony? Do you have to swear to it again, what is the value of this? I don't see any use to the Examiner system if you are going to get involved in legalistic ideas and kick the ball around like this. I assume the Examiner is qualified to hear these cases. If you come before the Examiner and try your case and the witnesses are all there and they are sworn, and the testimony is taken down and transcribed, what is the advantage of having this particular witness come in and repeat that again to the Commission orally instead of letting the Commission study the matter from the transcript. They are trying to save time. He wouldn't be any better off swearing to it twice than once. I don't see what the Commission gains. I think you ought to take a broad practical view of this thing. Certainly if I come before an Examiner, I don't see any reason. I have got one witness, I put him on and I swear him, and his testimony is there under oath, presumed that he

has testified to all he knows anyway, then when he comes before the Commission, if the other side comes up here, why can't the Commission decide that thing on the record? Why have another record. I don't suppose it would make it any better.

MR. KITTS: Because the Statute provides that the party shall have the right to have the hearing de novo before the Commission. It doesn't say de novo on the record.

MR. FOSTER: What is your idea on de novo?

MR. KITTS: There have been many interpretations of de novo.

MR. FOSTER: What is your interpretation?

MR. KITTS: It means opening the matter up again from the beginning.

MR. FOSTER: It seems that you defeat your purpose.

MR. KITTS: It doesn't provide for any specific review of the record.

GOVERNOR SIMMS: I don't think everybody will come back up here again. That is what we are talking about when I say cooperation.

MR. FOSTER: Governor, I am saying, somebody gets a little dissatisfied with the Examiner. He comes in here and I don't see any reason why the Commission says,"Until the Court decides it, I am going to take the record. If you don't like it take it over to the Courthouse", instead of setting the policy of not letting anybody submit anything on the record to the Commission.

GOVERNOR SIMMS: I think there is a second thing why the Commission wouldn't conscientiously be biased, if the Commission thought anyone was coming up de novo with their witness to testify to the thing that was in the provision, I think it would be against

him in the ultimate disposition, and I think he would realize it was against him if he was doing it to be ornery.

MR. FOSTER: I view it from statutory interpretation. I think the Commission can adopt the policy of construing it that way until the Court decides.

MR. KITTS: I don't think that on de novo that all the New Mexico agrees with the Texas decisions. Is it provided in your Statute, or is it by Court interpretation that it is de novo on the record?

MR. FOSTER: Ours says just de novo, our Statute has been interpreted entirely contrary.

MR. KITTS: A completely new case?

MR. FOSTER: A completely new case, swear them over and take it again. It looks silly to me. I don't care if it is good Texas law.

MR. KITTS: It was the feeling to provide the Examiner system that we will expedite matters by having a lot of routine cases where there are no protestants, or maybe one or two protestants, that those could be heard by Examiners, and we anticipate that in a large number of those cases, they will not be taken before the Commission thereafter. Maybe that is a wild assumption. You have seen your cases, where several cases, during any hearing where the case takes no more than five or ten minutes, with no protestant, but at the same time a great number of those cases being time consuming, that is at least part of the idea in providing for an Examiner system.

MR. KELLAHIN: I think we are overlooking one thing in this discussion. In the first place when the hearing has been held before the Examiner, the Commission then enters the order and they enter

their order on the basis of the record. What the purpose of coming back then for hearing de novo, certainly I agree wholeheartedly that the record should be introduced in the hearing before the Commission on a de novo hearing. At the same time, it was the intent of the law, in my opinion, that the hearing de novo means they would have the opportunity to argue about this record and to introduce additional testimony, if any were available, to the Commission.

There is some question under our Statute. I don't believe what Mr. Kitts says agrees with what I am going to say. When the Statute says de novo, that means a new trial. I don't believe the Supreme Court of New Mexico says that. In some cases you may be faced with the proposition that the de novo hearing means de novo on the record. If that were the interpretation under this Statute, it would be meaningless because you have had a review of the record by the Commission. While I approve of the language that the record can't be offered in a hearing before the Commission, I would like to hear it expanded, and let them --

GOVERNOR SIMMS: I know that two members of the Commission will. It is not de novo on the record, the record will be considered and you can introduce additional evidence.

MR. KELLAHIN: I understood that. I think that is correct, in the matter of interpretation that may have.

GOVERNOR SIMMS: Suppose we had the matter that we were hearing this morning, about this decision down at Eunice, and you had a trial examiner who had heard the whole thing, and it had gone six months and the study had been completed, and there were facts that you didn't know about at the time of the Examiner's recommendation or ruling, I think it would be very discriminatory not to be able

to introduce new evidence as a result of this additional study.

MR. KELLAHIN: I agree with you, and I think that was the intent of the Statute, The point I am trying to make, I think the Commission should solely interpret the Statute and proposals, even in their rules which would give us a precedent in case we need it.

GOVERNOR SIMMS: The only case we have that applies to us says de novo on the record, and it is a Supreme Court --

MR. KELLAHIN: (Interrupting) District Court. We have had no Supreme Court cases on the Statute. That is the reason I am a little concerned about the interpretation about this Statute. I think the interpretation placed on it by the Commission will be material.

GOVERNOR SIMMS: I think Bill is interpreting it as really de novo and not de novo on the record.

MR. KITTS: I feel that way. Is that the way you feel about it?

MR. KELLAHIN: Yes. I think you ought to consider the record before the Examiner.

MR. KITTS: Then we are in agreement.

MR. MACEY: Anyone else? Does anyone else have anything further in Case 903? The Case will be continued to July 14th. We will take a recess until 1:15.

(Noon recess.)

STATE OF NEW MEXICO)
: ss.
COUNTY OF BERNALILLO)

I, ADA DEARNLEY, Court Reporter, do hereby certify that the foregoing and attached transcript of proceedings before the New Mexico Oil Conservation Commission at Santa Fe, New Mexico, is a true and correct record to the best of my knowledge, skill and ability.

IN WITNESS WHEREOF I have affixed my hand and notarial seal this 5th day of July, 1954.

Ada Dearnley
Notary Public, Court Reporter

My Commission Expires:

June 19, 1959

BEFORE THE

Oil Conservation Commission

SANTA FE, NEW MEXICO

July 14, 1955

IN THE MATTER OF:

CASE NO. 903

TRANSCRIPT OF PROCEEDINGS

ADA DEARNLEY AND ASSOCIATES

COURT REPORTERS

605 SIMMS BUILDING

TELEPHONE 3-6691

ALBUQUERQUE, NEW MEXICO

BEFORE THE
OIL CONSERVATION COMMISSION
Santa Fe, New Mexico
July 14, 1955

Application of the Commission upon its own motion for an order revising Section "N" - RULES ON PROCEDURE of the Commission's Rules and Regulations to provide for additional rules governing hearings to be conducted by Trial Examiners and for any necessary revision in the existing rules.	Case 903

BEFORE:
Honorable John F. Simms
Mr. E. S. (Johnny) Walker
Mr. William B. Macey

TRANSCRIPT OF HEARING

MR. MACEY: The next case is Case 903.

MR. KITTS: I have a statement I would like to make. If it please the Commission, at this time I would like to introduce into the record in this Case the draft which was prepared during the month of June by the Committee appointed by the Commission.

Note has been made of the various recommendations as appeared in the record last time; and the Committee felt it best, rather than to attempt another full revision before this hearing, to merely make note of the suggestions that have been made, and it is of course anticipated that other parties will have either suggested rules or suggested revision to the draft we are submitting.

MR. MACEY: Did you mark that as an exhibit?

(Exhibit No. 1 marked for identification.)

MR. KITTS: Yes, I offer it in evidence.

MR. MACEY: Is there objection to the introduction of this exhibit in this case? Without objection it will be received.

Do you have anything further?

MR. KITTS: No.

MR. MACEY: Anything further in Case 903? Statements, comments they would like to make pertaining to the Committee Report?

MR. MADULE: Ross Madule, in behalf of Magnolia Petroleum Company, Dallas, Texas. It is the suggestion of Magnolia Petroleum Company that there be added to this proposed draft a new rule, copies of which I will introduce into the record, providing that in any pleading filed by any attorney in any case pending, that copies of those pleadings, motions and so forth, shall be served upon the opposing parties or their attorneys of record.

That is to permit the attorney or the representative of the company to be up to date on the proceedings in that particular case. There are times when, after an order of the Commission is entered, motions for rehearing are filed and there have been times in the past when those motions have not been received by the opposing parties. For the first time after the motion for rehearing has been granted, the attorney on the other side is advised of the fact that a motion for rehearing had been filed. I think that it is necessary in the orderly procedure of these cases before the Commission that a rule of this nature, not of my draftmanship but of any other similar rule which would permit and require, just as it does that we now have in the Courts, that copies of any pleadings, motions, be served upon the opposing parties. That is the purpose of that proposed rule.

The next change that Magnolia Petroleum Company suggests is

that we make a change in the proposed Rule 1221 as the rule now stands. Rule 1221 provides that the Commission orders shall be served upon the parties and labels it a "supplemental" notice. Under Rule 1207 of the same proposed draft, it is provided that a supplemental notice, that the failure to give a supplemental notice is non-jurisdictional. If we permit these rules to go in, so as to say that the order of the Commission which was entered is a supplemental notice, lawyers failing to receive a copy of the notice within the time to perfect an appeal or whatever other action they might desire, may wake up and find themselves out of Court. I don't feel we ought to put ourselves in that position. I think we ought to have a rule there where a copy of the order of the Commission shall be served by mail upon the opposing parties or their attorneys of record within ten days. That will permit time, which if my memory is correct, it is twenty days from the order overruling the motion for rehearing that you can perfect your appeal to the Courts. The only other suggestion that I have is to effect, to rewrite 1219, merely as a matter of draftmanship, to provide that you shall dispose of the recommendations and order of the Examiner after the expiration of ten days, rather than it now reads, simply upon the filing that you shall dispose of it; to be consistent with the previous rule which says any party has ten days in which to file objections to the proposed order or proposed findings and rulings of the Trial Examiner, because theoretically, you could think that you had ten days in which to file exceptions to the proposed findings of the Examiner or the proposed order, if the findings are incorporated in the order, and get yourself in at the expiration of the ten days and find out that the Commission had already disposed of the matter before

you filed your objection and exception to the findings. That is simply a suggested revision in draftmanship to coincide with the previous rule. That is all thatMagnolia has.

(Exhibits 2, 3 and 4 marked for identification.)

MR. MACEY: Anyone else have anything else in this case? I suggest that we introduce these in the record.

MR. MADULE: I offer those as exhibits for the purpose of the record.

MR. MACEY: Exhibits 2, 3 and 4 will be so marked and entered in the record.

(Exhibit 2. RULE____. Filing Pleadings; Copy Delivered to Adverse Party or Parties. When any party to a hearing files any pleading, plea or motion of any character (other than application for hearing) which is not by law or by these rules required to be served upon the adverse party or parties, he shall at the same time either deliver or mail to the adverse party or parties who have entered their appearance therein, or their respective attorneys of record, a copy of such pleading, plea or motion. If there be more than four adverse parties who have entered their appearance in said hearing, four copies of such pleading shall be deposited with the Secretary of the Commission and the party filing them shall inform all adverse parties who have entered their appearance, or their attorneys of record, that such copies have been deposited with the Secretary of the Commission. These copies shall be delivered by the Secretary to the first four applicants entitled thereto.)

(Exhibit 3. RULE 1221. Notice of Commission's Orders. Within ten (10) days after any order, including any order granting or re-

fusing or following rehearing has been rendered by the Commission, a copy of such order shall be mailed by the Commission to each person or his attorney of record who has entered his appearance of record in the matter or proceeding pursuant to which such order is rendered.)

(Exhibit 4. Rule 1219. Disposition of Cases Heard by Examiner. Upon the expiration of ten (10) days after such supplemental notice has been given as provided in Rule 1218 of the receipt of the report and recommendations of the Examiner, the Commission shall either enter its order disposing of the matter or proceeding or refer such matter or proceeding to the Examiner for the taking of additional evidence.)

MR. MACEY: Anyone else have anything further in this case?

MR. NESTOR: E. W. Nestor for Shell Oil Company. I have to appear as representative for our attorneys today. They are unable to be here. While I am not qualified to present this largely legalistic opinion, I have talked it over with our people and believe that I understand it rather well.

I refer first to Rule 1216. We feel that in order to strengthen the position of the Examiners that we should eliminate from this article 2 and 3. We fear that if we don't do that, actually the Examiner system may not prove very effective. We would suggest further that another item be added, to wit: If the matter or proceeding is Commission called "-- we think that in that case the hearing should be held before the Commission.

MR. KITTS: Repeat that again.

MR. NESTOR: If the matter or proceeding is Commission called.

GOVERNOR SIMMS: If the Commission calls it, the Commission

should hear it?

MR. NESTOR: Yes. In Rule 1217, we just have a question. We would like some deliberation over the last sentence in paragraph two, which says that: "Such affidavit may be filed at any time prior to three days before the date such matter or proceeding is set for hearing." We are wondering what happens if you are unable to determine that the Examiner is disqualified until after three days, until you have passed that period of three days before the hearing. It is simply something to think about.

In Rule 1220, we thought quite a bit about this and believe it might be better to eliminate the de novo hearing before the Commission completely and let the motion of rehearing specified in Rule 1222 suffice. Again the idea being to strengthen the hand of the Examiners. Then an item that we also think is worth considering is in Rule 1203 in item (4). We wonder whether the applicant should be able to request any particular place for hearing and think it might be better if the Rule provided that the Commission would select the place where the hearing would be held, with the thought in mind that it would probably be in some city of jurisdiction near the place where the field or fields are located. The idea being that we might think of a situation where the company having offices in Midland or Hobbs might operate in the San Juan Basin and they might have a hearing which involved a great number of operators in the Basin and then ask that the hearing be held in Hobbs, which would work a hardship on a lot of people as far as travel. We think that in that case the people should go to some place in the Basin to present their testimony.

That concludes Shell's recommendations.

MR. MACEY: Anyone else have anything further in Case 903? Mr. Howell.

MR. HOWELL: Ben Howell, representing El Paso Natural Gas. We have a question with respect to Rule 1215, that portion of it which reads as follows: "The Examiner shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing, including the swearing of witnesses, receiving of testimony and exhibits offered in evidence, subject to such objections as may be imposed." Does that give the Examiner the power to exclude evidence or only to receive it subject to objections? Was it the intention that the Examiner would rule upon evidence offered and either admit it or exclude it? We think he should have such power..

MR. HINKLE: If the Commission please, Clarence Hinkle, representing the Humble Oil and Refining Company. The Humble wishes to go on record to the effect that these proposed rules as a whole appear to be acceptable, with the exception or two that I will point out. Of course, we realize that this is a new thing and it is going to take some experience in actual practice to determine the best procedure. I think those are matters that can be corrected as time goes on, in case there are any inequalities that would be worked by the adoption of these rules.

I do want to point out, in connection with Rule 1213, the Act itself provides that any member of the Commission can act as Examiner. The proposed rules set up qualification for the Examiner "at least six years practical experience as a geologist, petroleum engineer or licensed lawyer, or at least two years of such experience and a

college degree in geology, engineering or law." Unfortunately, that might exclude the Land Commissioner, in this particular instance, from being an Examiner. I would suggest in order to conform with the law that a provision be added to that particular section providing nothing herein contained shall prevent any member of the Commission from being designated as an Examiner, because that is set up by the Act itself. The Shell has pointed out some objections to Rule 1216 and also to Rule 1220. I believe the Commission will find that in connection with those objections that the proposed rules essentially track the Statutes and that these provisions which are suggested in regard to the three days notice and also as to the de novo hearing are in the Act itself.

MR. MACEY: Anyone else have anything further in this case?

MR. FOSTER: May it please the Commission, I only have three suggestions to make. Two of them I made at the last hearing. Just for the purpose of this record, I would just like to call the Commission's attention to those two objections.

First, being the rule disqualifying the Examiner on affidavit, or a member of the Commission who may serve as an Examiner from sitting as an Examiner. It seems to me that the three day Statutory provision for objecting to a matter being referred to an Examiner is sufficient in that instance. If you add this rule that would permit anybody that might choose to do so to just file successive affidavits to the hearing before any particular Examiner that might be designated to hold the hearing, the result would be that by filing these affidavits you couldn't get a hearing at all before an Examiner. You couldn't find one that could qualify. I don't believe it would be the purpose of the rule to do that. For example,

if you appoint one Examiner and I file an affidavit against him, why, he is out. You appoint somebody else, I can still file an affidavit as to him, and he would be out. You would appoint somebody else and I would file an affidavit as to him, and he would be, and it would just -- you will run the whole string out that way. If a party doesn't want to have a hearing before the Examiner, why, he has the Statutory right to just make his objection to having the hearing before the Examiner, within three days, and then the Commission has to hear it. I believe that is what the Statute provides. It seems to me like that is safeguard enough.

The second objection and one of the two that I raised before was the disqualification provision in the rules, with respect to disqualifying a man because he happened to be well informed about the matter on which he was going to conduct the hearing. I think that rule should not obtain.

Now, the third objection and the one that I did not mention in the previous hearing and because at that time I didn't have available to me the Statute recently passed by the last Legislature, incorporating the provisions of Senate Bill 229. I think that portion of Rule 1220 which is contained in the last sentence of the rule and which reads: "Any person affected by the order or decision rendered by the Commission after hearing before the Commission may apply for rehearing pursuant to and in accordance with the provisions of Rule 1222, and said Rule 1222 together with the law applicable to rehearings and appeals in matters and proceedings before the Commission shall thereafter apply to such matter or proceeding." I believe that provision of the rule is objectionable because the Commission there is seeking a standby rule, the right

of judicial review to an order made on a de novo hearing. If anyone is willing to concede that there might be anything to the suggestion that the right of judicial review does not extend to an order of the Commission made on a de novo hearing, then that provision of the rule that I have called your attention to should be eliminated. I don't believe the Commission should be placed in the position, either upon its own motion or by way of adopting the suggestions that might be made by the Committee, of attempting to forecast beforehand just what the applicable law is with respect to the right of a judicial review of an order made on a de novo hearing. At least, to my mind there is a very serious question as to whether or not an order made by this Commission upon a de novo hearing is subject to a judicial review within the provisions of Section 69-223 of the Statutes. Therefore, I do not believe that this Commission should attempt by rule to extend to an order entered upon a de novo hearing before it, the right of judicial review. Now it may be that such a right exists, in my judgment it doesn't, but I believe that this rule would bring about a great deal of confusion and certainly a great deal of misunderstanding and perhaps could and might and probably would result in injury and harm and injustice to those who might appear before this Commission relying upon this provision of the rule in which the Commission tells them that they have unquestionably and without any argument about it, a right of judicial review of these orders entered on de novo hearing. In other words, a person before this Commission might very well rely on that and then find that in the ultimate determination of the fact, that he didn't have any such right to rely. I would like to suggest to the Commission that it would be much better to let

each individual who comes before this Commission assume the responsibility of making that determination for himself. I haven't had the time so far to put my exact views in writing, but I would like to write this Commission a letter and send all the members of the Committee a copy of it, pointing out why I think the right of judicial review which applies to proceedings on rehearing do not extend to orders entered in a de novo hearing.

MR. MACEY: Mr. Foster, we would like to have your thoughts on that matter. How long do you think it will take?

MR. FOSTER: I won't be able to get it in next week. It will be week after next.

MR. MACEY: Toward the end of the month?

MR. FOSTER: Yes, sir. I planned to attend the Rocky Mountain Institute at Boulder.

MR. MACEY: Does anyone else have anything further in this case?

MR. MALONE: If it please the Commission, Ross Malone. I would like to just suggest that the provisions of the rules dealing with notice are perhaps the most important provisions of all, because they may well be jurisdictional and affect the validity of the action which the Commission takes. There are, I believe, some apparent conflicts in the rules between the requirement for the giving of notice in case of any hearing before the Commission and the provision of Rule 1209 providing for continuance without new service. In particular, I would like to suggest that the Committee consider whether or not Rule 1204, which requires publication of notice of every hearing before the Commission, is going to be applicable, as it is now written, to the continuance of the hearing which

has been set before an Examiner in case a request is made that the matter be heard not by the Examiner but by the Commission. At the last monthly hearing of the Commission, that matter was discussed from the point of view whether due process of law was afforded, but it isn't that question to which my remarks are directed, but rather the inconsistency in the wording of the two rules which at present, under Section 1204, requires a published notice for every hearing before the Commission; and then in 1209 apparently purports to authorize a hearing before the Commission which does not require notice to be published, or in a situation in which time may not be available for a publication of notice of a usual hearing before the Commission.

I think the Committee should consider the possible inconsistency between those two sections as they now stand, because of the possibility that the jurisdiction of the Commission might be affected.

MR. MACEY: Anyone else have anything further in this case?

MR. KITTS: If it please the Commission, earlier this week W. D. Girand, Jr., of Hobbs wrote to me a letter incorporating certain suggestions, with copies to various members of the Committee, and I believe to yourself as well, Mr. Secretary. I think this should be introduced in the record as Exhibit 5. I so offer it.

(Exhibit 5 marked for identification.)

MR. MACEY: Without objection it will be received.

Does anyone else have anything further in Case 903? If nothing further, we will take the case under advisement.

Exhibit 5

"Mr. William F. Kitts,
c/o Oil Conservation Commission,
Santa Fe, New Mexico.

Dear Mr. Kitts:

The writer respectfully proposes certain changes in the proposed Rules of Procedure offered by your Committee at the June meeting of the Oil Conservation Commission.

Since Rule 1202 is being amended, I think that the emergency Order should be valid for more than 15 days. I would suggest thirty days.

I suggest the following changes in the Rules enumerated:

1. In Rule 1207, in the first paragraph, sub-number (a), that the words, "give or" in lines one and two be deleted;

2. In Rule 1216, delete after the word, "Commission", on line two before the numeral (1) through the word "or" appearing on line three before the numeral (2) and re-number;

3. In Rule 1217, delete the first sentence. I would also suggest under Rule 1217, that Paragraph 3 be amended so that a time be fixed in which to inaugurate proceedings to disqualify an examiner;

4. In Rule 1218, in the last paragraph thereof, delete the period and insert a comma and add, "and copies of such exceptions, objections and suggestions to such Order be furnished to each person who entered an appearance of record at the hearing".

6. Rule 1219, I suggest that after the word, "or", on Page 8, be added the following: "Order further Hearing", and delete that portion of the Rule appearing on Page 9;

7. I suggest that Rule 1220 be deleted in its entirety. In regard to this Rule, I see no need for it in light of your Rule 1222 for the reason that a trial De Novo before the Commission on a matter which the Commission has referred to an examiner and entered its Order based upon the examiner's report and the record made before the examiner would serve no purpose except to delay the entry of a final Order.

I take this opportunity to compliment you and your Committee on the fine job done in the preparation of the proposed Rules and offer the above only as suggestions.

Respectfully submitted,

NEAL & GIRAND, by:/s/ W. D. Girand, Jr.

STATE OF NEW MEXICO)
: SS.
COUNTY OF BERNALILLO)

I, ADA DEARNLEY, Court Reporter, do hereby certify that the foregoing and attached transcript of proceedings before the New Mexico Oil Conservation Commission at Santa Fe, New Mexico, is a true and correct record to the best of my knowledge, skill and ability.

IN WITNESS WHEREOF I have affixed my hand and notarial seal this 19th day of July, 1955.

Ada Dearnley
Notary Public, Court Reporter

My Commission Expires:

June 19, 1959.