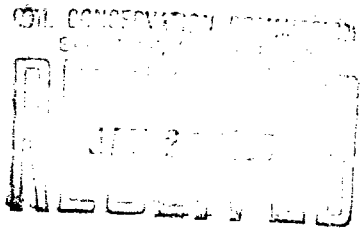
BEFORE THE OIL CONSERVATION COMMISSION OF

THE STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION OF JAMES D. HANCOCK AND CO., LTD., FOR AN ORDER REQUIRING RATABLE TAKE OF GAS IN THE WEST KUTZ-PICTURED CLIFFS POOL, SAN JUAN COUNTY, NEW MEXICO, OR FOR PRORATION OF GAS PRODUCTION IN SAID POOL

CASE NO. 696



APPLICATION FOR REHEARING

TO THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO:

Now comes Stanolind Oil and Gas Company and moves the Oil Conservation Commission for a rehearing of Case No. 696 for the following reasons:

1. On the 31st day of December, 1954, the Commission entered its Order No. R-566 in said case, which order is dated December 23, 1954, and this application is made within twenty days from and after the date said order was entered in the records of the Commission.

2. Said Order No. R-566 establishes certain rules and procedures for the allocation of gas among the proration units in the West Kutz-Pictured Cliffs Gas Pool, San Juan County, New Mexico.

3. Rule 6(A) of said Order No. R-566 provides in substance that a standard gas proration unit in said Pool shall be approximately 160 acres and that a non-standard proration unit may be formed after notice and hearing by the Commission or under the provisions of paragraph (B) of said Rule 6. The rule further provides that allowable production from any non-standard gas proration unit shall be in a ratio which the area of the non-standard unit bears to a standard proration unit of 160 acres.

4. Movant would show the Commission that no evidence was offered by any party at any of the hearings of said case which showed, or tended to show, that the proration units in this Pool should be 160 acres; that, on the contrary, the only evidence which was offered by any party on this question as to the size which the proration unit should be was the evidence of Stanolind Oil andGas Company and Benson and Montin to the effect that the proration units in this Pool should be approximately 320 acres; that under the state of the evidence in the record in this case, the standard gas proration unit should therefore be fixed at approximately 320 acres.

5. In the event, upon rehearing as herein requested, the Commission should determine that the standard proration unit should be 160 acres, then, and in such event, movant requests that the Commission amend its Rule 6(B) so as specifically to provide for non-standard proration units of a size greater than 160 acres, not to exceed 325 acres, without notice and hearing, following the identical procedures

as therein prescribed for non-standard units of less than 158 acres.

WHEREFORE, Stanolind Oil and Gas Company prays that the Commission grant the rehearing herein requested for the reasons hereinabove stated and, upon rehearing, that standard proration units in the West Kutz-Pictured Cliffs Pool be fixed at approximately 320 acres or, in the alternative, that the administrative procedure provided for in said rules for non-standard units of less than 158 acres be allowed for non-standard units consisting of approximately 320 acres.

Respectfully submitted,

STANOLIND OIL AND GAS COMPANY

By James K. Smith
James K. Smith, Its Attorney

James K. Smith
P. O. Box 1410
Fort Worth, Texas

State of New Mexico
First Judicial District Court
Aztec

Chambers of
C. C. McCulloh
Judge, Div. 3

Telephone F E 4 - 6151

October 5, 1955

Mr. Jason W. Kellahin
Attorney at Law
54½ East San Francisco
Santa Fe, New Mexico

Re: Stanolind Oil and Gas Company vs.
Oil Conservation Commission, et al,
No. 4909, San Juan County.

Dear Jason:

I am enclosing a copy of recusal in the above-entitled cause, in compliance with the request contained in your letter of September 29, 1955, for the convenience of attorneys in the case, all of whom live in Santa Fe, and in order that Judge Carmody may hear the motions and try the case, thereby saving expense to the Court fund of San Juan County.

With best personal regards.

Very truly yours,

C. C. McCULLOH
District Judge

CCM:vf
Encl.

cc: Hon. David W. Carmody
Mr. Oliver Seth
Mr. Willard F. Kitts

September 29, 1955

Hon. Clyde C. McCulloh
District Judge
San Juan County Courthouse
Aztec, New Mexico

Re: Stanolind Oil and Gas Company
v. Oil Conservation Commission, et al.,
No. 4909, San Juan County

Dear Judge McCulloh:

I am representing Western Development Company of Delaware and Frontier Refining Company, defendants in the above captioned case.

Due to the fact that all of the attorneys involved in this matter are located in Santa Fe with the exception of Texas attorneys who are participating, I would like to request that this matter be set for hearing in Santa Fe rather than in Aztec, as a matter of convenience. I anticipate that there will be several motions filed in this case requiring legal argument, and I would certainly think a pre-trial conference essential before a final hearing and would request such conference.

I discussed the matter of having the hearing in Santa Fe with Oliver Seth, attorney for the plaintiff, and Willard F. Kitts, attorney for defendant, Oil Conservation Commission, and with their approval contacted Judge Carmody in connection with that proposal. Judge Carmody suggested that if you were willing to recuse yourself, he would set the matter for hearing in Division 1, thereby avoiding either the necessity of the Santa Fe attorneys going to Aztec or your coming to Santa Fe for at least several hearings.

If you are willing to do this, it would certainly be appreciated, and I believe would result in a saving of time and money and would expedite a final disposition of the case.

Yours very truly,

Jason W. Kellahin

JWK:lm
cc: Mr. Oliver Seth
Mr. Willard F. Kitts

September 19, 1955

Mr. Ted Stockmar
Frontier Refining Company
Mile High Center
Denver, Colorado

Dear Mr. Stockmar:

You have probably received notice by now of the suit brought by Stanolind Oil and Gas Company against the Oil Conservation Commission seeking court review of Commission Order No. R-566 and subsequent orders entered in Case No. 696. This is the order which established proration in the West Kutz-Pictured Cliffs Gas Pool, San Juan County, New Mexico.

As attorney for Western Development Company, successor to James D. Hancock and Company, Ltd., I will participate in this case in support of the Commission's order, and Willard F. Kitts and I will be working closely together to defend the Commission's position.

Stanolind has named Frontier Refining Company as defendant in the case along with Western Development Company. I would be happy to cooperate with you in any way possible in defending the Commission's order. The chief object of attack by Stanolind is the 160-acre proration unit, their contention being that the Commission should have set the unit at 320 acres. If we can present a united front, I think it would be helpful and I would be glad to hear any suggestions you may have in this connection.

Yours very truly,

Jason W. Kellahin

JWK:lm

cc: Mr. Willard F. Kitts

September 19, 1955

Mr. William G. Webb
Turner, White, Atwood, McLane & Francis
Merchantile Bank Building - 17th Floor
Dallas 1, Texas

Dear Mr. Webb:

You have probably received notice by now of the suit brought by Stanolind Oil and Gas Company against the Oil Conservation Commission seeking court review of Commission Order No. R-566 and subsequent orders entered in Case No. 696. This is the order which established proration in the West Kutz-Pictured Cliffs Gas Pool, San Juan County, New Mexico.

As attorney for Western Development Company, successor to James D. Hancock and Company, Ltd., I will participate in this case in support of the Commission's order, and Willard F. Kitts and I will be working closely together to defend the Commission's position.

Stanolind has named New Mexico Western Oil and Gas Company as defendant in the case along with Western Development Company. I would be happy to cooperate with you in any way possible in defending the Commission's order. The chief object of attack by Stanolind is the 160-acre proration unit, their contention being that the Commission should have set the unit at 320 acres. If we can present a united front, I think it would be helpful and I would be glad to hear any suggestions you may have in this connection.

Yours very truly,

Jason W. Kellahin

JWK:lm

cc: Mr. Willard F. Kitts

November 25, 1955

Hon. David W. Carmody
District Judge
County Court House
Santa Fe, New Mexico

Re: Stanolind Oil and Gas Company
vs. New Mexico Oil Conservation Commission,
et al., No. 4909, San Juan County,
New Mexico

Dear Judge Carmody:

I am enclosing a copy of a motion filed in behalf of Western Development Company and Frontier Refining Company in the above-captioned case. New Mexico Western Oil and Gas Company has also entered appearance and joined in this motion, all of the three above companies being defendants in the case.

In this case, District Judge C. C. McCulloh has recused himself, and I understand the matter is now before you. I would appreciate it if you could set this motion for hearing at some convenient date. A similar motion has been filed by the New Mexico Oil Conservation Commission, and Mr. Willard F. Kitts said that he would send you a copy of that motion.

Due to the complex nature of this case, I believe that argument on these motions will take the better part of a day.

Yours very truly,

Jason W. Kellahin

JWK:lm
Encl. (1)

cc: Mr. Willard F. Kitts
Mr. Oliver Seth
Mr. J. K. Smith

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

February 3, 1955

Mr. J. K. Smith, Attorney
Stanolind Oil & Gas Company
Box 1410
FT. WORTH, TEXAS

Dear Sir: RE: Rehearing in Case 696

We attach a copy of the Commission's Order R-566-B granting your company's application for rehearing in Case 696. This will be advertised for March 17, 1955 (the day after the regular March hearing).

Very truly yours,

W. B. Macey
Secretary-Director

WBM:nr

cc: Mr. Jason Kellahin, Attorney
Box 361
Santa Fe, N M
(For J. D. Hancock, jr.)

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

April 26, 1955

Mr. Ted Stockmar
Frontier Refining Company
Mile High Center
DENVER COLORADO

Dear Sir:

We enclose a copy of Stanolind Oil & Gas Company's application for rehearing in Case 696. The case has been continued to May 3, and testimony will be presented on that date.

I will appreciate your returning this copy at your convenience, as it is a part of our case file.

Very truly yours,

W. B. Macey

WBM:nr

Encl.

DOMESTIC SERVICE

Check the class of service desired; otherwise this message will be sent as a full rate telegram

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DAY LETTER	
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WESTERN UNION

W. P. MARSHALL, PRESIDENT

1206 10-51

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FULL RATE	
LETTER TELEGRAM	
SHIP RADIOGRAM	

NO. WDS.-CL. OF SVC.	PD. OR COLL.	CASH NO.	CHARGE TO THE ACCOUNT OF	TIME FILED
			OIL CONSERVATION COMMISSION	

Send the following message, subject to the terms on back hereof, which are hereby agreed to

MR TED STOCKMAR
FRONTIER REFINING COMPANY
MILE HIGH CENTER
DENVER COLO

APRIL 29 1955

FOR YOUR INFORMATION HEARING IN CASE 696 SCHEDULED FOR MAY 3

WILL BE CONTINUED UNTIL MAY 19 DUE TO INABILITY OF COMMISSIONER'S

TO BE PRESENT NEXT WEEK

W B MACEY OIL CONSERVATION COMMISSION

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

COPY

January 20, 1955

Miss Ada Dearnley
605 Simms Building
ALBUQUERQUE N M

Dear Ada:

Here is the July 14, 1954, transcript in Case 696, which we discussed on the telephone today. The copy should be sent, along with the invoice, to:

Mr. R. G. Hilts
Stanolind Oil and Gas Company
Box 1410
FORT WORTH, TEXAS

As soon as the girls have finished copying it, I would appreciate your mailing our copy back, as we will probably have others wanting to look at it prior to the rehearing, if granted.

Thanks very much for taking care of this.

Sincerely,

Nancy Royal

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

March 8, 1955

Mr. William G. Webb
Turner, Atwood, White, McLane & Francis
17th Floor, Mercantile Bank Bldg.
DALLAS, TEXAS

Dear Bill:

Here are the order and the application in Case 696 involving Stanolind's request for rehearing in the West Kutz-Pictured Cliffs Gas Pool case.

Sincerely,

W. B. Macey

WBM:nr

October 20, 1955

William G. Webb, Esq.
Turner, White, Atwood,
McLane and Francis
Attorneys at Law
Mercantile Bank Building
Dallas, Texas

RE: Stanolind vs. New Mexico
Oil Commission et al,
#4909, San Juan County

Dear Mr. Webb:

At the suggestion of Mr. Jason W. Kellahin, I am sending you a copy of the motions I have prepared and filed on behalf of the New Mexico O. C. C. Mr. Kellahin and I will be very happy if you and your client join us in this case.

Very truly yours,

W. F. Kitts

WFK:lh

ILLEGIBLE

WGW

TURNER, WHITE, ATWOOD, McLANE AND FRANCIS

ATTORNEYS AND COUNSELORS AT LAW

J GLENN TURNER
W. D. WHITE
FELIX ATWOOD
ALFRED E McLANE
EDWARD L. FRANCIS
JAMES B. FRANCIS
JULIAN M. MEER
TREVOR REES-JONES
HARRY S. WELCH
THOS. R. HARTNETT III
H. L. HITCHINS, JR.
WILLIAM L. McINERNEY
WILLIAM G. WEBB
LEWIS CHANDLER
SNOWDEN M. LEFTWICH, JR.
WILLIAM C. HERNDON, JR.
THOMAS B McELROY

7TH FLOOR MERCANTILE BANK BUILDING

DALLAS 1, TEXAS

March 9, 1955

Mr. W. B. Macey
Secretary & Director
New Mexico Oil Conservation Commission
P. O. Box 871
Santa Fe, New Mexico

Re: Case Number 696

Dear Bill:

This will acknowledge receipt of your letter dated March 8, 1955 enclosing a copy of Stanolind's application for rehearing in the captioned case and the order of the Commission granting the same. We wish to thank you for your courtesy in forwarding these instruments to us and, with best wishes, I am

Yours very truly,

William G. Webb

WGW:mch

E. F. CESINGER
GEOLOGIST
1315 PACIFIC
DALLAS, TEXAS

MAY 13, 1955

MR. W. B. MACEY
SECRETARY AND DIRECTOR
NEW MEXICO OIL CONSERVATION COMMISSION
SANTA FE, NEW MEXICO

DEAR SIR:

AS ONE OF THE OPERATORS WHO WOULD BE AFFECTED BY THE HEARING WHICH STANOLIND HAS SCHEDULED BEFORE YOU ON THE 19TH OF MAY, REGARDING THE ATTEMPT TO SCHEDULE 320 ACRE PRORATION UNITS INSTEAD OF THE PRESENT 160 ACRE UNIT FOR THE PICTURED CLIFFS PRODUCTION IN THE WEST KUTZ FIELD, THIS IS TO ADVISE YOU THAT WE HAVE NO OBJECTION TO THIS RULING AND CONCUR WITH STANOLIND THAT A 320 ACRE UNIT WILL AMPLY DRAIN THE AREA.

RESPECTFULLY YOURS,

E. F. Cesinger

E. F. CESINGER

EFC/LM

BROOKHAVEN OIL COMPANY
FIRST NATIONAL BANK BUILDING
(MAIL) P. O. BOX 644
Albuquerque, New Mexico
PHONE 7-8853 TELETYPE AQ-96

May 18, 1955.

Oil Conservation Commission of the State of New Mexico
The Capitol
Santa Fe, New Mexico

SUBJECT: REHEARING OF CASE NO. 696, MAY 19, 1955
(Rehearing in Case 696 was postponed from a special date of May 3, 1955, and will be heard at 9 A.M. May 19, 1955, Mabry Hall, State Capitol, Santa Fe, New Mexico. (The rehearing was granted upon request of Stanolind Oil and Gas Company; in the case as originally heard, J. D. Hancock, Jr., sought an order requiring ratable take or proration of gas production in the West Kutz-Pictured Cliffs Pool, San Juan County, New Mexico.)

Dear Mr. Chairman:

The following statement by the Brookhaven Oil Company is respectfully submitted as follows:

CHRONOLOGICAL REFERENCES AND HISTORY OF WELL SPACING AND PRORATION WEST KUTZ-PICTURED CLIFFS GAS POOL, SAN JUAN COUNTY, NEW MEXICO

1. Originally Benson-Montin, Operators of the Gallegos Canyon Unit of the West Kutz-Pictured Cliffs Gas Pool were granted by temporary Order R-172, Case No. 377 in June 1952, permission to drill wells within the Gallegos Canyon Unit on 320 acre spacing even though the south half of the West Kutz-Pictured Cliffs Gas Pool had been drilled on 160 acre spacing. Under date of December 17, 1953, after hearings in which statements and verbal testimony was taken, your Commission rescinded the original temporary Order R-172 and issued Order R-172-B in the same Case No. 377, stating that the Gallegos Canyon Unit would be developed on 160 acre spacing pattern.

   In the second phase of this Case No. 377, after the Oil Conservation Commission required Benson-Montin to appear to show cause why 160 acre spacing pattern should not be instituted for Pictured Cliffs wells in the Gallegos Canyon Unit, San Juan County, to supersede the temporary 320 acre spacing earlier granted, the Brookhaven Oil Company advocated 160 acre spacing, and they do now, in opposition to Benson-Montin's request for 320 acre spacing.

1. (Continued)

The testimony, both written and verbal, which formed the base for the rescinding of original temporary Order R-172 and issuance of new Order R-172-B, showed the following:

(a) The West Kutz-Pictured Cliffs Gas Pool, which includes the Gallegos Canyon Unit on the north and independent operators' wells on the south, is a common source of supply and initially had the same bottom hole pressure.

(b) The bottom hole pressures on the south end of the pool were, and it is supposed still remain, less than the corresponding pressures on the north end of the pool in the Gallegos Canyon Unit. Therefore, drainage of gas from the north end of the pool to the south end of the pool is proven because it has been proven that the common reservoir has sufficient porosity and permeability and pressure to drain from one well or group of wells to another well or group of wells. (In a gas pool the decline in pressure is directly proportional to the amount of gas produced.)

(c) A great many more wells have been drilled and more gas has been produced from the south end of the pool than from the north end of the pool (Gallegos Canyon Unit).

(d) Wells drilled on 160 acre spacing are economical and profitable.

(e) The primary requisite of proration and conservation and the protection of correlative rights is that one common source of supply must be drilled on the same spacing pattern. If in addition to that primary requisite wells are prorated by formula based on capacity (the present proration formula is adequate), that is an additional matter, but the spacing of wells must remain the same in a common source of supply.

As mentioned above, the Oil Conservation Commission agreed with these premises and issued Order R-172-B stating that the Gallegos Canyon Unit would be developed on 160 acre spacing pattern.

2. Following the above Order R-172-B of December 17, 1953, and under date of March 5, 1953, Benson-Montin, as Operators of the Gallegos Canyon Unit and lessees under a Farmout Agreement from Stanolind Oil and Gas Company, the two being majority owners of acreage in the Gallegos Canyon Unit, forced other unit participants to take into the Unit along the southern border of the Unit acreage belonging to Benson-Montin which had been drilled

2. (Continued)

on a pattern of 160 acres per well. The undersigned company opposed this expansion. I refer you to the undersigned's letter to Benson-Montin, Unit Operator, as of March 13, 1953, copy of which was sent to you. Because of the majority acreage and thus the majority voting power residing in Benson-Montin and Stanolind Oil and Gas Company, the proposed expansion was carried out and Benson-Montin was reimbursed for all their expenses on both the commercial and non-commercial wells.

3. Stanolind Oil and Gas has now become Operator of the Gallegos Canyon Unit, Benson-Montin having resigned. Stanolind Oil and Gas Company and Benson-Montin remain with the majority of voting power in the Unit and the majority of the acreage.

4. Now comes Stanolind Oil and Gas Company asking for a rehearing in Case 696 wherein Orders R-566 and R-566-A of December 23, 1954, were rendered by the Oil Conservation Commission after hearing and other testimony. This case was originally heard on the application of J. D. Hancock, Jr. pleading ratable take or proration of gas production in the West Kutz-Pictured Cliffs Gas Pool, San Juan County, New Mexico. The above orders granting proration of gas production in this pool put into effect proration for this pool under the same general proration formula as was ordered for other Pictured Cliffs gas pools in the San Juan Basin, New Mexico. In all of these orders the spacing pattern for Pictured Cliffs wells is 160 acres per well.

RECOMMENDATIONS:

A. That the following orders remain in effect:

Order R-172-B (Case 372)
Orders R-566 and R-566A (Case 696)

B. That no exceptions to the proration orders, including spacing pattern per well, be made in the West Kutz-Pictured Cliffs Gas Pool as against similar orders for other Pictured Cliffs Gas Pools. It would be definitely unsound and contrary to conservation measures and correlative rights for one-half of a common pool to be drilled on one spacing pattern and the other half on another spacing pattern. If this were by any chance permitted by your Commission, the only equitable measure to this non-uniform spacing would be that the wells drilled on 160 acre spacing would be prorated under the present proration formula to 50% of the wells drilled on 320 acre spacing.

Respectfully submitted at hearing of the above case May 19, 1955, Mabry Hall, State Capitol, Santa Fe, New Mexico.

BROOKHAVEN OIL COMPANY

Thos. B. Scott, Jr.

Thos. B. Scott, Jr.
President

TBS:ms

CLASS OF SERVICE
This is a fast message unless its deferred character is indicated by the proper symbol.

WESTERN UNION
TELEGRAM

W. P. MARSHALL, PRESIDENT

(531)

SYMBOLS
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W B MACEY=

:NEW MEXICO OIL CONSERVATION COMMISSION SANTA FE NMEX=

:AZTEC OIL & GAS COMPANY CONCURS IN PETITION OF STANOLIND OIL AND GAS COMPANY IN CASE 696= WE BELIEVE THAT THE 160 ACRE SPACING AND GAS PRORATION UNIT FOR THE WEST KUTZ FIELD WILL REQUIRE THE DRILLING OF UNNECESSARY WELLS AND URGE THE COMMISSION TO GIVE DUE CONSIDERATION TO THE PROPOSED 320 ACRE SPACING AND PRORATION UNIT=

:AZTEC OIL & GAS CO QUILMAN B DAVIS GENERAL ATTORNEY=

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

August 24, 1955

COPY

Mr. J. K. Smith
Stanolind Oil & Gas Company
Oil & Gas Building
Ft. Worth, Texas

Dear Sir:

We enclose a copy of Order R-566-C issued August 17, 1955, by the Oil Conservation Commission in Case 696, which was heard at the May 19th hearing.

Very truly yours,

W. B. Macey
Secretary - Director

WBM:brp
Enclosure

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

August 24, 1955

COPY

Mr. Jason W. Kellahin
P.O. Box 597
Santa Fe, New Mexico

Dear Sir:

In behalf of your client, James D. Hancock & Company, Ltd., we enclose a copy of Order R-566-C issued in Case 696 and dated August 17, 1955.

Very truly yours,

W. B. Macey
Secretary - Director

WBM:brp
Enclosure

OIL CONSERVATION COMMISSION

P. O. BOX 871

SANTA FE, NEW MEXICO

March 3, 1955

Mr. J. K. Smith, Attorney
Stanolind Oil & Gas Company
Box 1410
FORT WORTH, TEXAS

Dear Sir:

Reference is made to your letter of February 28 pertaining to the continuation of Case 696, which has been readvertised for hearing on March 17.

The Commission believes that it is impossible for us to issue an order continuing the case until some time in April, in view of the fact that the case has already been readvertised on the basis of the order granting the rehearing. You may be assured that this Commission will not take any testimony, in view of the agreement between the interested parties, said agreement pertaining to the continuation of the case until some time in April. The date of continuance will, in all probability, be April 21.

Yours very truly,

WBM:nr

W. B. Macey, Secretary-Director

cc: Mr. Jason Kellahin
Box 361
SANTA FE

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

COPY

January 14, 1955

Mr. J. K. Smith
Stanolind Oil and Gas Company
Box 1410
Ft. Worth, Texas

Mr. Albert R. Greer
Benson-Montin-Greer Drilling Corp.
315-1/2 West Main Street
Farmington, N. M.

Gentlemen:

I am sending you herewith printed copies of Orders R-566 and R-566-A issued by this Commission in Case 696, in which your companies presented joint testimony at the July 14, 1954, hearing.

Very truly yours,

W. B. Macey
Secretary - Director

WBM:nr

FORM 1020 1-51

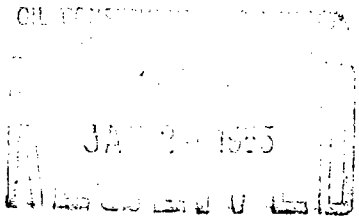
STANOLIND OIL AND GAS COMPANY

OIL AND GAS BUILDING

FORT WORTH, TEXAS

JAMES K. SMITH
DIVISION ATTORNEY

January 19, 1955



Mr. W. B. Macey
Secretary and Director
Oil Conservation Commission
P. O. Box 871
Santa Fe, New Mexico

Re: Case No. 696

Dear Mr. Macey:

Please find enclosed the original and two copies of Stanolind Oil and Gas Company's Application for Rehearing in Case No. 696, which you will please file for consideration by the Oil Conservation Commission.

This Application for Rehearing is filed within twenty days after the entry of Order No. R-566, which we are advised was entered on December 31, 1954.

Will you please advise us whether or not this Application is granted or refused?

Yours very truly,

James K. Smith

JAMES K. SMITH

JRT:cb
Encs.3

Form 502 2-38

STANOLIND OIL AND GAS COMPANY

OIL AND GAS BUILDING

FORT WORTH, TEXAS

February 28, 1955

File: RGH-4098-986.510.1

Subject: Rehearing in Case 696 Relative to the Proration of Gas in the West Kutz Pictured Cliffs Gas Pool, San Juan County, New Mexico

New Mexico Oil Conservation Commission
P. O. Box 871
Santa Fe, New Mexico

Attention: Mr. W. B. Macey

Gentlemen:

By its Order No. R-566-B, dated January 31, 1955, the Commission granted Stanolind's motion for rehearing on Order No. R-566, relative to the proration of gas in the West Kutz Pictured Cliffs Gas Pool, San Juan County, New Mexico. It was ordered that this matter be re-opened and a rehearing held on March 17, 1955, at Santa Fe.

Subsequent to the issuance of the above referenced order relative to the rehearing, Mr. Macey contacted representatives of Stanolind and J. D. Hancock, Jr., for the purpose of reaching an understanding as to further postponement of this rehearing to the regular monthly statewide proration hearing which will be held on April 20, 1955. This is to confirm our understanding that the Commission, on its own motion, will order that this matter be continued until April 20, 1955, and that it will not be necessary for the affected parties to appear at the rehearing originally scheduled for March 17, 1955. Since the March 17 date is on the day following the regular monthly proration hearing for March, we assume that the Commission will issue the appropriate order postponing the matter until the specified date in April.

Yours very truly,

J. K. SMITH
Division Attorney

RGH:cp

cc: Mr. Jason Kellahin, Attorney
P. O. Box 361
Santa Fe, New Mexico
(For J. D. Hancock, Jr.)

Case 696

BEFORE THE OIL CONSERVATION COMMISSION

OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION OF J. D. HANCOCK, JR., FOR AN ORDER REQUIRING RATABLE TAKE OF GAS IN THE WEST KUTZ PICTURED CLIFFS POOL, SAN JUAN COUNTY, NEW MEXICO, OR FOR PRORATIONING OF GAS PRODUCTION IN SAID POOL.

PETITION

To the Oil Conservation Commission of New Mexico:

Comes now J. D. Hancock, Jr., 1524 Fidelity Union Life Building, Dallas, Texas, and petitions the Commission for an order requiring ratable take of gas from wells producing from the Pictured Cliffs formation in the West Kutz Pictured Cliffs Pool, San Juan County, New Mexico, as defined by the Commission, or, in the alternative, to enter its order prorating the production of gas from said pool, and in support thereof would show:

1. That Petitioner is the operator of numerous gas wells located in the West Kutz Pictured Cliffs Pool, San Juan County, New Mexico.

2. That Petitioner's wells are connected to the Southern Union Gas Company's gathering and transmission lines.

3. That the operator's wells offsetting those of Petitioner are connected to the gathering and transmission lines of El Paso Natural Gas Company.

4. That the Southern Union Gas Company operates its gathering and transmission lines at a pressure greatly exceeding that of El Paso Natural Gas Company's lines.

5. That, as a result of this pressure differential, wells of operator's offsetting those of Petitioner have produced large quantities of gas, whereas production of gas from Petitioner's

wells have been greatly curtailed, to Petitioner's detriment and damage.

6. That Petitioner has not been, and is not being allowed to use his fair and equitable share of the reservoir energy and is being denied the opportunity to produce his just and equitable share of the gas in the pool.

Wherefore Petitioner requests that the Commission, after notice and hearing, as required by law, enter its order enforcing ratable take of gas from all gas wells in the West Kutz Pictured Cliffs Gas Pool, San Juan County, New Mexico, or in the alternative, prorate gas production in said pool.

Respectfully submitted,

J. D. Hancock, Jr.

By Jason W. Kellahin
Attorney

Jason W. Kellahin
Laughlin Building
Santa Fe, New Mexico

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

May 20, 1954

COPY

Mr. Ben Howell, Attorney
Bassett Tower
El Paso, Texas

Dear Mr. Howell: RE: OCC Case 696

We have today handed to the Santa Fe Blue Printing Company for photostat the exhibits in Case 696, which was heard by the Commission yesterday.

They are being instructed to mail one copy each to the following, along with invoice to each individual:

1 - Mr. Ben Howell
Jones, Hardie, Grambling & Howell
Bassett Tower
El Paso, Texas

1 - Mr. J. S. Stricklin
El Paso Natural Gas Company
Farmington, New Mexico

1 - Mr. A. S. Grenier
Southern Union Gas Company
Burt Building
Dallas, Texas

Sincerely,

RRS:nr

Oil Conservation Commission

F

OIL CONSERVATION COMMISSION
P. O. BOX 871
SANTA FE, NEW MEXICO

April 30, 1954

Mr. Quilman Davis, Attorney
Southern Union Gas Company
Burt Building
DALLAS - TEXAS

El Paso Natural Gas Company
Attention: Mr. Ben Howell, Attorney
Bassett Tower
EL PASO - TEXAS

Gentlemen:

We hand you herewith each a copy of the petition submitted by J. D. Hancock, jr., the subject of which has been set for hearing before this Commission on May 19, 1954, as Case No. 696.

Inasmuch as your companies figure in the petition, we felt that you would like to have a copy of the complete petition, rather than merely the notice of publication in the case.

Very truly yours,

R. R. Spurrier
Secretary - Director

RRS:nr

COPY

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN UNION

FX-1201

(59)

W. P. MARSHALL, PRESIDENT

SYMBOLS
DL=Day Letter
NL=Night Letter
LT=Int'l Letter Telegram
VLT=Int'l Victory Ltr.

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

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1954 JUL 12 AM 11 06

D=TYA140 PD=TYLER TEX 12 1157AMC=

NEW MEXICO OIL & GAS BOARD=

:SANTAFE NMEX=

IN RE CASE NO 696, SET FOR JULY 14, APPLICATION OF J D HANCOCK JR, WEST KUTZ PICTURED CLIFFS POOL, SAN JUAN COUNTY NEW MEX, DELTA DRLG CO AS JOINT OPERATOR WITH BENSON=MONTIN CONCURS IN THEIR RECOMMENDATION 320 ACRE PRORATION UNITS WITH AN ALLOWABLE FORMULA OF 75% ACREAGE TIMES DELIVERABILITY PLUS 25% ACREAGE=

H C MATHENY DELTA DRILLING CO=

696 14 320 75% 25%=

Legal Notice OCC Hearing

Publication:

Date: May 19

Style

CASE _____:

In the matter of the application of J. D. Hancock, jr., for an order requiring ratable take of gas in the West Kutz-Pictured Cliffs Pool, San Juan County, New Mexico, or for proration of gas production in said pool; ~~this application deriving from~~ it being applicant's contention that, because of pressure differentials in gathering and transmission lines, its wells are not permitted to utilize a fair share of of the gas reservoir energy in proportion to the amount utilized by offset wells connected to another transporter.

WEST KUTZ FIELD
PICTURED CLIFFS FORMATION

RELATION OF NET EFFECTIVE PORE SPACE TO PERMEABILITY

DETERMINED BY CORE LAB FROM SIDEWALL CORES IN GALLEGOS CANYON UNIT

PERMEABILITY — MILLIDARCIES

10 9 8 7 6 5 4 3 2 1 9 8 7 6 5 4 3 2 1 9 8 7 6 5 4 3 2 1

.30 .20 15 10 .09 .08 .07 .06 5 4 3 2 .05 .04 .03 .02 .01

0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20

NET EFFECTIVE PORE SPACE — PERCENT OF BULK VOLUME

KEUFFEL & ESSER CO., N. Y. NO. 359-731
Semi-Logarithmic, 3 Cycles × 10 to the ½ Inch.
MADE IN U. S. A.

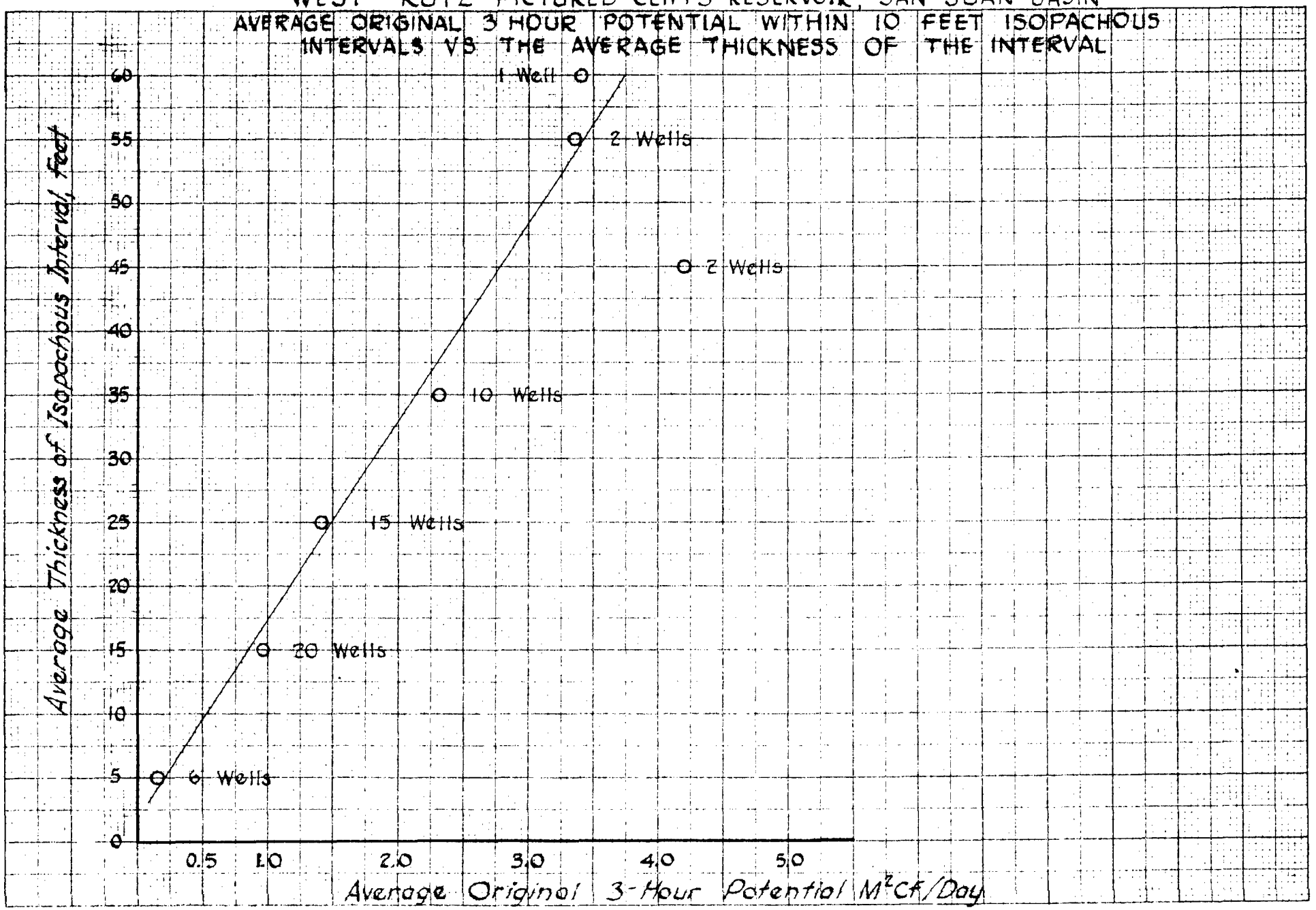
Exhibit #1

10 X 10 TO THE ½ INCH 359 11
KEUFFEL & ESSER CO.

EL PASO NATURAL GAS COMPANY

WEST KUTZ PICTURED CLIFFS RESERVOIR, SAN JUAN BASIN

AVERAGE ORIGINAL 3 HOUR POTENTIAL WITHIN 10 FEET ISOPACHOUS INTERVALS VS THE AVERAGE THICKNESS OF THE INTERVAL



BEFORE THE OIL CONSERVATION
COMMISSION OF THE STATE OF
NEW MEXICO

IN THE MATTER OF THE APPLICATION OF SHERRAY MID-CONTINENT OIL COMPANY FOR AN ORDER EXTENDING THE HORIZONTAL LIMITS OF THE BISTI-LOWER GALLUP OIL POOL IN SAN JUAN COUNTY, NEW MEXICO, AND TEMPORARILY ESTABLISHING UNIFORM 80-ACRE WELL SPACING AND PRORULGATING SPECIAL RULES AND REGULATIONS FOR SAID POOL.

CASE NO. 1308

RESPONDENTS MEMORANDUM BRIEF IN SUPPORT OF
OCC ORDER NO. R-1069-B

The Application for Rehearing filed by the applicant, Shell Oil Company, alleges that this Commission erred in entering its Order No. R-1069-B which granted an optional 40-80 acre well spacing unit in the Bisti-Lower Gallup Oil Pool as an exception to the statewide 40-acre spacing pattern. Various grounds as a basis for the invalidity of this Order are contained in the body of the Petition for rehearing. However, the prayer reads as though Petitioner had abandoned its allegations set forth in the Petition for the relief sought in the prayer is entirely foreign to and inconsistent with the issues raised in the Petition for Rehearing. Moreover, the requested affirmative relief if granted would necessarily affirm in all respects the validity of the Order complained of with the modification that Petitioner's fourteen 40-acre wells be given a double unit allowable.

We fully appreciate that the prayer of a petition or pleading does not constitute any part of the pleading either under common law or code pleading.

See

Burnham-Hanna-Munger Dry Goods Co. v. Hill,
17 N.M. 347, 128 P. 682, syllabus

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ATTORNEYS AT LAW
SANTA FE, NEW MEXICO

"Under code pleading the prayer for relief is no part of the statement of the cause of action."

But, one cannot likely pass over the real objective the Petitioner is seeking to accomplish by the instant rehearing. It cannot be seriously argued nor did the Petitioner set forth any facts in the Petition to entitle it to such relief. Obviously their muteness in this respect is because the objective relief is beyond the power of the Commission to grant.

See

Section 65-3-14 (c), N.M.S.A. (1953) Anno.

which reads in part:

"the owner of any tract that is smaller than the drilling unit established for the field, shall not be deprived of the right to drill on and to produce from such tract, if the same can be done without waste; but in such case the allowable production from such tract as compared with the allowable production therefrom if such tract were a full unit shall be in ratio of the area of such tract to the area of a full unit."

(Emphasis ours.)

We call the Commission's attention to the apparent real objective of Petitioner's rehearing because it should be strongly pointed up before disposing of the merits of the allegations contained in the body of the Petition.

As alleged in the Petition, Shell Oil Company drilled fourteen wells each upon a 40-acre unit under the then existing rules and regulations of the Commission and by so doing now claims that Order No. R-1069-B by granting an optional 40-80 acre drilling unit and in establishing a proportionate unit allowable for an 80-acre drilling unit is invalid. Petitioner alleges the subject Order to be improper in the following respects:

1. The Order is arbitrary, unreasonable, and discriminatory against Shell who "in good faith" drilled the subject wells on a 40-acre density. (Paragraphs 1, 2, 3 and 4 of the Petition).

2. That the Order is not supported by a finding that one well will

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efficiently and economically drain 80 acres. (Paragraph 5 of Petition).

3. That the Order confiscates Petitioner's alleged vested property rights in violation of the constitutional State and Federal due process clauses. (Paragraph 7 of Petition).

4. The Order impairs the obligation of contracts in violation of the State and Federal constitutional provisions. (Paragraph 8 of Petition).

5. The Order is contrary to OCC Rule 505 relating to the depth factor in the allocation of production. (Paragraph 9 of Petition).

And, last,

6. That by reason of the action and representations made by the Commission to the Petitioner prior to the issuance of the Order complained of, the Commission should now be estopped from establishing an 80-acre drilling unit with the given proportionate allowable.

Each of these contentions will be discussed in the above order. However, Petitioner's contention as set forth in Paragraph 6 of the Petition does not warrant any argument and it will be recalled that Petitioner itself did not see fit to argue this contention at the re-hearing on March 13, 1958.

POINT I.

IS ORDER NO. R-1069-B ARBITRARY, UNREASONABLE, AND DISCRIMINATORY AS TO THE PETITIONER WHO ALLEGEDLY "IN GOOD FAITH" DRILLED THE SUBJECT WELLS AT THE TIME AND UNDER THE CIRCUMSTANCES THEN PREVAILING?

It will be recalled that the Application by Sunray Mid-Continent Oil Company to establish an 80-acre spacing unit in the Bisti-Lower Gallup Oil Pool was filed before this Commission on August 5, 1957 and the hearing thereon was held September 18-19, 1957. As of the date of the original hearing, Shell apparently had no plans to drill any 40-acre units for the remainder of the year. On Pages 280-281 of the transcript, their witness, Mr. Robison, stated in answer to a question by Mr. Seth -- "The balance of

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this year we have planned and our budget approved and calls for the drilling of twenty-nine additional wells in addition to the thirty-seven listed on exhibit shown as 13-b (referring to the drilling on an 80-acres pattern). For the next year under 40-acre spacing we have tentative planned in our budget and incidentally our budget is on a calendar year basis, etc." And in response to a question by Mr. Campbell, on Page 282 of the transcript, Mr. Robison states -- "To what we consider proven now, there would be enough 80-acre wells for the remainder of 1957 there would be twenty-nine wells to keep us going for the balance of the year the same as the 40, but next year there would be eleven wells." And on Page 285, Mr. Cooley asks Mr. Robison -- "You stated that Shell has not commenced any 40-acre wells since the filing of this Application. Would you be in a position to state whether they anticipate commencing any until there is a final decision in this case?" And Mr. Robison replies -- "I think that is right, that we will defer, we will like to and probably will defer drilling until there is a decision in this case."

At this point we refer to the abundance of correspondence had between Shell and other interested parties in the Carson Unit Area which were introduced at the oral hearing as Respondents' Exhibits Rx 1-20. These Exhibits demonstrate how fully aware Shell must have been of the consequence of their acts and doings and how the interested parties pled with Shell not to develop on a 40-acre unit.

The legality of Shell's drilling of the twelve wells on a 40-acre pattern between October 9, 1957 and October 17, 1958 is not questioned in view of the existence of the statewide spacing rule and Order No. R-1069, but it may be questioned whether the drilling of 40-acre wells prior to "a final decision in this case" demonstrated the exercise of ordinary sound judgment. Shell admitted at the hearing on March 13, 1958, through Mr. Robison, that it was well aware of the statutory provisions for rehearing and would not one expect that they would not have abruptly changed their avowed plans not to

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drill anymore 40-acre locations during the 20-day period permitted for filing applications for rehearing and the 10-day period within which the Commission had the right to rule on such applications. After the applications for rehearing were filed and surely after the rehearing was granted Shell certainly must have been aware of the fact that 80-acre spacing for the Bisti-Lower Gallup was at least within the realm of possibility. That possibility existed until the Commission entered the subject Order No. R-1069-B and the fact that such Order was entered surely demonstrates how good the possibility was. Shell's change of plans and their rapid acceleration of developing their properties upon a 40-acre spacing pattern suggests the thought that their actions were designed to accomplish the very result that they pleaded in the Application for Rehearing -- that the accomplished drilling of more 40-acre locations could serve to dissuade the Commission to depart from their ruling in the original hearing.

If Petitioner feels Order No. R-1069-B adversely affects it, it is only because of their own knowledgeable actions in the premises. We further submit that Shell is in no worse position now than it was before the granting of the Order for it is permitted under Rule No. R1069-B to do precisely that which it could do under the statewide spacing rule. It may drill one well to each of its 40-acres and receive therefor one 40-acre allowable. This is exactly what Shell has advocated in this cause from the beginning.

Nor is Shell in a position to say that it had not been apprised of the possibility that 80-acre locations would be given two 40-acre allowables. This is borne out by the correspondence above referred to as Respondents' Exhibit Rx 1-20 and, in fact, the attorneys for Shell at the original hearing seemed to be apprehensive of that very result. Reference is made to the remarks by Mr. Cooley and Mr. Porter, Pages 320-321 of transcript; Mr. Seth's statement, Page 332; and that of Mr. Kell's, Page 337. Refer also to the discussion at the first rehearing, Pages 68-69 of transcript by Mr. Grenier

and Mr. Brinkley; The recommendations made by Sinclair, Pages 90-91-99 and 118, and the statement of Mr. Campbell, Page 305, and the statement of Mr. Dutton, Pages 307-309.

If, for the sake of argument, we were to assume that Shell did act "in good faith" as it so strenuously urges, is Shell under the law entitled to relief? There is an abundance of law to the contrary. For example, in the case of

Reichhoff v. Consolidated Gas Co., (Montana 1950) 217 P. 2d 1076

wherein the Plaintiff owned an oil and gas lease. The Defendant purchased the fee title to the tract and brought a quiet title suit against the Plaintiff. The decree favored the Plaintiff Gas Company in that action and the Gas Company entered upon the lands and drilled a producing gas well. Plaintiff Reichhoff appealed the quiet title suit to the Supreme Court and got a reversal of the lower court's decision (151 P. 2d 588, 590). Plaintiff Reichhoff then brought this action for an accounting and an injunction against the Gas Company. The lower court held that his lease had terminated and he again appealed to the Supreme Court. The Supreme Court stated, with regard to the Gas Company's actions -

> "but the company says it was not a willful trespasser for it entered under the District Court's decree annulling the lease and to quiet title in it. However, it knew the law gave to Reichhoff the right of appeal and that on such appeal the decree might be either reversed, modified, affirmed, or the case be sent back for the taking of further evidence or a new trial. It knew Reichhoff had vigorously fought the suit and that he was likely to appeal from the judgment entered against him. In misjudging the law and Reichhoff the gas company acted at its peril. It assumed the attendant risk of drilling the well in the lands leased to Reichhoff and of having the trial court's judgment reversed on appeal, but it took the chance and lost."
>
> (Emphasis ours.)

"It is ordinarily held that the court will not relieve from the prejudicial effects of a mistake of law introduced by an erroneous decision of an inferior court."
(Citing authorities.)

"As was said in a case involving similar facts 'entirely good faith, it occurs to us, would have dictated to them that the proper course would be to wait until the controversy had been finally determined before expending large sums of money in drilling upon the land.' "
(Citing cases.)

Quoting further, the Court said:

"Why should one be treated as acting in good faith when dealing with property as his own, when he knows all of the facts which constitute his claim as well as the claim of his adversary, which facts, when properly construed, give him no title to the land. Such a holding would make every man a judge of the law in his own case, instead of being bound by the law as interpreted by those charged with that duty. We must therefore conclude that the defendants, when they drill the wells on these lands, were willful trespassers just as much as though there had been no question but that the plaintiff had the superior right. They could not decide the disputed question in their own favor, and then proceed with the hope that their acts would be characterized by this court as in good faith even though their judgment upon the law of the case should not be approved."

(Emphasis ours.)

Other cases could likewise be cited, such as,

Liles v. Thompson,
85 S.W.2d 784

wherein the Court stated, at Page 784:

"But it seems to us a serious impeachment of the good faith of the lessees when they persisted in developing the land for oil over the vigorous protest of an adverse claimant who was then suing; of which adverse claim and suit such lessees had full notice. It would seem in such a case the lessees should be held to have expended their money at their own risk and cannot be justly considered as innocent trespassers."

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POINT II.

PETITIONER'S CONTENTION THAT ORDER NO. R-1069-B "IS CONTRARY TO LAW IN THAT IT IS NOT SUPPORTED BY A FINDING THAT ONE WELL WILL EFFECTIVELY AND ECONOMICALLY DRAIN 80 ACRES" IS NOT SUPPORTED BY THE LAW APPLICABLE TO THE INSTANT CASE.

Petitioner construes Section 65-3-14 (b), N.M.S.A. (1953) Anno. as requiring an Order to be bottomed upon such a finding. The statute in question provides:

> "The Commission may establish a proration unit for each pool, such being the area that can be efficiently and economically drained and developed by one well, and in so doing the Commission shall consider the economic loss caused by the drilling of unnecessary wells, the protection of correlative rights including those of royalty owners, the prevention of waste, the avoidance of the augmentation of risks arising from the drilling of an excessive number of wells and the prevention of reduced recovery which might result from the drilling of too few wells."

(It is hard to follow Petitioner's reasoning that if such a finding as they insist upon be made why they would not by the same reasoning insist that all the other considerations recited in the statute should not also be made findings of fact as a prerequisite for the validity of an Order.)

It will be observed that this provision of the statute makes no requirement that the Commission make any finding whatever. It is merely permissive in nature and defines the factors which control the permissive action.

The Commission in entering its Order No. R-1069-B made certain general findings, particularly Findings Nos. 5, 6, and 8 which, it is submitted, effectively show the Commission concluded that sufficient evidence was adduced to justify the establishment of 80-acre proration units on a temporary basis, that 80-acre proration units should be temporarily established, and that a proportional factor of two should be assigned to each such 80-acre unit for allowable purposes.

Our United States Supreme Court, in the case of

United States v. Louisiana,
290 U.S. 70

where the statute under which the agency is operating requires a finding be made, the Court held that it is essential that this be done but where the statute is indefinite on the question of findings or makes no requirement, the Court held that findings are not essential to the validity of the Order.

In a suit to enjoin an I.C.C. rate increase, it was held in

Montana v. United States,
2 F. sup. 443

> "The statute provides that, in exercise of its authority the Commission shall report in writing, but only when damages are awarded does it stipulate findings shall be included. * * * In all other investigations, if justification otherwise clearly appears formal and precise findings are not necessary."

Where an ultimate finding has been made, a subordinate finding results by necessary implication.

Truck Ins. Exchange v. Industrial Accident Commission,
226 P.2d 583

A case raising an almost identical question as the one at issue is that of

Humble Oil & Refining Co. v. Bennett,
149 S.W. 2d 220

wherein the Court held that the creation of a drilling unit implied a finding that one well would drain a unit. This involved a Rule 37 question. In answer to a contention that wells drilled on 10-acre spacing would have a drainage advantage over wells drilled on 20-acres, the Court pointed out that Rule 37 authorized drilling of wells on 10-acres and its application to the Pool in question "implies a finding by the Commission that a well would drain 10-acres instead of 20 as insisted by Appellants."

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Where the scope of review in the District Court encompasses the entire record as it does under Oil Conservation Commission statutes, findings are not necessary to sustain the Order and are in no wise binding upon the reviewing court.

Seaward v. D&R.G. Ry.,
17 N.M. 597

Harris v. State Corporation Commission,
46 N.M. 352

The New Mexico Supreme Court in

Ferguson-Steere Motor Co. v. State Corporation Commission,
50 N.M. _____, 288 P.2d 440

passed on many of the questions involved in this Application and ruled that lack of or insufficiency of findings should not be raised unless the party complaining of their absence or insufficiency has made a request for findings. A distinction between the instant case and the Ferguson-Steere case might be raised upon the ground that the ruling in the Ferguson-Steere case is based upon the fact that the Corporation Commission had adopted the rules of procedure of the District Court, but the court in the Ferguson-Steere opinion went to some pains to point out that this fact merely strengthened its conclusion in regard to the point involved.

The best means of presenting a conclusion is to quote from the Ferguson-Steere opinion. This was a motor transportation case where the contention was raised that the Corporation Commission in making its Order failed to make findings of fact upon the issues raised in the proceedings before it and failed to make appropriate findings relative to the adequacy of existing transportation facilities.

The Court in its opinion first held that the absence of specific findings did not render the Order of the Commission invalid.

> "We think the better reasoned decisions hold and absence of specific findings does not render void an order granting a certificate such as that here

> involved. More specifically is this true, when there was no request made on the Board or Commission whose acts are challenged to make specific findings.
> * * *
> If findings, more adequate findings, by the Administrative Board or Commission be desired, a duty rests on the party complaining of their absence to have made a request for them."

The Court then quoted with approval the opinion in

Railroad Commission v. Great Southern Ry. Co., 185 Ala. 354, 64 Southern 15

to the effect that the Court accepts the making of the Order by a Commission as a finding by the Commission that the circumstances are such as to justify the making of the Order.

It is thus seen that there is no necessity under the statute under consideration here for the Commission to make specific findings; that the Commission did in fact make the ultimate finding in creation of a proration unit and the question of drainage by one well flows from that finding by necessary implication since it cannot be presumed that the Commission did not follow the mandate of the statute; and that the applicant for rehearing is in no position now to complain as to the sufficiency of findings in this case, having submitted no request to the Commission for more specific findings.

POINT III.

THE PETITIONER HAD NO VESTED RIGHT AND THE ORDER COMPLAINED OF DOES NOT CONFISCATE ANY OF PETITIONER'S PROPERTY RIGHTS.

As alleged in Paragraph 7, Shell Oil Company drilled fourteen wells upon 40-acre units under the then existing rules and regulations of the Commission and by so doing it now claims that Order No. R-1069-B by creating 80-acre spacing, setting well locations, and in establishing proration units confiscates the Petitioner's alleged vested property rights in violation of the State and Federal due process clauses.

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SANTA FE, NEW MEXICO

The questions thus posed under Paragraph 7 would appear to be:

1. Did the Applicant acquire a vested property right by the drilling of these wells?

2. Does the Commission have the power and authority to alter their spacing rules and regulations from time to time?

3. Is the Order complained of an arbitrary and unreasonable rule and regulation?

The opinions in the cases hereinafter cited deal with all three of these questions simultaneously. The wholesale litigation involving these issues beyond question support the action of the Commission in the issuance of its Order No. R-1069-B.

Did the Petitioner acquire any "vested" property right by the drilling of any well upon a 40-acre spacing unit prior to the Order complained of?

In the case of

Texas Trading Co., et al., v. Stanolind,
161 S.W. 2d 1046 (1942)

the Texas Trading Co. appealed from an Order of the Commission which cancelled Appellant's permit to drill an additional well within a drilling unit. The Plaintiff contended as a matter of law it was entitled to drill the additional well because under the then spacing rules and regulations in existence at the time the subject land was segregated and when it acquired the lease the Plaintiff had the right to drill the additional well. To this contention, the Texas Court of Appeals had this to say:

> "The contention is overruled. Spacing rules must be subject to change from time to time to permit fair and equitable adjustment of the machinery of oil proration to meet changing conditions. If a lease owner could acquire a 'vested right' in the spacing rules existing at any particular time, then the power of the Railroad Commission to make new rules for regulating drilling and oil production equitably and fairly among lease owners, and properly to conserve the oil resources of the State, would be greatly hindered. In the very nature of the police powers from which the State derives its right to regulate the production of oil and gas, the oil operators can acquire no 'vested right' in the mere rules by which the power is exercised from time to time."

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Also see

Railroad Commission v. Rowan and Nichols Oil Co., 310 U.S. 573, 84 L.Ed. 1368

Similarly in the case of

Patterson v. Stanolind Oil & Gas Co., 77 P. 2d 83 (Okla. 1938)

certain royalty owners contested the constitutionality of the Oklahoma Well Spacing Act (1952 Oklahoma Stat. Anno. Section 85-87) with regard to their interests in a well completed prior to the spacing order of the Commission. Among the issues raised were the due process clause, impairment of contractual obligations, and the retroactive effect of the well spacing order. The statute in question, provided, among other things, that the different royalty owners within a drilling unit shall share in the production in proportion that their acreage bears to the entire drilling unit.

The Supreme Court of Oklahoma in overruling the Plaintiff's contention said:

> "The decision of the United States Supreme Court in the case of Ohio Oil Company v. State of Indiana, 177 U.S. 190, 44 L.Ed. 729, was based upon the theory that the right of the owner of land to the oil and gas thereunder is not exclusive but is common to and merely co-equal with the rights of other land owners to take from the common source of supply, and therefore that his property rights to said oil and gas are subject to the legislative power to prevent the destruction of the common source of supply. It has already been decided that this police power of the State to prevent the destruction of the common source of supply may be exercised by regulation of production therefrom."

In support of this contention, the Court cited the case of

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 76 L.Ed. 1062

viz:

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"Every person has the right to drill wells on his own land and take from the pools below all the gas and oil that he may be able to reduce to possession including that coming from land belonging to others, but the right to take and thus acquire ownership is subject to the reasonable exertion of the power of the state to prevent unnecessary loss, destruction, or waste. And that power extends to the taker's unreasonable and wasteful use of natural gas pressure available for lifting the oil to the surface, and the unreasonable and wasteful depletion of a common supply of gas and oil to the injury of others entitled to resort to and take from the same pool." (Citing many authorities.)

The Court then further said:

"From the foregoing authorities, it is obvious that it is not beyond the police power of the state to restrict the individual owner's taking from the common source of supply, as well as to authorize a 'just distribution' among the various owners of mineral rights in land overlying the common source of supply, of that portion of said supply so taken or reduced to possession by the individual owner. The restriction of drilling by the spacing of wells seems to be a much more feasible and effective method of securing a just distribution for such owners than restrictions upon production after same has already commenced, for it tends to eliminate many difficult facts apparent in such regulations. One of these was pointed out by Judge Kennamer when the case of Champlin Refining Co. v. Corporation Commission, supra, was before the federal District Court, 51 F.2d 823, 834. He said the following of the 1915 conservation law:

'Acreage is ignored and an operator with two 5,000-barrel wells on 5 acres may take out of the common source of supply, under the provisions of section 4, as much oil as an operator with two 5,000-barrel wells on 80 acres in the same field. Proportionate taking per well is wholly inequitable if the Legislature intends to secure 'a just distribution, to arise from the enjoyment * * * of their privilege to reduce to possession', because the operation with 20 acres has four times as much privilege as the operator with 5 acres in the same field.'

The 'wasteful necessity of drilling off-set wells' is another vice which is minimized by such restrictions on drilling. Helmerich & Payne v. Kenoma Petroleum Corp., 136 Kan. 254, 14 P.2d 663. One of the essentials to the preservation of the common source of supply or the prevention of its waste is the preservation of the reservoir energy necessary to production therefrom by the natural process of flowing. This has been recog-

> nized by the courts and the power of the state to prevent the waste of said reservoir energy is beyond successful contradiction.
> * * *
> The restriction of drilling limits the number of penetrations in the reservoir and it seems logical that the less the reservoir is punctured, the less the supply of reservoir energy is likely to be depleted."

In upholding the constitutionality of the rule and regulation, the Court concluded by saying:

> "And this would be true even though the plaintiff were able to prove a distinct loss to himself through the operation of the statutes putting said police power into force and effect.
>
> In Brown et al. v. Humble Oil & Refining Company, supra, the following words were quoted with approval from Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W. 2d 475, 478:
>
> 'All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exertion of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law.'
> * * *
> Regulation, of course, includes a determination of the location of the wells and the amount of oil each should be allowed to produce, so that the reservoir energy will not be exhausted before all of the recoverable oil is wrested from the common source of supply."
>
> (Emphasis ours.)

In the case of

Hunter Oil Co. v. McHugh,
11 So.2d 495 (La. 1942)

Plaintiff drilled a well on a 190-acre tract at a cost of $44,000.00 and the installation of a pipeline at a cost of $12,390.16. Thereafter, the Commission established a compulsory drilling unit of 320 acres. Thereafter, Plaintiff contended that it should be permitted to produce from its well the allowable permitted at the time the well was drilled and the Commission's

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Order requiring it to unitize its 130 acres with other acreage to conform with the required drilling unit of 320 acres was unconstitutional. The Court in upholding the Commission's Order cited an array of authorities and cited with approval the above mentioned case of Patterson v. Stanolind, Supra.

It is of interest to note the comment in the Court's opinion as to the relationship of the number of wells drilled to the market demand.

> "The evidence in this case shows that the establishing of the 320-acre drilling unit will allow for at least 28 wells and possibly 34 wells, according to the estimated area, on the Louisiana side of the Logansport gas field; and that that number of wells will produce many times the present market facilities or demand for many years to come. The evidence shows also that if a larger number of wells were allowed to be drilled on the Louisiana side of the Logansport field they could not produce eventually more gas from the common reservoir than the volume that can be produced from the number of wells which the 320-acre drilling unit allows. It goes without saying that the drilling of more wells than are necessary to drain a gas field efficiently and economically causes waste; it is a waste of valuable material and skill and labor; a waste of gas for fuel in the drilling of the unnecessary wells; and a waste of gas in the allowing of the unnecessary wells to clean themselves out before being placed on production."

There is no Supreme Court decision in New Mexico defining the authority or powers of the New Mexico Oil Conservation Commission. However, it is believed that considerable weight and substance can be given to the text writer of Summers Oil and Gas, Volume I, Page 352, Section 85, which reads:

> "§ 85. SPACING OF WELLS-POOLING-NEW MEXICO
> The New Mexico oil and gas conservation statute authorizes the conservation agency of that state to make regulations governing the spacing of wells and issue orders creating proration units for each pool. A proration unit is defined as an area which may be efficiently and economically drained by one well. The pooling of separate tracts within a proration unit is permitted and the conservation agency is authorized to require pooling of such tracts where necessary to afford the owners the opportunity to produce their just and equitable share of the oil or gas in the pool. The owner of a tract smaller than a drilling unit may drill and produce oil or gas, provided it can be done without waste, but in such a case the allowable

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> production for the tract shall be with respect to the allowable production for the unit shall be in the ratio of the area of the tract to the area of the unit. * * * An owners' just and equitable share of the oil and gas in a pool is defined as being 'an amount, so far as can be practically determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas or both in the pool, and for this purpose to use his just and equitable share of the reservoir energy.' The conservation agency is authorized to adopt a well spacing plan agreed by the owners in a pool, if it has the effect of preventing waste and is fair to the royalty owners, although the agency may modify such plan for the prevention of waste upon a hearing and after notice."

The author further says:

> "The oil and gas conservation statutes of twenty-two states authorize their conservation agencies to regulate the spacing of wells, to establish drilling units, to permit agreements for the pooling of separately owned tracts within a drilling unit and in all of these states, with one exception, (Oregon) the conservation agencies are authorized to require the pooling of tracts within a drilling unit."

Volume I, Page 280,
Sections 65-3-11 N.M.S.A. (1953)
and 65-3-14 N.M.S.A. (1953)

Also, the Petitioner in Paragraph 7 of the Petition for Rehearing claims that the "Order R-1069-B is a retrospective regulation and the retroactive effect of it is to confiscate and violate the vested property rights of the Applicant."

Our New Mexico Supreme Court has defined a "vested right" as the power to do certain actions or possess certain things lawfully and this right may be created by common law, by statute or by contract, and upon principle every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already passed must be deemed retrospective.

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See

Rubal Cava v. Garst,
53 N.M. 295, 206 P.2d 1154

We submit, in what way or manner does the Order complained of take away or impair any right which Petitioner acquired under any prior rule or regulation of this Commission? In what respect does the Order create any new obligation in respect to any prior transaction or consideration? Order No. R-1069-B does not set forth a compulsory drilling unit but is permissive in nature only. Now, as before the adoption of the Order, cannot the Petitioner and all other operators similarly situate develop any or all their acreage upon a 40-acre drilling unit? Now, as before, is not the proration formula on an acreage basis and the same full allowable given to a 40-acre unit as before the adoption of the Order?

Is the Order retrospective in nature when the rights exercised by the Petitioner were subject to Rule 104-L of the Commission, which reads, in part:

> "In order to prevent waste the Commission may after notice and hearing fix different spacing requirements and require greater acreage for drilling tracts in any defined oil pool or in any defined gas pool * * * ."

And, in further view of Rule 501 (b):

> "After notice and hearing, the Commission, in order to prevent waste and protect correlative rights, may promulgate special rules, regulations or orders pertaining to any pool."

Is not the Petitioner now as before the issuance of the Order afforded the same right and opportunity to recover its just and equitable share of the oil in the pool? In reality and in truth and fact, all the Petitioner is asking by the instant Petition is: We have spent twice as much money in the pool as any other operator, although unnecessarily, but having done so we now want to receive twice as much oil as the other

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operators.

In conclusion, we refer to the recent New Mexico Supreme Court case decided in April, 1957,

State v. Kelman,
62 N.M. 264, 308 P.2d 983

where it upheld the power of the State in the State Engineer to enforce rules and regulations regarding the appropriation of water and in so doing, said:

> "All water within the State whether above or beneath the surface of the ground belongs to the State which authorizes its use and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is of beneficial use. The State as owner of water has a right to prescribe how it may be used. This the State has done by the enactment of Section 75-11-2 * * *. Water appropriators and appropriations on each of the Artesian basins of the State are numerous. The State is vitally concerned in every appropriation. The need for water is imperative and often the supply is insufficient. Such conditions lead inevitably to many serious controversies, and demand from the State an exercise of its police power, not only to ascertain rights but also to regulate and protect them. Regulation, however, is not confiscation."

This pronunciation by our Supreme Court would undoubtedly be applied to the instant case were it to review the same.

POINT IV.

THE ORDER COMPLAINED OF DOES NOT IMPAIR THE OBLIGATION OF ANY CONTRACT IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONAL PROVISIONS AND PARTICULARLY THE CARBON UNIT AGREEMENT.

Shell, in Paragraph 8 of their Petition, contends that Order No. R-1060-B,

> "impairs obligations under contracts between the State of New Mexico, the United States Geological Survey and Shell Oil Company as operator which contracts were created by the Carbon Unit Agreement. * * * ."

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It is indeed a novel argument that the approval of the Carson Unit Agreement and the plans for development by the State of New Mexico and by the USGS, ipso facto, make such governmental agencies contracting parties to the agreement. No such governmental agency can act in such matters except in its capacity of regulation and its sole contact with the unit is but an approval. None of these agencies by their own limited creation can go beyond regulation and approval. See

21 F.Supp. 989, 83 L.Ed. 352

The State Land Commissioner has no such power to contract as Petitioner contends and his only authority and power to act in the premises in regard to the Carson Unit Agreement is under Section 7-11-39, N.M.S.A. (1953) Anno. which reads, in part:

> "For the purpose of more properly conserving the oil and gas resources of the State, the Commissioner of Public Lands may consent to and approve the development or operation of State lands under agreements made by lessees of State land jointly or severally with other lessees of State lands, with lessees of the United States, or with others, including the consolidation or combination of two or more leases of State lands held by the same lessee."

Moreover, the authorities consulted indicate that an Order of a State Conservation Commission relating to spacing is an exercise of the police power and any contracts or rights of parties are subject to the exercise of this police power. This question regarding impairment of obligation of contracts has been raised in numerous cases and in each instance it appears that the Court has stated that the police power is a limitation on all contracts. See

Henderson Company v. Thompson,
14 F.Supp. 388
affirmed on appeal, 300 U.S. 258, 81 L.Ed. 632

In

Cranham v. State,
97 P.2d 11 (Okla. 1939)

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the Corporation Commission entered an Order for 20-acre spacing in the form of triangular tracts. The protestants alleged that this impaired their contractual rights to drill on their own land. The Court stated that the real objection of the protestant was as to the limitation on production which is a valid exercise of police power unless arbitrary and unreasonable.

Also, in the case of Patterson v. Stanolind Oil and Gas Co., Supra, (Pages 13, 14, and 15 of Brief) is another example where a 10-acre spacing order was upheld as against the same fallacious impairment of obligation of contract argument.

In

Alston v. Southern Production Co.,
21 So.2d 383 (La. 1945)

the Court passed upon the power of the conservation department to increase the size of drilling units theretofore prescribed from 320 acres to 640 acres and the effect such order would have upon existing pooling agreements. The Court in upholding the power of the regulatory body to so amend their orders, said:

> "Order 28-C, increasing the drilling units to 640 acres in the Logansport Field, and the unitization Orders 28-C-6 and 28-C-8 are valid orders. Act 157 of 1940 authorizes the Commissioner to change the established units if conditions require it. In Paragraph 3 of Section 3 of the act it is provided that 'the Commissioner shall have authority to make, after hearing and notice as hereinafter provided, such reasonable rules, regulations and orders as may be necessary from time to time.' The only restriction on the authority of the Commissioner to establish drilling units is that such an order must be reasonable and the unit prescribed must not exceed the maximum area which one well can efficiently and economically drain. In the absence of a showing to the contrary, we assume that the Commissioner's finding, in this instance, which was preceded by the notice and hearings required by the statute, determined correctly that one well could efficiently and economically drain 640 acres.
> * * *
> An order of the Department of Conservation increasing the size of the drilling units theretofore established by an order of the department, in a given oil or gas

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field, any supersede contracts made between land-owners or leaseholders in the oil or gas field under authority of the previous order of the department, without being subject to the objection that the later order is unconstitutional for impairing the obligations of such contracts."

(Citing numerous cases.)

Shell particularly calls attention to the fifty-three well program of the third plan of development which they ever was unconditionally approved by the USGS on October 15, 1957. We do not agree with Shell's conclusion that the approval was unconditional but rather that it was based upon supposition that the 40-acre spacing pattern had been finally determined. We invite the Commission's review of the subject letters on this point, namely, Shell's letter dated October 22, 1957, letter from Skelly dated October 31, and letter from Phillips dated November 4, being Exhibits Rx 12, 13, and 16. Also see letter dated December 6, telegrams dated December 24 and December 27, Exhibits Rx 18, 19, and 20, indicating Carson Unit development on an 80-acre unit basis. Attention is further directed to the fact that the terms of the Carson Unit Agreement specifically provide that the agreement is subject to the orders, rules, and regulations of the Commission. See Paragraphs 8 and 9 of Agreement. We submit that the contention of Petitioner that the Order violates the obligation of any contractual right is equally without merit as the other points raised by it.

POINT V.

PETITIONER'S CONTENTION THAT THE ORDER COMPLAINED OF IS CONTRARY TO OCC RULE 505 RELATING TO THE DEPTH FACTOR IN THE ALLOCATION OF PRODUCTION IS INAPPLICABLE TO THE CASE AT HAND.

Paragraph 9 of the Application for Rehearing alleges that Order No. R-1069-B is contrary to Rule 505 of the Commission's Rules and Regulations. Rule 505 provides a proportional factor for wells on 80-acre spacing for wells below 5,000 feet.

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It seems apparent from the reading of Rule 505 that, in the first place, it never was intended and does not now provide for any 80-acre proportional factor in pools where the depth range is from 0 to 5,000 feet. In the absence of any provision for a factor in such a pool for 80-acre spacing, Rule 1 would seem to apply. This Rule is as follows:

> "SCOPE OF RULES AND REGULATIONS
>
> (a) The following General Rules of statewide application have been adopted by the Oil Conservation Commission to conserve the natural resources of the State of New Mexico, to prevent waste, and to protect correlative rights of all owners of crude oil and natural gas. Special rules, regulations and orders have been and will be issued when required and shall prevail as against General Rules, Regulations and Orders if in conflict therewith. However, whenever these General Rules do not conflict with special rules heretofore or hereafter adopted, these General Rules will apply in each case.
>
> (b) The Commission may grant exceptions to these rules after notice and hearing, when the granting of such exceptions will not result in waste but will protect correlative rights or prevent undue hardship."

Under this Rule 1, even if there were some factor provided in Rule 505 for wells of this depth, certainly after notice and hearing, the Commission, upon application, can establish any reasonable rules, including the allocation of production.

It should also be noted that Rule 505 (h) provides as follows:

> "The allocation to each pool shall in turn be prorated or distributed to the respective units in each pool in accordance with the proration plan of the particular pool, whereby any such plan exists. Where no proration plan exists, then the pool allocation shall be distributed or prorated to the respective marginal and non-marginal units therein as determined hereinabove."

This seems to contemplate that the statewide rule with reference to allocation is applicable only when there has been no proration plan for a particular pool.

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POINT VI.

THE QUESTION OF ESTOPPEL CANNOT BE RAISED AGAINST A STATE OR SOVEREIGN IN REFERENCE TO ITS ACTS IN THE EXERCISE OF ITS POLICE POWERS.

Petitioner's contention of estoppel is without merit for the reason that two of the essential elements of estoppel are lacking, namely, any acts, language or other representation or concealment of any material fact made by the Commission to mislead the Applicant in doing what it did and, secondly, good faith on the part of the Petitioner in relying upon such acts, language or conduct of the Commission. The question of good faith has been fully covered in Point I of this Brief. Surely, Petitioner does not claim, nor do we attempt to assert that it so claims, that the Commission made any false representation or concealed any material fact that could have misled the Petitioner. Petitioner did say, however, at the rehearing on March 13th, that they relied upon Order No. R-1069; and further admitted that they realized the Order could be altered, amended or modified.

There are many New Mexico decisions against Petitioner's contention that estoppel can be asserted against the State in its exercise of its police powers. For example, in State v. McLean, Supra, where the State under its police power was regulating the appropriation of water in answer to the contention of estoppel said:

> "Defendant claims that the action against him is barred on ground of estoppel by reason of laches on the part of the Artesian water supervisor who had knowledge of the method employed by him in watering his native grass and livestock. The plaintiff (State) contends that estoppel and laches do not run against the State to prevent its acting in a governmental capacity and we agree with this contention."

Our Supreme Court, in the case of

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First Thrift & Loan Association v. State,
304 P.2d 582 (1956)

passed upon the question of estoppel against the State where a corporation acted upon reliance to an Attorney General's ruling. Briefly, the facts were that the First Thrift & Loan Association incorporated under the New Mexico general corporation statutes instead of in accordance with the banking incorporation statutes. Years later the Attorney General brought an injunction to prohibit them from conducting the banking business. The Association based its right to so incorporate under the general corporation statutes and its right to do banking business thereunder upon a series of opinions previously issued by the New Mexico Attorney General's office which purportedly gave it the right to conduct such business. The Association contended the State should now be estopped to deny it the right to do business under its general charter because it had relied, among other things, upon the Attorney General's opinion. The Supreme Court answered this contention by saying:

> "Whatever the effect of the opinions mentioned * * * in any event the State cannot be estopped from the exercise of its police power. 'A State cannot estop itself by grant or contract from the exercise of the police power.' Sanitary District of Chicago v. United States, 266 U.S. 405, 69 L.Ed. 352."

The Court then cited

Town of Gallup v. Constant,
36 N.M. 211, 11 P.2d 962

and numerous other authorities.

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In conclusion, by reason of the authorities above cited and the statutes applicable, we respectfully submit that none of the contentions made by Petitioner are well taken; that the Order complained of OCC R-1069-B is reasonable, lawful and just and that the Commission acted within its power and authority by promulgating the same and for the reasons heretofore stated the Order should be affirmed.

Respectfully submitted,

SUNRAY MID-CONTINENT OIL COMPANY
for itself and on behalf of

MAGNOLIA PETROLEUM COMPANY

HUMBLE OIL AND REFINING COMPANY

BRITISH-AMERICAN OIL PRODUCING CO.

SKELLY OIL COMPANY

AMARDA PETROLEUM CORPORATION

and

PHILLIPS PETROLEUM COMPANY

BY GILBERT, WHITE AND GILBERT

By _____
L. C. White, Attorney

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BEFORE THE OIL CONSERVATION COMMISSION

OF THE STATE OF NEW MEXICO

SHELL BRIEF

IN THE MATTER OF THE APPLICATION OF SUNRAY MID-CONTINENT OIL COMPANY (BISTI POOL SPACING REHEARING). CASE NO. 1308

BRIEF

This Brief is submitted to supplement the application for rehearing filed by Shell Oil Company in this action. The application for rehearing is directed to Order No. R-1069-B of January 17, 1958.

A brief consideration of the facts established during the hearings is necessary before considering the legal consequences of the action taken by the Commission and by the applicant.

As shown by Shell's rehearing Exhibits Nos. 1 and 2 at the Shell rehearing, 40-acre wells were drilled by Shell, the first commencing about the middle of August, 1957, and thereafter an additional well was drilled prior to October 9, 1957, which is the date of Order No. R-1069. Between October 9 and November 4, 1957, four (4) 40-acre wells were commenced, and between November 4, 1957, which is the date of Order No. R-1069-A, and January 17, 1958, the date of Order No. R-1069-B, eight (8) 40-acre wells were commenced. As established at the hearing, the total cost of these fourteen wells to the applicant was $565,600.00, exclusive of lease facilities. It was further established during the hearings the Commission was officially advised of the commencement of drilling of each of these wells on the regular Commission forms.

The initial 40-acre wells drilled were, of course, drilled under the State-wide Rule No. 104, which had been in effect for many years. About August 5, 1957, Sunray Mid-Continent Oil Company applied for an exception to this State-wide Rule and the exception

was denied by Order No. R-1069; consequently the State-wide Rule remained in effect as theretofore. On November 4, 1957, Order No. R-1069-A was issued which granted a rehearing to Sunray. This Order expressly recites that Order No. R-1069 shall remain in full force and effect, consequently it recites that the State-wide Rule shall remain in effect. The State-wide Rule remained in effect until Order No. R-1069-B of January 17, 1958, was issued.

The facts developed at the hearing further show that the applicant drilled the 40-acre wells in reliance on the State-wide order of the Commission. None of the facts listed above are in any way controverted by the parties opposing the Shell rehearing.

In this Brief, we would like to discuss four principal points and refer to other points raised in the application for rehearing. These points briefly are:

First: Order No. R-1069-B is retroactive in effect and, consequently, violates the due process clause of the Constitution.

Second: The action of the applicant in reliance on the orders of the Commission, coupled with the knowledge of the Commission that the wells were being drilled, invokes the doctrine of estoppel against the Commission to prevent it changing the regulations as they pertain to the wells already drilled.

Third: The action of the Commission in issuing Order No. R-1069-B constitutes an impairment of the obligation of contracts; the contracts being those arising in and from the Carson Unit Agreement.

Fourth: The next points relate to the general matter of discrimination against the applicant in the issuance of the Order and other related points.

ORDER NO. R-1069-B OF THE COMMISSION IS RETROACTIVE, AND IN VIOLATION OF THE DUE PROCESS CLAUSE

The New Mexico Oil Conservation Commission was created by the State Legislature as an administrative agency to which has

been delegated power to regulate development and production of oil and gas. The Commission has the express power to make rules, regulations and orders (New Mexico Statutes 1943 Annotated, Section 65-3-11).

The application for rehearing is concerned with the State-wide spacing Rule and the field-wide Rule R-1069-B. These State-wide and field-wide Rules probably have the force and effect of law. In any event, there is a penalty for the violation of such rules, We are dealing with rules, regulations and orders which do not merely interpret the statute, but which constitute an exercise of the delegated legislative power.

The power here exercised and the acts performed do not involve adjudication of rights. The regulations here are prescribed by the Commission pursuant to a specific delegation of power as above indicated. This type of regulations prescribes for the future within the scope of the standards set down by the Legislature and the rules are of general application.

The Supreme Court of New Mexico has made the distinction between administrative proceedings which determine policy and those which adjudicate rights. This distinction is made in Phillips vs. City of Albuquerque, 60 N.M. 1, 287 P. (2d) 77. This case dealt with the question of notice to be given to parties concerned in an administrative proceeding and the Court defines legislative proceedings as those involving a determination of policy rather than an adjudication of rights. This distinction is of great importance in considering the matters involved in this hearing.

The Supreme Court of New Mexico has also held an administrative agency performing functions similar to those involved in this hearing was exercising a legislative function. This case is Continental Bus System vs. State Corporation Commission, 56 N.M. 158, 241 P. (2d) 829. The case involved the issuance of a

certificate of public convenience and necessity to a bus company. The Court there said:

> "The State Corporation Commission in these matters is an administrative board exercising a legislative function ***."

We believe that this is a necessary and reasonable distinction in the analysis of the functions of an administrative agency to distinguish between legislative and judicial powers and acts. If a delegation of authority to the Oil Conservation Commission is valid, it must be limited to the exercise of legislative functions. This distinction between functions of an administrative agency is especially important in the State of New Mexico where the matter of delegation of judicial powers has been very severely curtailed. This strict rule is especially apparent in the recent case of Hovey Concrete Products Company vs. Mechem, 63 N.M. 250, 316 P. (2d) 1069. In this case, the New Mexico Supreme Court struck down the creation of an administrative agency on the ground that it could exercise judicial functions. In so doing, the Court regarded it as being in conflict with Section 1, Article 6 of the New Mexico Constitution. The Court said:

> "Here the Legislature has attempted to create an executive agency, clothed it with judicial power, on a parity with district courts, and invested it with state-wide jurisdiction. This cannot be done."

Thus, in the matter we are now considering, if the acts creating this Commission are valid, it must be exercising a legislative function and not a judicial function.

Since New Mexico is very strict in its construction of the delegation of powers by the Legislature, we do not feel that the case of State vs. Bond, 172 Okla. 415, 45 P. (2d) 712, which was cited by those opposing the rehearing, is applicable. This case related to a cancellation of under-production, and the Court there said in part:

> "*** to exercise discretion, judicial in nature, and to make and modify its orders ***."

The Court further says, at page 715, with regard to the underproduction in question:

> "It was not accumulated then through any reliance upon any order of the Commission, nor did it accumulate under any provisions of the act, for there was none."

The parties opposing the application further cite the case of Rieckhoff vs. Consolidated Gas Co., 123 Mont. 555, 217 P. (2d) 1076. This case again concerns parties involved in private litigation and the position of parties during an appeal of a case in Court. This, again, is an entirely different question.

Other cases which relate to the exercise of judicial functions which are permitted in other States and which are permitted by some Federal agencies cannot be regarded as pertinent in this situation. This distinction between legislative and judicial functions must always be borne in mind in considering the cases on this subject and in any analysis of the powers and duties of the New Mexico Oil Conservation Commission. The Legislature, or any agency to which legislative powers have been delegated, cannot issue retroactive rules, laws or regulations, for to do so is to take property without due process of law.

We believe that it is apparent without the citation of authority that the exercise of a delegated legislative power is subject to the same limitations as imposed on the Legislature itself, which delegated the authority.

Thus, if the Legislature cannot do so, this Commission cannot issue an order or rule which has the force and effect of a law and which has a retroactive effect, to deprive a party of its property. This basic problem of retroactive regulations has been considered in other States and by the United States Supreme Court.

As we have seen from the brief description of the Orders which are concerned in this case, they are of general application

and, in fact, the Orders under which the wells were drilled are of State-wide application; consequently, it is more apparent in this case than in the usual situation that the matter here concerned is one of legislative character. Certainly these rules are of general application and do not, by any stretch of the imagination, constitute an adjudication of rights or an interpretation of any statute, and cases involving such matters cannot be considered at all applicable in this case. Next, to consider some cases involving the same principle as is here concerned in other jurisdictions:

In the case entitled Utah Hotel Company vs. Industrial Commission, 107 Utah 24, 151 P. (2d) 467, 153 A.L.R. 1176, the question involved was whether the hotel had to contribute to the unemployment compensation fund. The Court drew the distinction between acts or orders of an administrative board which only interpret and those which are legislative. Those which are made pursuant to an express delegation of legislative power and which prescribe for the future a rule of general application are considered legislative. The Court indicates that the different types of acts and orders are reviewed differently, and that the distinction is otherwise important.

In the case of Helvering vs. R. J. Reynolds Tobacco Company, 306, U.S. 110, 83 L. Ed. 536, the United States Supreme Court considered the application of income tax laws to the sale by a corporation of its own stock. The corporation had acted under a Treasury Regulation which was later amended. Following issuance of the original regulation, Congress re-enacted the Revenue Act. The Court felt that a regulation by virtue of the re-enactment had the force of law and, further, that Congress did not intend to authorize the Treasury Department to repeal the rule of law during the period during which the tax was imposed. This problem considered by the United States Supreme Court is somewhat similar

in principle to the matter involved in this hearing. And we believe that the Commission does not have authority to repeal the "rule of law" which was in effect and which existed during the period that the applicant did the drilling in reliance thereon. The Helvering case has been very fully treated by a number of writers. These include articles appearing at 49 Yale Law Journal, Page 660, 40 Columbia L.R., Page 252, 88 U. Pa. L. R., Page 556, and 54 Harv. L. R. 377, 398, 1311. The danger of permitting administrative agencies to issue retroactive regulations and orders is treated in 29 Ga. L.J., Page 1.

With further reference to the question raised by the case of Helvering vs. R. J. Reynolds Tobacco Company, the writer of the article entitled "Treasury Regulations and the Wilshire Oil Case," appearing at 40 Columbia L. R., Page 252, summarizes as follows:

> "The power to change legislative regulations offers no serious difficulties. So long as the delegated legislative power is in effect, there should be no doubt that authority exists to amend prospectively, subject, of course, to the limitation that the amended regulation shall be reasonable, and within the granted power. Re-enactment of the section containing such a power, moreover, constitutes a new grant of the power to make regulations, and should be conclusive of the issue. New Problems and constantly changing conditions require prospective amendments. A retroactive amendment of legislative regulations, however, stands on a different footing. The retroactive application of an amendment of a legislative regulation, precisely as in the case of the retroactive application of a statute, should be avoided; and, as in the case of a statute, an amendment of a legislative regulation should be construed if at all possible to have prospective application only. As a matter of policy, an administrative official should not have power to amend retroactively a legislative regulation adverse to the individual. As a matter of law, it would seem sound to require specific statutory authority. In any event, any attempt by Congress to delegate such a power to an administrative official would necessarily be subject to the same rigid limitations which the due process clause imposes upon retroactive legislation by Congress. Axiomatically, Congress can delegate no greater power than it itself possesses."

The matter has also been considered at some length by the Supreme Court in the case of Arizona Grocery Company vs. A.T.S.F. Railroad, 284 U.S. 370, 76 L. Ed. 348. This case concerned rates for shipments imposed by the Interstate Commerce Commission and also the matter of award of reparations under such approved rates. The Court here made the following significant statement (76 L. Ed. 356):

> "The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future it was performing a legislative function, and that when it was sitting to award reparation it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of res judicata, it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."

The California District Court of Appeals, in the case of Strother vs. P. G. & E., 94 Cal. App. (2d) 525, 211 P. (2d) 624, refused to give retroactive effect to a Civil Aeronautics Authority rule relating to notice of intention to erect poles and wires near an airport, and again the Supreme Court of Florida, in the case of York vs. State ex rel Schwaid, 10 S. (2d) 813, refused to give retroactive effect to certain action of the Dental Board in the issuance of a license. The Court said, at Page 815:

> "Administrative regulations are binding on those affected by them only when promulgated in due course. They will not be permitted to be used in ex post facto as charged in this case."

In the annotation appearing at 153 A.L.R. 1188, the writer considers this problem briefly and clearly sets forth the distinction between legislative and interpretive regulations issued by administrative agencies.

The Supreme Court of Washington, in the case of Hansen Packing Company vs. City of Seattle, 48 Wash. (2d) 737, 296 P.

(2d) 670, concerned itself with an assessment of excise taxes. The case involved administrative rulings and acts of the City authorities. The Court said in part, at Page 675:

> "An administrative agency may not retroactively impeach itself on general rules because of asserted errors of fact, judgment or discretion on its own part. If it were permissible for a taxing agency to challenge years later, such rules promulgated by its own enforcement agency, taxpayers would never be able to close their books with assurance."

We feel that the same considerations apply in this matter, and operators in this situation would never have any assurance that when proceeding with a development plan, there might be a change of mind by the regulatory authorities causing them a large loss of investment.

One of the more interesting cases on this point is the case of Hercules Powder Company vs. State Board of Equalization, 66 Wyo. 268, 208 P. (2d) 1096. In this case, the Supreme Court of Wyoming considered an assessment for sales taxes against the powder company. It does not seem necessary to quote from this case in detail, but to note that the Court found that as a general proposition, regulations of administrative agencies should be compared to judgments of a court of final appeal. We would, however, like to make the following quotation from the opinion (208 P. (2d) 1112):

> "The editorial comment concerning the conduct of administrative agencies in the note in 153 A.L.R. 1194 appears to us as not only practically sound but also in accord with what is just and fair. That comment points out that:
>
> "'In view of the important part played by administrative agencies in modern life, and their expertness and wide experience in matters confided to their administration, it is believed that as a general proposition their regulations should, as concerns the effect of a retroactive change, be likened to judgments of a court of final appeal, rather than to judgments of a trial court, particularly if it is taken into consideration that the individual citizen has practically no choice in carrying on activities in reliance upon such regulations, prior to their being sanctioned by judicial decision.'

> "To this may we add briefly that there is no good reason in this day and era that we can perceive why the agencies of the state - unless clearly by statute commanded to act otherwise - should not be held to the same standards of morality, equity and fair dealing that are expected by the established courts of the land from the citizenry of the several states."

There is no question that rights of parties which have been established pursuant to a judgment may not be divested by subsequent legislative action. Missengill vs. Downs, 7 How. 758, 12 L. Ed. 903, McCullough vs. Commonwealth of Virginia, 172 U.S. 102, 43 L. Ed. 382.

Thus, we notice that under a variety of circumstances and in a number of separate jurisdictions, the Courts have felt that regulations of the type which we are here considering should not be given retroactive effect.

We have considered in this Brief a variety of cases in order to show that the principle is of universal application, whether oil or any other subject of governmental regulation is concerned. We again point out the general application and prospective effect of the State-wide orders under which the action by the applicant was taken.

No one is arguing in this case that the Commission does not have the power to change its rules and regulations. Shell is the first one to recognize such power and freedom on the part of the Commission to regulate the oil and gas production and development in New Mexico. Such power is necessary for the proper functioning of the Commission in its mission to promote conservation; however, it is equally apparent that when an operator has acted in accordance with the requirements of the Commission's regulations, if the Commission feels that they should be changed for the future, this operator should not be penalized thereby. The new rules and regulations should look only to the future and should not attempt to affect the action

taken under the old rules. In any situation of this nature and in any statute, provision is made to protect those who have rights acquired under the old regulations. This applies in any situation, not only in this spacing case or any other spacing case, but it can apply to casing regulations, tankage and any other production or development activity that has been carried on by any producer in the State of New Mexico. The Commission heretofore has recognized the fact that its rules when changed must only relate to the future, and this is done in the same Rule No. 104 which is under discussion in this case. In sub-section (k), the Rule states: "The provisions of (i) and (j) above shall apply only to wells completed after the effective date of this rule. Nothing herein contained shall affect in any manner any well completed prior to the effective date of this Rule, and no adjustment shall be made in the allowable production for any such wells by reason of these Rules."

Thus, we notice that in the adoption of Rule 104, express provision was made to recognize the existing rights. The same must be done in the case we are now considering. As a matter of principle, law and everyday fairness, orders should not be given retroactive effect to penalize in any manner persons who have in good faith relied upon previous regulations and policy of the same agency.

THE APPLICANT HAD ACQUIRED VESTED PROPERTY RIGHTS.

In the application for rehearing the applicant sets out in some detail the fact that it had acquired vested property rights by reason of the drilling of wells pursuant to the requirements of the State-wide spacing rules. These rules not only permitted but required the spacing which was followed by the applicant. The applicant in such spacing acquired this vested right to a full unit allowable. It was entitled to such

a full unit at the time the wells were commenced and it is still entitled to such a property right. Under this point we will discuss the cases which clearly hold that the applicant did acquire such a right and that it may not be taken away by the action of the Commission. First to consider what is a vested right under our laws:

In the case of Rubalcava vs. Garst, 53 N.M. 295, 206 P. (2d) 1154, the New Mexico Supreme Court had occasion to consider the nature of vested rights. In this case the court was called upon to determine whether a 1947 enactment, requiring that a claim against a decedent's estate to impose a trust or equitable interest therein must be based upon an agreement in writing, would be applicable to a claim based upon an oral agreement which arose prior to 1947. In concluding that the statute would violate vested rights if it were to be applied retroactively to claims which originated prior to the date of its enactment, the court stated:

> '"A 'vested right' is the power to do certain actions or possess certain things lawfully, and is substantially a property right, and may be created either by common law, by statute, or by contract. And when it has been once created, and has become absolute, it is protected from the invasion of the Legislature by those provisions in the Constitution which apply to such rights. And a failure to exercise a vested right before the passage of a subsequent statute, which seeks to divest it, in no way affects or lessens that right."'

and also noted:

> '"***Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."'

This matter of the duration of vested rights in spacing has not received the attention of the courts in many cases. We are unable to find any expression of opinion by courts of any state except in Texas. This is a very important factor in this

particular case and this point constitutes an independent ground for invalidity of Order No. R-1069-B. As has been demonstrated during the previous hearings the petitioner drilled a number of wells on 40-acre tracts and has acquired property rights which it is entitled to have protected.

This matter of vested rights and spacing has been considered by the Court of Civil Appeals of Texas in the case of Chenoweth vs. Railroad Commission, 184 S.W. (2d) 711. This case was a so-called Rule 37 case and concerned the changes in the Texas Spacing Rule Number 37. The Court, in a detailed opinion, held that when an owner or operator invests money and drills a well in keeping with an existing valid order of the Railroad Commission he acquires property rights thereby, and further that such operator is entitled to have those rights protected as against subsequent changes in the Rule by the Commission. The Court in this case at Page 715 stated:

> "It is settled law that when an owner or operator invests his money and drills a well in keeping with an existing valid order of the Commission he acquires property rights which he is entitled to have protected. The most common instance in such cases is where an owner has drilled his tract to a density authorized by the old oil spacing provisions of 150-300 feet. Change of the spacings to 330-660 feet cannot operate to destroy his property rights legally acquired in the wells already drilled under the former spacing provisions."

In this case the Court and the parties were clear that no one was asserting any vested rights as against the proration of the output of the wells concerned. Likewise the applicant in this case makes no contention that it has vested rights to the continuation of any particular proration. However, it is clear that the applicant cannot be discriminated against as regards other producers in the same field by this proration.

As in the Chenoweth case, the applicant here acquired a vested right in the spacing of its wells which were drilled under valid existing orders of the Commission.

The Texas Court in the case of Atlantic Refining Company vs. Gulf Land Company, 122 S.W. (2d) 197, considered another spacing case under the Rule 37 and again recognized that there is a vested right entitled to protection. In this case the Court carefully considers the particular spacing rule that was in effect at the various times concerned. Thus in this case, as in other Texas cases, the Courts are careful to protect the vested rights of the parties under such circumstances. We notice also that at one time the Texas Spacing Rule 37 made reference expressly to vested rights. There was, consequently, a clear recognition of such rights incorporated in the Rule itself.

In the case of Humble Oil & Refining Co. vs. Railroad Commission, 94 S.W. (2d) 1197, the Court of Civil Appeals again considered a spacing case and again the Court refers to the danger of destroying property rights if the Commission is not required to recognize the creation and vesting of rights under the Spacing Rule. At Page 1198 the Court made the following statement:

> "It requires no departure from the rules laid down in those cases to sustain the action of the commission in the instant case. It is true that when the permit here attacked was granted, it required an exception to rule 37 as that rule existed when said permit was granted. At that time the spacing provisions required were 466-933 feet. But at the time the 2.5 acres were segregated, spacings under said rule of only 150-300 feet were required. A subsequent amendment to such spacing rule should not, however, be permitted to destroy a property right duly acquired in keeping with the provisions of such rule as they existed at the time such property was so acquired. And the right to develop said 2.5 acre tract should be determined, we think by the provisions of rule 37 as they applied at the time the tract in question was segregated. Otherwise, an amendment to such rule, by increasing such spacings between wells, would in effect work a confiscation of vested property rights legally acquired in good faith and in keeping with such rule."

The parties opposing the application cite the cases of Alston vs. Southern Production Co. 207 LA. 370, 20 So. (2d) 383, and Texas Trading Co. vs. Stanolind Oil & Gas Co. 161 SW. (2d) 146, as applicable to the vested rights issued involved in this rehearing.

The former case arose from an action between private parties to cancel oil and gas leases because of improper royalty payments. The defense was that royalties were paid in accordance with an order of the Commission increasing the size of gas drilling units. The decision was predicated upon the fact that the government had promulgated a wartime order which provided "No material may be used for the drilling of any oil well on less than 40 acres, or any gas well on less than 640 acres". The courtconcluded that the Commission's authority was subordinate to that of the Federal Government during the emergency caused by war and that, accordingly, the size of the drilling unit must conform to that prescribed by such wartime emergency order.

The latter decision involved a Rule 37 case where the operator was contending that it acquired a vested right in the spacing rule in existence at the time it acquired its lease. As previously mentioned, Shell is not contending that it acquired a vested right in spacing rules as they existed at the time it acquired its leases in the Carson Bisti Area, or at any other time, nor that the Commission may not amend such rules insofar as future wells are concerned. However, any such amendment must not penalize Shell as to wells previously drilled under prior rules. Thus it is obvious that neither of these decisions is applicable to the instant situation.

It would not seem necessary to cite further authorities on the treatment of this matter in Texas, and there is no reason why vested property rights should not be protected in the same manner in New Mexico. The applicant in this instance clearly acquired such rights by the drilling of the wells whichhas been brought to the attention of the Commission. As in the consideration of the doctrine of estoppel it should be borne in mind that the Commission was advised and had knowledge of the drilling being conducted by the petitioner.

At the time the 40-acre wells in question were drilled they were each entitled to the same allowable as adjoining 80-acre competitor wells. Under Order R-1069-B, such 40-acre wells are discriminated against and given half the allowables of 80-acre wells which were drilled to the same depth. The net effect of Order R-1069-B is to deprive the petitioner of any allowables for fourteen (14) of its 40-acre wells drilled in accordance with State-wide rules, confirmed by orders of the Commission. It is no answer to say, as does the Commission's memorandum 3-58 of January 17, 1958, that such wells will be permitted to produce all or a portion of the allowable given petitioner's well on an adjoining 40-acre location. The fact remains that fourteen (14) of these 40-acre wells will not earn any additional allowables under Order R-1069-B. The result is the same as if this order had required that these fourteen (14) wells be entirely shut in for a one-year period.

As indicated under State-wide Rule 104 the 40-acre spacing was proper and was in fact required. This State-wide rule was not affected by Order No. R-1069 which only served to refuse an exception to the rule. Also, as we have noted above, Order No. R-1069-A of November 4, 1957 likewise confirmed the applicability of the State-wide rules, and such State-wide rules were consequently in effect until January 17, 1958 when Order No. R-1069-B was issued. This order of January 17 is, of course, the one which purports to affect the vested property rights of the applicant. We feel for this reason alone that the order is invalid and should be set aside.

IMPAIRMENT OF OBLIGATION OF CONTRACTS

In the application for rehearing, petitioner also pointed out that Order R-1069-B violates the provisions of Section 10, Article I of the United States Constitution and Section 19 of Article 2 of the Constitution of the State of New Mexico relating to

impairment of obligations of contracts. Since the principles of law involved are well established, it is not necessary to review them at great length. However, it is interesting to note that the Supreme Court of the United States has held that orders of State commissions or other State agencies, exercising delegated authority which is legislative in character, constitute "laws" within the meaning of these constitutional prohibitions. Grand Trunk western Railway Company vs. Railroad Commission of Indiana, 221 U.S. 400, 55 L. Ed. 786; Prentis vs. Atlantic Coast Line Railroad Company, 211 U.S. 210, 53 L. Ed. 150.

The contract involved in this situation is, of course, the Carson Unit Agreement which was established during the course of the hearings. The Unit Agreement contemplates supplemental plans of development which become a part of the contract obligations. The testimony and evidence established that the third supplemental plan provided for the drilling of forty acre unit wells. This point, of course, concerns only those wells within the Carson Unit Area.

In the case of Rubalcava vs. Garst, the Supreme Court of New Mexico quoted with approval the following statement from Volume 1, Cooley's Constitutional Limitations 8 Ed., Page 583:

> "'The obligation of a contract,' it is said, 'consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operations amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.'"

The three (3) 40-acre wells included in the aforementioned third supplemental plan of development, which have been drilled pursuant to the Carson Unit Agreement, were drilled when the State-wide 40-acre spacing and proration rules were in full force and effect. Consequently each of these 40-acre wells was entitled to a full unit allowable at the time it was drilled. The United States Geological Survey, the Commissioner of Public Lands and the State Oil Conservation Commission were aware that Shell's assumption of the obligation to drill 40-acre wells under such plan of development was based upon the State-wide rules under which a full unit allowable would be granted to each 40-acre well. Under Order R-1069-B, the three (3) 40-acre wells will receive one-half of the allowable given wells drilled to the same depth on adjoining competitor lands on an 80-acre spacing pattern. It is obvious that under Order R-1069-B performance of Shell's obligations under the third supplemental plan of development will be burdensome and onerous in that the wells will receive one half of the allowable that they would have received at the time of approval of this plan of development pursuant to which they were drilled. In the above quoted language of Rubalcava vs. Garst, Order R-1069-B clearly amounts to a "denial or obstruction" of "the right" to a full unit allowable which existed at the time of creation of the contract arising from approval of the Carson Unit Agreement and such plan of development and, therefore, impairs obligations of contracts contrary to the above-mentioned constitutional prohibitions contained in the United States Constitution and the Constitution of the State of New Mexico.

THE COMMISSION IS ESTOPPED BY ITS ACTION FROM THE ISSUANCE OF ORDER NO. R-1069-B

In the application of Shell Oil Company for rehearing, reference is made to the drilling of wells in good faith in reliance on the existing orders of the Commission and with the

further statement that as a matter of equity and justice, the Commission is estopped from establishing spacing and proration units which discriminate against the applicant's wells so drilled.

As we noticed above, it was established at the hearings, and not controverted, that the wells in question were drilled in reliance upon the State-wide order of the Commission. It was further established that the Commission had knowledge that these wells were being so drilled, by reason of the official notice forms furnished to the Commission, and we have also seen that the order granting the rehearing expressly provided that the State-wide rule would not be altered. Thus, all action was taken pursuant to and in reliance upon the State-wide orders of the Commission.

The parties opposing this application have cited the New Mexico Supreme Court decision of Chambers vs. Bessent, 17 N.M. 487, 134 Pac. 237, as setting forth the elements of equitable estoppel:

> "(1) There must be conduct -- acts, language or silence -- amounting to a representation or concealment of material facts. (2) These must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concernint these facts must be unknown to either party claiming the benefit of the estoppel at the time when such conduct was done and at the time when it was acted upon by him. (4) The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and proper that it will be acted upon. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse; in other words, if he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights consistent with it."

In discussing this New Mexico decision the United States Court of Appeals for the Tenth Circuit in the case of Houtz vs.

General Bonding & Insurance Co., 235 Fed. (2d) 591, at Page 597, commented:

> "In Chambers vs. Bessent, 17 N.M. 487, 134 P. 237, the New Mexico Court set out in great detail the elements necessary to bring into play equitable estoppel. Reduced to simple terms, its holding, consistent with the general holding of other courts, is that equitable estoppel results from a course of conduct which precludes one from asserting rights he otherwise might assert against one who has in good faith relied upon such conduct to his detriment. The court did not hold that actual knowledge of facts must be had by one relying thereon for estoppel."

However, it is readily apparent that all of the elements set forth in Chambers vs. Bessent are present in this case. Following the corresponding numerical sequence in that case, they may be briefly summarized as follows:

1. The acts or representations of the Commission, which constitute the basis for estoppel, consist of the issuance of Orders R-1069 and R-1069-A, which provide for continuation of State-wide 40-acre spacing and proration rules. Such representations were supplemented by the actual establishment of 40-acre proration units in the Carson-Bisti Area for the months of December of 1957 and January of 1958.

2. The New Mexico Oil Conservation Commission was at all times aware of the fact that 40-acre wells were being drilled by Shell, and of the further fact that such wells were being drilled on the basis that they would receive a full unit allowable in accordance with existing State-wide rules.

3. Shell did not at any time prior to January 17, 1958, receive information indicating, nor did it have reason to believe that, the Commission would issue a retrospective order purporting to nullify the provisions of prior Orders R-1069 and R-1069-A, that State-wide rules would remain in full force and effect until changed; under Order R-1069-B such provisions of R-1069 and R-1069-A were treated as if nonexistent.

4. The Commission, in providing for continuation of

State-wide rules under Orders R-1069 and R-1069-A, knew that Shell would proceed with its 40-acre development program in reliance upon the State-wide rules. As previously noted, copies of its notices of intention to drill each of the 40-acre wells in question were filed with the State of New Mexico.

5. As established by the uncontroverted testimony in the rehearing, Shell drilled the 40-acre wells in question in reliance upon State-wide 40-acre rules as affirmed by Orders R-1069 and R-1069-A.

6. As a result Shell expended in excess of $565,600.00 in drilling fourteen (14) 40-acre wells which, under Order R-1069-B, will earn no additional allowable whatsoever.

This is the doctrine of estoppel. There is no question whatever of its application as between private individuals, and there is little question under modern authorities for its application against Governmental agencies.

There is a general consideration of the application of the doctrine as to Governmental agencies in 1 A.L.R. (2d) at Page 346. At this place, the following rule is set forth:

> "Assuming, however, the presence of all the prerequisites for the application of the doctrine of estoppel as between individuals, under some circumstances the public or the United States or the State may be held estopped if an individual would have been held estopped; as when acting in a proprietary or contractual capacity; or when the acts of its public officials alleged to constitute the ground of estoppel are done in the exercise of powers expressly conferred by law, and when acting within the scope of their authority."

There are few decisions in the State of New Mexico concerning the application of the doctrine to Governmental agencies; however, in the case of City of Carlsbad vs. Neal, 56 N.M. 465, 245 P. (2d) 384, the Court considered the matter and held that the doctrine should be applied against a municipality. This case constitutes a clear holding that the doctrine will be applied against Governmental agencies. This case concerned the

dedication of a street, the City bringing an action against an individual to recover possession of land claimed to be part of a street. The Court stated, with reference to the matter of estoppel, at Page 389:

> "With regard to the estoppel question, it has been generally held that the doctrine of equitable estoppel may be invoked against the public depending upon the circumstances of the particular case and the requirements of justice and that, under certain circumstances, a municipality may be estopped from asserting that it owns a street or from opening and accepting a street although it has been previously dedicated to the use of the public. See the annotations on this subject in 171 A.L.R., Pgs. 94 to 171."
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> "But, as stated in the case of Dabney v. City of Portland, 124 Or. 54, 263 P. 386, 388, 'No hard and fixed rule can be stated for determining when this principle should be applied. Each case must be considered in the light of its own particular facts and circumstances.' And, in order that an estoppel may arise, there must be inequitable conduct on the part of the city, and irreparable injury to parties honestly and in good faith acting in reliance thereon,"

We feel that this doctrine is entirely applicable to the situation in which Shell Oil Company finds itself in this hearing. The previous cases in New Mexico, which are Ross vs. Daniel, 53 N.M. 70, 201 P. (2d) 993, and Durell vs. Miles, 53 N.M. 264, 206 P. (2d) 547, recognize the existence of the doctrine, but do not present a clear holding on the point as does City of Carlsbad vs. Neal.

This matter has, of course, been considered in other States. It has received considerable attention in the State of California. In the case of Market Street Railway Company vs. California State Board, 137 Cal. App. (2d) 87, 290 P. (2d) 20, the Court was concerned with an action brought by a street railway company to recover sales tax. In this instance, when the company sold its properties, the State Board of Equalization had in effect a ruling that a bulk sale of property was not subject to the sales tax. During the course of the liquidation of the company, the Board changed its rule. The Court held that the Board was

estopped and could not collect penalty and interest, the Court thereby deciding that under proper circumstances, estoppel can be applied against a Governmental agency, and the Court, with reference to this point, made the following statement:

> "As was said in Baird v. City of Fresno, 97 Cal. App. (2d) 336, 342, 217 P. (2d) 681, 685: 'Ordinarily a governmental agency may not be estopped by the conduct of its officers and employees but there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it.'. See for a good discussion, Farrell v. County of Placer, 23 Cal (2d) 624, 145 P. (2d) 570, 153 A.L.R. 323. In Cruise v. City and County of San Francisco, 101 Cal. App. (2d) 558, 565, 225 P. (2d) 988, 993, this court had the following comment to make: 'Whether an estoppel exists against the government should be tested generally by the same rules as those applicable to private persons. The government should not be permitted to avoid liability by tactics that would never be countenanced between private parties. The government should be an example to its citizens, and by that is meant a good example and not a bad one.'"

The California Court, in the case of Sawyer vs. City of San Diego, 138 Cal. App. (2d) 652, 292 P. (2d) 233, also considered the application of the doctrine of estoppel. The Court held that the doctrine would be applied against Governmental bodies. This case concerned the question of whether property owners located outside the City had the right to water service. The Court, in its decision at Page 239, made the following statement:

> "Whether or not the doctrine of estoppel is applicable is a question of fact unless but one inference can be drawn from the evidence. (Citing cases). The trial court's finding in this connection is also supported by substantial evidence. The doctrine of estoppel will be applied against governmental bodies where justice and right require it. (Citing cases.) In City of Coronado v. City of San Diego, 48 Cal. App. (2d) 160, 172, 119 P. (2d) 359, supra, the doctrine of estoppel was applied against the city of San Diego where it acquiesced for many years in the taking of water under contract and a new agreement and consideration of settling other litigation was entered into modifying the original contract. This court there held that the city was estopped to insist upon a different interpretation of the new contract."

The Supreme Court of Colorado, in the case of Piz v. Housing Authority, 132 Col. 457, 289 P. (2d) 905, considered

the application of the doctrine in condemnation proceedings. The Court applied the doctrine, and stated:(Page 912 Pac.)

> "It was suggested by the trial court that estoppel against a governmental agency should be permitted only in extreme cases. Whether the Housing Authority is a governmental agency we need not decide. We have in this state ample authority for the proposition that estoppel against such an agency may be applied in a proper case. (Citing cases.) Estoppel was applied against the City of Denver in an eminent domain proceeding. Heimbecher v. City and County of Denver, supra. If estoppel applies to the City and County of Denver, it surely applies to the Housing Authority."

Thus under the brief consideration of these cases applying estoppel against governmental agencies, we feel that it is clear that all of the elements are present in this case.

There has been some discussion of good faith by those who oppose the application for rehearing. They apparently misunderstand our assertion of good faith in this situation. We simply assert that we relied on the orders of the Commission, that we had a right to rely on the orders of the Commission and that this constitutes our good faith. There is not in any way involved in this case the question of good faith as in those many cases which involved disputes between private individuals and trespass cases. As is well established by the authorities, the matter of whether a person trespasses in good faith upon the property of another involves a question of notice given by the true owner of the land to the trespasser, but we fail to see how this is in any way concerned in this case. The cases cited by their oral argument indicate that they are relying on this unrelated doctrine. For example, they cited the case of Liles vs. Thompson, 85 S.W. (2d) 784 (Texas Court Civil Appeal 1935). This case was relied on by the opposition but involves a dispute between two individuals and the question is whether the trespass was innocent or willful This is clearly not involved in our case. Also at the oral argument much was made about the fact that certain parties to the Carson

Unit Agreement did not agree to the forty-acre unit spacing, but this again obviously makes no difference in this case. Under a unit agreement the objections or disagreements among working interest owners on technical matters cannot have any effect on an operator who is conducting his business in accordance with the official rules and regulations of the State and Federal agencies having jurisdiction over such matters.

It was clearly established at the hearings that Shell received no advice, recommendations or any other indication from any official agency that its action in developing on a forty-acre basis was in any way improper. This is the good faith. This is the reliance upon the official action of the appropriate governmental agency. Just because an attorney in some other company writes a letter to Shell does not mean that it should disregard the official rules and regulations of the Oil Conservation Commission, although such an attorney may have been practicing from a very early age.

It has been contended by the parties opposing Shell's application that because of Sunray's application for an exception to the State-wide spacing and proration rules which was filed August 5, 1957, Shell should not have proceeded with the drilling of 40-acre wells. It must be recognized that this application did not seek to amend such rules or in any way contest their validity, but merely requested an exception thereto. Obviously a request for an exception to State-wide rules does not serve to render them inoperative. This was clearly recognized by the language in Orders R-1069 and R-1069-A continuing such rules. If the Commission were to take the position that every time an application for an exception to State-wide rules was filed, all operators must immediately cease operations which might be affected by the application, for such time as may be necessary to finally dispose of such application, oil and gas drilling and other development operations would be seriously hindered and impeded. This would be inconsistent with the Commission's function to foster conservation. If the

Commission were to follow the position, urged by the parties opposing this application, with regard to the effect of filing an application for an exception to State-wide rules, it would be a simple matter for a group of individuals or companies to thwart and hinder development of a particular field or area by filing successive applications for exceptions to State-wide rules.

In this situation we believe that the authorities clearly hold that the doctrine of estoppel will be applied against the Oil Conservation Commission under the facts of this particular case. Obviously, the facts as they were developed at the hearings are significant on this matter of estoppel, since it is an equitable matter. It is apparent that the applicant relied upon the orders of the Commission and, in reliance thereon, drilled a considerable number of wells, and further that the Commission thereafter has attempted to change these rules to the detriment of the applicant. Consequently, in order to prevent this damage to the applicant, the Commission should be estopped from asserting such contrary position as to the wells so drilled. This matter of estoppel is necessarily an independent reason for the basis of the invalidity of Order No. R-1069-B. Each and any of the grounds raised in this memorandum would constitute of itself a basis for the invalidity of this Order.

OTHER POINTS

In the application for rehearing, the petitioner refers to other matters related to the invalidity of the order complained of. It would not seem necessary to cite cases on these several points, although they are of importance. The applicant, in its petition for rehearing, refers to a discrimination against it as a result of the issuance of Order R-1069-B. We believe that this discrimination is apparent from the effect upon the applicant of this order complained of and it would not seem necessary to discuss the matter at any particular length here. This discrimination is

a matter related to the retroactive effect of the order and to the effect of the order upon the vested rights of the applicant. It is sufficient to establish this discrimination by merely pointing out the fact that by reason of the order fourteen (14) wells of the applicant will be shut in for a period of one year and that these wells were properly located, legally drilled and entitled to a full unit allowable prior to the issuance of the order.

The applicant believes that any one of the several points upon which this brief is based is sufficient in itself to warrant revocation of the order and to establish that the order, insofar as this applicant is concerned and insofar as action already taken by it, is invalid. The order as to the future is clearly valid, but any operator in the state must be protected in a situation such as Shell finds itself here. Therefore, the applicant respectfully urges the Commission to reconsider its order and to rescind and revoke it.

Respectfully submitted,

SHELL OIL COMPANY

By Oliver Seth
Oliver Seth

Leslie E. Kell
Leslie E. Kell

STATE OF NEW MEXICO)
)
COUNTY OF SAN JUAN)

IN THE DISTRICT COURT

IN THE MATTER OF THE APPEAL OF SHELL OIL COMPANY FROM CERTAIN ORDERS OF THE NEW MEXICO OIL CONSERVATION COMMISSION.

No. 6953

I

MOTION FOR SUMMARY JUDGMENT

Comes now the Respondent PHILLIPS PETROLEUM COMPANY and respectfully moves the Court, under Rule 56 of Rules of Civil Procedure, to dismiss the petition for review herein and enter judgment approving and sustaining the orders of the Oil Conservation Commission of the State of New Mexico under attack herein by said petition for review for the reason that there is no genuine issue as to any material fact in this cause and Respondent is entitled to summary judgment as a matter of law; and in support of this Motion the whole of the record and transcript of the proceedings had before said Commission is hereby offered in evidence but by reason of the length of said record and transcript same are not attached hereto, but are, by reference, incorporated herein.

II

MOTION TO STRIKE

The aforesaid Respondent, PHILLIPS PETROLEUM COMPANY, in the alternative moves the Court to strike from said petition for review the following described allegations contained therein:

(1) That portion of Paragraph 2 of the Petition for Review which reads:

> "During the time the 40-acre orders were in effect and in reliance thereon, petitioner drilled wells in the pool in accordance with such 40-acre rule."

and all of Paragraphs 4(a), 4(b), 4(c), and 4(d) for the reason that said allegations, and each and all of them, are redundant and immaterial, and for the further reason that at all times herein pertinent, the establishment of 80-acre proration units was under consideration by the Oil Conservation Commission of the State of New Mexico with respect to the Bisti-Lower Gallup Oil Pool.

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(2) All of Paragraph 4(f) of the said petition because the allegations therein contained are redundant and immaterial.

(3) All of Paragraph 4(g) of said petition since the allegations therein contained are redundant and immaterial, and for the further reason that petitioner has no vested rights which were violated by any of the orders of the Oil Conservation Commission of the State of New Mexico, of which orders petitioner herein complains.

(4) All of Paragraphs 4 (i) and 4(j) of said petition for the reason that the allegations contained in said paragraphs are redundant and immaterial.

(5) All of Paragraph 4(k) of said Petition for the reason that the allegations therein contained are redundant and immaterial, and for the further reason that no estoppel can be asserted herein against the Oil Conservation Commission of the State of New Mexico.

(6) That the alternative portion of the prayer of the Petition for Review reading:

> ". . . or that the orders be modified to preserve the rights of the petitioner, and for such other and further relief as the Court may deem just."

be stricken, since this court has no power, jurisdiction or authority under the Constitution or laws of the State of New Mexico to modify orders of the said Commission or to grant equitable relief herein, or to substitute its discretion for that of the said Commission.

Dated at Santa Fe, New Mexico, this 30th day of June, 1958.

H. L. Hollis
Bartlesville, Oklahoma

KELLAHIN and FOX
P.O. Box 1713
Santa Fe, New Mexico

By /s/ Jason W. Kellahin
Attorneys for Respondent
PHILLIPS PETROLEUM COMPANY

I certify that a copy of the foregoing instrument was mailed to Jack Conley, Attorney for the Oil Conservation Commission of the State of New Mexico, and to Oliver Seth, Attorney for Petitioner Shell Oil Company, this 30th day of June, 1958.

/s/ Jason W. Kellahin
One of the Attorneys for Respondent
PHILLIPS PETROLEUM COMPANY

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STATE OF NEW MEXICO, COUNTY OF SAN JUAN, IN THE DISTRICT COURT

In the Matter of the Appeal of)
SHELL OIL COMPANY from Certain) No. 4551.
Orders of the New Mexico Oil)
Conservation Commission.)

ANSWER OF GULF OIL CORPORATION

Comes now Gulf Oil Corporation and for its answer to the Petition herein filed herein by Shell Oil Company, alleges and states:

1. That Gulf Oil Corporation joined with Shell Oil Company in the proceedings before the New Mexico Oil Conservation Commission in Case No. 1306, as protestants to the application of Sunray Mid-Continent Oil Company for the establishment of 80 acre proration units for the Bisti Lower Gallup Pool in San Juan County, New Mexico, which resulted in the denial of said application by Order No. R-1069.

2. That thereafter Sunray Mid-Continent Oil Company filed its application for rehearing of Order No. R-1069 and Gulf Oil Corporation joined with Shell Oil Company in opposition to said application for rehearing in the hearing thereof before the New Mexico Oil Conservation Commission.

3. That as a result of the rehearing of Order No. R-1069, the Commission entered its Order No. R-1069B reversing its previous order and establishing temporary 80 acre proration units for the Bisti Lower Gallup Pool for a period of one year from March 1, 1958, and further providing for double the normal unit allowable for each such proration unit.

4. That Gulf Oil Corporation did not file an application for rehearing of Order No. R-1069B as provided for by law as a prerequisite to appeal, but Shell Oil Company did file its application for rehearing of Order No. R-1069B which was denied by the Commission in its Order No. R-1069D.

5. That this is an appeal by Shell Oil Company from Order No. R-1069D of the New Mexico Oil Conservation Commission entered in Case No. 1306 denying the application of Shell Oil Company for a rehearing of Order No. R-1069B, and, is filed pursuant to Section 65-3-22 of the New Mexico Statutes 1953 Annotated which requires notice of appeal to be served upon the adverse party or parties and the Commission in the manner provided for service of summons in civil proceedings.

6. That Gulf Oil Corporation has been served with summons as a defendant in this action, but it is not an adverse party to Shell Oil Company and is not appealing from any order of the New Mexico Oil Conservation Commission or asking for any relief in this proceeding.

WHEREFORE, Gulf Oil Corporation asks that it be dismissed without costs.

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ATWOOD AND MALONE
Roswell Petroleum Building
Roswell, New Mexico

Booth Kellough
801 Guaranty Bank Building
P. O. Box 2097
Denver, Colorado

Attorneys for Defendant,
Gulf Oil Corporation

By _____
Ross Malone, Member of the
Firm of Atwood and Malone

Address of Defendant:

GULF OIL CORPORATION
8th Floor Guaranty Bank Building
17th and Stout Streets
Denver, Colorado

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STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

In the Matter of the Appeal of SHELL OIL COMPANY from Certain Orders of the New Mexico Oil Conservation Commission.

No. 6953

DISCLAIMER

Comes now Lion Oil, Inc. and states:

Lion Oil, Inc. was served as a Respondent in the above Cause, but it has no interest in any of the lands in the Ojo Alamo Lower Gallup Oil Pool in San Juan County, New Mexico, and disclaims any interest in the above Petition for Review.

B. L. ALLEN
1401 South Coast Building
Houston 2, Texas

HERVEY, DOW & HINKLE
P. O. Box 547
Roswell, New Mexico

Attorneys for Lion Oil, Inc.

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STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

In the matter of the Appeal of SHELL OIL COMPANY from certain Orders of the New Mexico Oil Conservation Commission.

No. 6553

MOTION TO STRIKE CERTAIN ALLEGATIONS

Comes now the Respondent, Monsanto Chemical Company, and respectfully moves the Court to strike from the Petition for Review each of the lettered subparagraphs under Paragraph 4 for the reason that each of said subparagraphs is redundant and immaterial.

R. L. ALLEN
1401 South Coast Building
Houston 2, Texas

HERVEY, DOW & HINKLE
P. O. Box 547
Roswell, New Mexico

Attorneys for Respondent, Monsanto Chemical Company

Same motion filed by:

Atlantic Refining Company
Humble Oil and Refining Company
Pan-American Petroleum Corporation
Standard Oil Company of Texas

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STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

In the Matter of the Appeal of SHELL OIL COMPANY from Certain Orders of the New Mexico Oil Conservation Commission.

No. 6553

MOTION TO STRIKE CERTAIN ALLEGATIONS AND FOR SUMMARY JUDGMENT

Comes now the Respondent, British-American Oil Producing Company, and joins in the Motions filed in this Cause by the Respondent, Sunray Mid-Continent Oil Company, and adopts said Motions in the same manner and to the same extent as though each paragraph thereof was herein fully set out.

R. W. SULLIVAN
Room 1512
1700 Broadway
Denver 2, Colorado

HERVEY, DOW & HINKLE
P. O. Box 547
Roswell, New Mexico

Attorneys for Respondent, British-American Oil Producing Company

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STATE OF NEW MEXICO COUNTY OF SAN JUAN

IN THE DISTRICT COURT

In the Matter of the Appeal of Shell Oil Company from Certain Orders of the New Mexico Oil Conservation Commission. No. 6553

MOTION TO DISMISS, TO STRIKE AND FOR SUMMARY JUDGMENT

I

MOTION TO DISMISS

Comes now Rex Moore, a respondent herein, and moves the Court to dismiss the petition for review filed herein by the Shell Oil Company, in that such company has not properly lodged its appeal in accord with the requirements of the State of New Mexico, and for the further reason that such petition fails to state a claim upon which relief can be granted.

II

MOTION TO STRIKE

Comes now Rex Moore, a respondent herein, and moves the Court to strike various portions of the petition for review filed herein by Shell Oil Company, all as hereinafter more particularly set forth, to-wit:

1. The last two sentences of paragraph 2, all of paragraphs 4(a), 4(b), 4(c), 4(d), 4(h), 4(i), 4(j) and 4(k), and that portion of paragraph 4(g) which reads as follows: "These wells being drilling as hereinabove alleged during the period of the State-wide 40-acre spacing rules, during the period between the entry of Order No. R-1069 and the Order No. R-1069-A granting the re-hearing, and between the time of the Order granting the rehearing and the issuing of Order No. R-1069-B"; for the reason that all of such parts of the petition for review are immaterial and of no consequence at law, and for the further reason that at the time when the petitioner for review, Shell Oil Company, drilled

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the various wells for which grievance is claimed, the original application of Sunray Mid-Continent Oil Company filed with the Oil Conservation Commission of New Mexico for 80 acre spacing was pending before such Commission, and such petitioner's wells were drilled subsequent to such application and with knowledge that such application might be granted.

II.

MOTION FOR SUMMARY JUDGMENT

Comes now Rex Moore, a respondent herein, and pursuant to Rule 56 (b) of the Rules of Civil Procedure moves the Court to dismiss the petition for review and render a summary judgment in his favor, sustaining the orders of the Oil Conservation Commission of the State ofNew Mexico complained of by Shell Oil Company in its petition for review, for the reason that there is no genuine issue as to any material fact and this respondent is entitled to a judgment to such effect by reason of the pleadings and material presented to the Court by the petitioner for review.

In further support of this motion for summary judgment, the whole of the record and transcript of proceedings had before the Oil Conservation Commission of the State of New Mexico is hereby offered in evidence and incorporated herein as part of this motion.

Geo. L. Verity
Attorney for Rex Moore

CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of the foregoing pleading to counsel of record this 3rd day of July, 1958.

Geo. L. Verity

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STATE OF NEW MEXICO COUNTY OF SAN JUAN

IN THE DISTRICT COURT

In the Matter of the Appeal of Shell Oil Company from Certain Orders of the New Mexico Oil Conservation Commission. No. 6553

MOTION TO DISMISS, TO STRIKE AND FOR SUMMARY JUDGMENT

I
MOTION TO DISMISS

Comes now Sun Oil Company, a respondent herein, and moves the Court to dismiss the petition for review filed herein by the Shell Oil Company, in that such company has not properly lodged its appeal in accord with the requirements of the State of New Mexico, and for the further reason that such petition fails to state a claim upon which relief can be granted.

II
MOTION TO STRIKE

Comes now Sun Oil Company, a respondent herein, and moves the Court to strike various portions of the petition for review filed herein by Shell Oil Company, all as hereinafter more particularly set forth, to-wit:

1. The last two sentences of paragraph 2, all of paragraphs 4(a), 4(b), 4(c), 4(d), 4(h), 4(i), 4(j), and 4(k), and that portion of paragraph 4(g) which reads as follows: "Those wells being drilled as hereinabove alleged during the period of the State-wide 40-acre spacing rules, during the period between the entry of Order No. R-1069-B and the Order No. R-1069-A granting the rehearing, and between the time of the Order granting the rehearing and the issuing of Order No. R-1069-B"; for the reason that all of such parts of the petition for review are immaterial and of no consequence at law, and for the further

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reason that at the time when the petitioner for review, Shell Oil Company, drilled the various wells for which grievance is claimed, the original application of Sunray Mid-Continent Oil Company filed with the Oil Conservation Commission of New Mexico for 80 acre spacing was pending before such Commission, and such petitioner's wells were drilled subsequent to such application and with knowledge that such application might be granted.

III

MOTION FOR SUMMARY JUDGMENT

Comes now Sun Oil Company, a respondent herein, and pursuant to Rule 56(b) of the Rules of Civil Procedure moves the Court to dismiss the petition for review and render a summary judgment in its favor, sustaining the orders of the Oil Conservation Commission of the State of New Mexico complained of by Shell Oil Company in its petition for review, for the reason that there is no genuine issue as to any material fact and this respondent is entitled to a judgment to such effect by reason of the pleadings and material presented to the Court by the petitioner for review.

In further support of this motion for summary judgment, the whole of the record and transcript of proceedings had before the Oil Conservation Commission of the State of New Mexico is hereby offered in evidence and incorporated herein as part of this motion.

Geo. L. Verity
Attorney for Sun Oil Company

CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of the foregoing pleading to counsel of record this 3rd day of July, 1958.

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Geo. L. Verity

STATE OF NEW MEXICO COUNTY OF SAN JUAN

IN THE DISTRICT COURT

IN THE MATTER OF THE APPEAL OF)
SHELL OIL COMPANY FROM CERTAIN)
ORDERS OF THE NEW MEXICO OIL) No. 6553
CONSERVATION COMMISSION.)

SHELL OIL COMPANY,

Petitioner,

v.

OIL CONSERVATION COMMISSION
OF NEW MEXICO,

Respondent

MOTION TO STRIKE AND FOR SUMMARY JUDGMENT

I

Motion to Strike

COMES NOW the Respondent Oil Conservation Commission of New Mexico, composed of Edwin L. Mechem, Chairman, Murray E. Morgan, and A. L. Porter, Jr., Secretary-Director, and by its attorneys moves the Court to strike from the Petition for Review the following allegation:

All of Paragraph 4 (f) upon the ground that Petitioner failed to present any statements, testimony or evidence in support of this contention at the rehearing before the Oil Conservation Commission of New Mexico from which this appeal is taken; hence Petitioner has waived and abandoned said contention and it is not within the scope of review before this Court.

II

Motion for Summary Judgment

Respondent further moves this Court to enter summary judgment for Respondent pursuant to Rule 56 of the Rules of Civil Procedure for the District Courts of New Mexico on the ground that there is no genuine issue of any material fact and that Respondent

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is entitled to judgment as a matter of law. In support of this Motion for Summary Judgment the exhibits introduced in evidence in Case No. 1305 before the Respondent Oil Conservation Commission of New Mexico are attached hereto and made a part hereof for all purposes. Due to the length of the record and transcript of proceedings had before the Respondent Commission, the same are not attached hereto but said record and transcript have been filed by other Respondents in this cause and are incorporated herein by reference.

_____

_____
Attorneys for Respondent
Oil Conservation Commission
of New Mexico

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STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

In the Matter of the Appeal of SHELL OIL COMPANY from Certain Orders of the New Mexico Oil Conservation Commission.) No. 4953

MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO STRIKE CERTAIN ALLEGATIONS AND FOR SUMMARY JUDGMENT

I

Motion to Dismiss

Comes now the respondent Southern Union Gas Company and respectfully moves this Honorable Court to dismiss the subject Petition for Review upon the ground that said Petition fails to state a claim upon which relief can be granted.

II

Alternative Motion to Strike

Respondent, in the alternative, but only in the event that its Motion to Dismiss be not sustained, moves the Court to strike from the Petition for Review the following allegations:

1. All of Paragraph 4(f) upon the ground that Petitioner failed to present to the Oil Conservation Commission of the State of New Mexico at the rehearing any grounds, statements, evidence or testimony in support of this contention and, therefore, Petitioner has waived and abandoned said contention, and for the reasons aforesaid said contention is outside the scope of the Petition for Review as provided in Section 65-3-22, N.M.S.A. (1953).

2. All matters and allegations relating to the alleged "good faith" on the part of the Petitioner, namely:

(a) That portion of Paragraph 2, Page 2, of the Petition for Review reading "during the time the 40-acre Orders were in effect and in reliance thereon, Petitioner drilled wells in the pool in accordance with such 40-acre rule", said allegations being redundant and immaterial.

(b) All of paragraphs 4(a), 4(b), 4(c), 4(d), and 4(j) for the reason that each and all of said allegations are redundant and immaterial.

3. That portion of the Petition referring to Petitioner's alleged "vested rights", namely, all of Paragraph 4(g) for the reason that the same is redundant and immaterial.

4. That portion of the Petition relating to the impairment of the obligation of contracts, namely, all of Paragraph 4(h) for the reason that the same is redundant and immaterial.

5. That portion of the Petition relating to Rule 505, namely, Paragraph 4(i) for the reason that the same is redundant and immaterial.

6. All of Paragraph 4(k) for the reason that the allegations contained therein are redundant and immaterial, and upon the further ground that no estoppel can be asserted herein against the Oil Conservation Commission of the State of New Mexico.

7. Respondent further moves the Court to strike the prayer in the Petition for Review upon the ground that the relief requested is inconsistent with and contrary to the relief requested by the Petitioner in its application for rehearing before the Oil Conservation Commission of the State of New Mexico, and for the further reason that same is redundant and immaterial.

III

Motion for Summary Judgment

Respondent further, in the alternative, respectfully moves this Honorable Court, pursuant to Rule 56 of Rules of Civil Procedure, to enter judgment dismissing the Petition for Review upon the ground that there is no genuine issue as to any material fact, and these respondents are entitled to judgment as a matter of law, as appears from the record and transcript of the proceedings had before the Oil Conservation Commission of the State of New Mexico which are attached hereto and made a part hereof by reference.

WILLIS L. LEA, JR.
A. J. SCHERER
Burt Building, Dallas, Texas
Manuel A. Sanchez
Santa Fe, New Mexico

By s/ Manuel A. Sanchez
Attorneys for above named Respondent

I certify that I mailed a copy of the foregoing pleading to opposing counsel of record on June 24, 1958
s/ Manuel A. Sanchez

Brite

GILBERT, WHITE AND GILBERT
ATTORNEYS AND COUNSELORS AT LAW
BISHOP BUILDING
SANTA FE, NEW MEXICO

CARL H. GILBERT
L. C. WHITE
WILLIAM W. GILBERT
SUMNER S. KOCH
EDWIN E. PIPER, JR.

July 17, 1958

Mr. Howard C. Bratton
Hervey, Dow & Hinkle
P. O. Box 547
Roswell, New Mexico

Mr. Charles Spann
904 Simms Building
Albuquerque, New Mexico

Kellahin & Fox
P. O. Box 1713
Santa Fe, New Mexico

Mr. Manuel A. Sanchez
Batts Building
Santa Fe, New Mexico

Mr. Gayle M. Pickens
P. O. Box 1650
Tulsa, Oklahoma

Mr. James E. Sperling
Modrall, Seymour, Sperling, Roehl & Harris
P. O. Box 466
Albuquerque, New Mexico

Mr. Geo. L. Verity
211 East Broadway
Farmington, New Mexico

Mr. Robert W. Sullivan
c/o British-American Oil Producing Co.
Suite 1109, 1700 Broadway
Denver 2, Colorado

Oil Conservation Commission of New Mexico
Capitol Building
Santa Fe, New Mexico
Attn: Mr. Jack Cooley, Attorney

Re: In the Matter of the Appeal of Shell Oil Company from Certain Orders of the New Mexico Oil Conservation Commission. San Juan County Cause No. 6553.

Gentlemen:

For your information, I am enclosing copies of the various Motions filed by the following Respondents:

Amerada Petroleum Corporation
Phillips Petroleum Company
Gulf Oil Corporation

Lion Oil Co., Inc.
Monsanto Chemical Company
The Atlantic Refining Company
British-American Oil Producing Company
Humble Oil and Refining Company
Pan American Petroleum Corporation
Standard Oil Company of Texas

Rex Moore
Sun Oil Company
Oil Conservation Commission of New Mexico
Southern Union Gas Company

We have previously forwarded you the Motions filed by Sunray Mid-Continent Oil Company, joined by The Texas Company, Sinclair Oil and Gas Company, and Magnolia Petroleum Company. It is my understanding that the Magnolia Petroleum Company has or will file a Motion on their own behalf.

Very truly yours,

L. C. WHITE

LCW:LG

Enclosures

STATE OF NEW MEXICO)
)
COUNTY OF [illegible])

IN THE DISTRICT COURT

IN THE MATTER OF THE APPEAL OF SHELL OIL COMPANY FROM CERTAIN ORDERS OF THE NEW MEXICO OIL CONSERVATION COMMISSION.

No. 6553

I

MOTION FOR SUMMARY JUDGMENT

Comes now the Respondent AMERADA PETROLEUM CORPORATION and respectfully moves the Court, under Rule 56 of Rules of Civil Procedure, to dismiss the Petition for Review herein and enter judgment approving and sustaining the orders of the Oil Conservation Commission of the State of New Mexico under attack herein by said Petition for Review for the reason that there is no genuine issue as to any material fact in this cause and Respondent is entitled to summary judgment as a matter of law; and in support of this Motion the whole of the record and transcript of the proceedings had before said Commission is hereby offered in evidence but by reason of the length of said record and transcript same are not attached hereto but are, by reference, incorporated herein.

II

MOTION TO STRIKE

The afore said Respondent, AMERADA PETROLEUM CORPORATION, in the alternative moves the Court to strike from said Petition for Review the following described allegations contained therein:

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(1) That portion of Paragraph 2 of the Petition for Review which reads:

> "During the time the 40-acre orders were in effect and in reliance thereon, petitioner drilled wells in the pool in accordance with such 40-acre rule.",

and all of Paragraphs 4(a), 4(b), 4(c), and 4(d) for the reason that said allegations, and each and all of them, are redundant and immaterial, and for the further reason that at all times herein pertinent, the establishment of 80-acre proration units was under consideration by the Oil Conservation Commission of the State of New Mexico with respect to the Bisti-Lower Gallup Oil Pool.

(2) All of Paragraph 4(f) of the said petition because the allegations therein contained are redundant and immaterial.

(3) All of Paragraph 4(g) of said petition since the allegations therein contained are redundant and immaterial, and for the further reason that petitioner has no vested rights which were violated by any of the orders of the Oil Conservation Commission of the State of New Mexico, of which orders petitioner herein complains.

(4) All of Paragraphs 4(i) and 4(j) of said Petition for the reason that the allegations contained in said paragraphs are redundant and immaterial.

(5) All of Paragraph 4(k) of said Petition for the reason that the allegations therein contained are redundant and immaterial, and for the further reason that no estoppel can be asserted herein against the Oil Conservation Commission of the State of New Mexico.

(6) That the alternative portion of the prayer of the Petition for Review reading:

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". . . or that the orders be modified to preserve the rights of the petitioner, and for such other and further relief as the court may deem just."

be stricken, since this court has no power, jurisdiction or authority under the Constitution or Law of the State of New Mexico to modify orders of the said Commission or to grant equitable relief herein, or to substitute its discretion for that of the said Commission.

Dated at Santa Fe, New Mexico this 30th day of June, 1958.

JOHN J. MILLER
H. D. BUSHNELL

P. O. Box 2040
Tulsa, Oklahoma

BENJAMIN ALD FOX

P. O. Box 1713
Santa Fe, New Mexico

By: s/d/ Jason W. Kellahin
Attorneys for Respondent
AMERADA PETROLEUM CORPORATION

I certify that a copy of the foregoing instrument was mailed to Jack Cooley, Attorney for the Oil Conservation Commission of the State of New Mexico, and to Oliver Seth, Attorney for Petitioner Shell Oil Company, this 30th day of June, 1958.

s/d/ Jason W. Kellahin
One of Attorneys for Respondent
AMERADA PETROLEUM CORPORATION

Same pleading filed by Phillips Petroleum.

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STATE OF NEW MEXICO COUNTY OF SAN JUAN

IN THE DISTRICT COURT

IN THE MATTER OF THE APPEAL OF)
SHELL OIL COMPANY FROM CERTAIN) NO. 6553
ORDERS OF THE NEW MEXICO OIL)
CONSERVATION COMMISSION.)

SHELL OIL COMPANY,

Petitioner

v.

OIL CONSERVATION COMMISSION
OF NEW MEXICO,

Respondent

MOTION TO DISMISS

COMES NOW the Respondent Oil Conservation Commission of New Mexico, composed of Edwin L. Mechem, Chairman, Murray E. Morgan, and A. L. Porter, Jr., Secretary-Director, and by and through its attorneys, William J. Cooley and Oliver E. Payne, moves the court to dismiss the above-styled cause and for its reason states:

1. That, as appears from the face of the Petition for Review, Sunray Mid-Continent Oil Company and others (such others being the following: Skelly Oil Company, British American Oil Producing Company, Amerada Petroleum Corporation, Rex Moore, Southern Union Gas Company, Phillips Petroleum Company, Sun Oil Company, The Texas Company, Magnolia Petroleum Company, and Humble Oil and Refining Company) were parties to the Rehearings in Case No. 1308 before the Oil Conservation Commission of New Mexico and that said parties were adverse to Petitioner Shell Oil Company.

2. That, as appears from the face of the Petition for Review, Petitioner Shell Oil Company failed to join said companies as parties defendant in this action.

3. That, as appears from the face of the Petition for Review, Sunray Mid-Continent Oil Company and others are indispensably necessary to a full and final adjudication of this controversy.

4. That the Court is without jurisdiction to hear this appeal inasmuch as Petitioner Shell Oil Company failed to join all parties indispensably necessary to a full and final adjudication of this controversy.

5. That an affidavit in support of this motion is attached hereto and made a part hereof for all purposes.

WHEREFORE, Respondent Oil Conservation Commission of New Mexico prays that the petition herein be dismissed with costs to the petitioner

_____

_____

Attorneys for Respondent
P. O. Box 871
Santa Fe, New Mexico

AFFIDAVIT

That I, William J. Cooley, Attorney for the Oil Conservation Commission of New Mexico, being first duly sworn, do hereby depose and say:

1. That the following named companies were parties of record to all proceedings before the Oil Conservation Commission of New Mexico in Case No. 1308 of which Petitioner Shell Oil Company complains in this appeal, to-wit:

> Sunray Mid-Continent Oil Company, Skelly Oil Company, British American Oil Producing Company, Amerada Petroleum Corporation, Rex Moore, Southern Union Gas Company, Phillips Petroleum Company, Sun Oil Company, The Texas Company, Magnolia Petroleum Company, and Humble Oil and Refining Company.

2. That the above-named companies were adverse to Petitioner Shell Oil Company in all proceedings before the Oil Conservation Commission of New Mexico in Case No. 1308.

_____

Subscribed and sworn to before me this _____ day of _____, 1958.

_____
Notary Public

_____
My Commission Expires

S E A L

STATE OF NEW MEXICO, COUNTY OF SAN JUAN, IN THE DISTRICT COURT.

In the Matter of the Appeal of SHELL OIL COMPANY from Certain Orders of the New Mexico Oil Conservation Commission.

No. 6553.

PETITION FOR REVIEW

Comes now Shell Oil Company and, for its petition for review of certain orders of the New Mexico Oil Conservation Commission, alleges and states:

1. The petitioner was a party to a rehearing proceeding held before the New Mexico Oil Conservation Commission in Case No. 1308 on the docket of the said Commission, and rehearing was held on March 13th, 1958. Thereafter, the Commission entered Order No. R-1069-D in the said case, and petitioner, being dissatisfied with the disposition of the application for rehearing, takes this appeal. This appeal is filed pursuant to Section 65-3-22, New Mexico Statutes 1953 Annotated.

2. The nature of the proceeding before the New Mexico Oil Conservation Commission is briefly as follows: Sunray Mid-Continent Oil Company filed an application for an exception to the State-wide rules relative to the spacing of oil wells and to have established an 80-acre spacing rule for the Bisti Lower Gallup oil pool in San Juan County, New Mexico. This became Case No. 1308 on the docket of the Commission. The matter was set down for hearing before the Commission and a hearing was held, and the application was opposed by this petitioner. The Commission thereafter entered its Order No. R-1069, which denied the application of Sunray Mid-Continent Oil Company for an exception to the 40-acre well spacing

rules of the Commission, thus the State-wide 40-acre rule continued in effect. Thereafter Sunray Mid-Continent Oil Company and others filed an application with the Commission for a rehearing. The rehearing was granted and held. After the rehearing was held, the Commission entered its Order No. R-1069-B, which changed the previous Order No. R-1069 and provided instead for 80-acre spacing in the pool on a temporary basis. Thereafter this petitioner filed an application for rehearing, which was allowed, and the rehearing was held. The Commission thereafter entered Order No. R-1069-D, which essentially affirmed Order No. R-1069-B, the previous 80-acre spacing order. During the time the 40-acre orders were in effect and in reliance thereon, petitioner drilled wells in the pool in accordance with such 40-acre rule. These wells were, of course, commenced or completed at the time the Commission attempted to change to 80-acre spacing.

3. The Orders herein referred to and which are set forth in this Petition as required by statute are Orders Nos. R-1069, R-1069-A, R-1069-B, R-1069-C and R-1069-D. Copies are attached as Exhibits A through E, and made a part hereof as though fully set out in this paragraph. The petitioner states that Order No. R-1069-B and Order No. R-1069-D are invalid, and the petitioner hereby complains of the entry of said Orders, and in this petition hereinafter sets out the reasons and grounds for the invalidity of the Orders so complained of.

4. The petitioner states that Orders Nos. R-1069-B and R-1069-D are invalid, and the grounds of invalidity thereof upon which this petitioner will rely are as follows:

(a) That the Orders are arbitrary, unreasonable and discriminatory in that in establishing temporary 80-acre proration units, it

(1) discriminates against operators who in good faith drilled wells on a 40-acre pattern in accordance with then existing State-wide spacing and proration rules.

(b) That the Orders are further unreasonable, arbitrary and discriminatory as to the applicant for the reason that they discriminate against the petitioner who in good faith drilled wells on the 40-acre pattern following the 9th day of October, 1957, on which date the Commission entered Order No. R-1069 in Case No. 1308, which Order found in part that the Bisti-Lower Gallup Oil Pool should be developed on a uniform 40-acre well spacing pattern in accordance with the rules and regulations of the Oil Conservation Commission.

(c) That the Orders are further discriminatory, unreasonable and arbitrary for the reason that they discriminate against the petitioner who in good faith, following the 4th day of November, 1957, drilled wells on a 40-acre spacing pattern in accordance with the provisions of Order No. R-1069-A, which order is entitled "Order of the Commission for Rehearing" and which recites that Order No. R-1069 shall remain in full force and effect until further order of the Commission.

(d) The petitioner had commenced two wells on a 40-acre pattern before October 9th, 1957, and the petitioner between October 9th and November 4th had commenced four wells on a 40-acre pattern, and had commenced eight wells between November 4th, 1957, and January 17th, 1958, on the same pattern. All of the wells described in this paragraph on 40-acre pattern were drilled at an approximate total cost to the petitioner of $565,600.00 exclusive of lease facilities. Of the number of wells above indicated, 14 wells under Order No. R-1069-B can not be assigned sufficient acreage to enable them under the terms of the Order to be allowed an 80-acre allow-

able; consequently, the petitioner will not be permitted any allowable on these wells and has thereby been penalized.

(e) That the Orders are contrary to law in that they are not supported by a finding that one well will efficiently and economically drain 80 acres in accordance with Section 65-3-14 (b) of the New Mexico Statutes 1953 Annotated, as amended, and are also contrary to law in other respects.

(f) That the Orders are contrary to the evidence in that to constitute a basis for an exception to the State-wide rules providing for 40-acre spacing and proration units, the evidence must reveal a better than average reservoir with good homogeneity, whereas the evidence of the proponents, as well as the protestants, clearly shows that the reservoir is below average and relatively heterogeneous in nature.

(g) That the Orders Nos. R-1069-B and R-1069-C are retrospective regulations and the retroactive effect of which is to confiscate and violate the vested property rights of the petitioner. During the course of the proceedings in this case the exhibits of the petitioner and of the other parties showed the wells which had then been drilled or commenced under the Commission's existing and reaffirmed 40-acre spacing and proration rules. These wells being drilled as hereinabove alleged during the period of the State-wide 40-acre spacing rules, during the period between the entry of Order No. R-1069 and the Order No. R-1069-A granting the rehearing, and between the time of the Order granting the rehearing and the issuing of Order No. R-1069-B. The Orders in their retroactive effect upon the property rights of the petitioner, which were acquired under existing rules and regulations of the Commission, are contrary to the Fourteenth Amendment to the Constitution of the United States and Section 18, Article II of the Constitution of the State of New

Mexico. Petitioner had a vested property right by reason of the location of the wells hereinabove alleged drilled pursuant to the authority of the Commission, which right vested prior to the entry of Order No. R-1069-B. The Orders in creating 80-acre spacing, in setting well locations, and in establishing proration units confiscated petitioner's vested property rights as hereinabove set forth.

(h) The Orders impair obligations under contracts between the State of New Mexico, the United States Geological Survey and Shell Oil Company as operator, which contracts were created by the Carson Unit Agreement and plans of development for the Carson Unit which were previously approved by the Commissioner of Public Lands of the State of New Mexico, by the Oil Conservation Commission and by the United States Geological Survey. This violation and impairment of the obligations of contracts is contrary to the provisions of Section 10, Article I of the United States Constitution and Section 19, Article II of the Constitution of the State of New Mexico. The Carson Unit Agreement has been duly approved and was in operation at the time the original petition herein was filed. Thereafter plans of development numbered 1 and 2 had been duly approved by the State of New Mexico and by the United States Geological Survey. The third plan of development for the Carson Unit Area was approved by the New Mexico Oil Conservation Commission by letter dated July 23rd, 1957. It was approved by the Commissioner of Public Lands of the State of New Mexico on the 24th day of July, 1957, and was unconditionally approved by the United States Geological Survey by letter dated October 15th, 1957. This third plan of development proposed the drilling of 53 wells within the Carson Area, the development thereby to be upon a 40-acre pattern. The approval of this third plan of development on the 40-acre pattern became an

obligation under the Carson Unit Agreement which was a contract among the three parties as set forth above. This Unit Agreement specifically so provided. The Orders herein complained of as above provided impair the obligation so created.

(i) The Orders herein complained of are contrary to Rule No. 505 of the Commission relating to depth factors in the allocation of production. The Orders are contrary to the said Rule 505 in that said Rule makes no provision for 80-acre wells at a depth less than 5000 feet. The modification or amendment of Rule 505 is not within the issues of the case or within the notice of the hearings.

(j) At the time the Commission entered the Order granting the rehearing, it had previously announced the institution of proration within the area affected and beginning in December, 1957, allocation of production was made to 40-acre tracts by orders entered by the Commission, and consequently at all times here pertinent the Commission had adopted a policy of allocating full allowables to 40-acre tracts, and the petitioner in reliance thereon proceeded with its drilling program as above set forth.

(k) That as a result of the aforesaid substantial expenditures and other action by the petitioner in drilling wells in good faith in reliance upon the then existing State-wide 40-acre spacing and proration rules, which were continued by the above-mentioned Orders of the Commission of October 9th and November 4th, 1957, the Commission is, as a matter of equity and justice, estopped from establishing spacing and proration units which discriminate against all wells so drilled prior to January 17th, 1958, the date of Order No. R-1069-D.

WHEREFORE, Petitioner prays that an order be entered, setting aside Orders Nos. R-1069-B and R-1069-D entered by the New Mexico Oil Conservation Commission in Case No. 1308, entitled "Application of Sunray Mid-Continent Oil Company," etc., or that the Orders be modified to preserve the rights of the petitioner, and for such other and further relief as the Court may deem just.

Respectfully submitted,

SHELL OIL COMPANY

By s/ Leslie E. Kell
Leslie E. Kell

By SETH, MONTGOMERY, FEDERICI & ANDREWS

By s/ Oliver Seth

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION OF THE STATE OF NEW
MEXICO FOR THE PURPOSE OF
CONSIDERING:

CASE NO. 1308
Order No. R-1069

APPLICATION OF SUNRAY MID-CONTINENT
OIL COMPANY FOR AN ORDER EXTENDING
THE HORIZONTAL LIMITS OF THE BISTI-
LOWER GALLUP OIL POOL IN SAN JUAN
COUNTY, NEW MEXICO, AND TEMPORARILY
ESTABLISHING UNIFORM 80-ACRE WELL
SPACING AND PROMULGATING SPECIAL
RULES AND REGULATIONS FOR SAID POOL.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9 o'clock a.m., on September 18, 1957, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission."

NOW, on this 9th., day of October, 1957, the Commission, a quorum being present, having considered the application and the evidence adduced, and being fully advised in the premises,

FINDS:

(1) That due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof.

(2) That the applicant, Sunray Mid-Continent Oil Company, proposes to include within the horizontal limits of the Bisti-Lower Gallup Oil Pool a large amount of acreage which has not yet been proven productive.

(3) That the Commission should continue to follow its established policy of extending the horizontal limits of oil and gas pools in the State of New Mexico to include only such acreage as has been proven productive by actual drilling operations.

(4) That the applicant proposes to establish a uniform 80-acre well spacing pattern in the Bisti-Lower Gallup Oil Pool for a period of one year.

(5) That the applicant has failed to prove that the Bisti-Lower Gallup Oil Pool can be adequately drained by an 80-acre well spacing pattern.

(6) That the Bisti-Lower Gallup Oil Pool should be developed on a uniform 40-acre well spacing pattern in accordance with the Rules and Regulations of the Oil Conservation Commission.

IT IS THEREFORE ORDERED:

EXHIBIT A.

That the application of Sunray Mid-Continent Oil Company for an order establishing uniform 80-acre well spacing in the Bisti-Lower Gallup Oil Pool for a period of one year and extending the horizontal limits of said pool to include the following described acreage:

TOWNSHIP 24 NORTH, RANGE 10 WEST, NMPM
Sections 2 & 3: All
Section 4: S/2

TOWNSHIP 25 NORTH, RANGE 10 WEST, NMPM
Sections 19, 26, 27, and 28: All
Section 31: S/2
Section 35: All

TOWNSHIP 25 NORTH, RANGE 11 WEST, NMPM
Sections 7, 13, 14, and 15: All
Section 16: N/2
Section 24: All
Section 27: SW/4
Sections 28, 29, 30, 35, and 36: All

TOWNSHIP 25 NORTH, RANGE 12 WEST, NMPM
Section 3: All
Section 4: N/2
Section 5: NE/4
Section 7: SW/4
Section 10: E/2
Sections 11 and 12: All
Section 17: SW/4
Section 18: All
Section 25: S/2

TOWNSHIP 25 NORTH, RANGE 13 WEST, NMPM
Section 1: SW/4
Section 2: All
Section 3: S/2 and NE/4
Sections 4 and 11: All
Section 12: S/2 and NW/4

TOWNSHIP 26 NORTH, RANGE 12 WEST, NMPM
Section 31: N/2
Section 32: All

TOWNSHIP 26 NORTH, RANGE 13 WEST, NMPM
Section 26: N/2
Section 29: S/2, NW/4, and W/2 NE/4
Sections 30, 31, and 32: All
Section 36: NE/4

all in San Juan County, New Mexico,

be and the same is hereby denied.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION
EDWIN L. MECHEM, Chairman
MURRAY E. MORGAN, Member
A. L. PORTER, Jr., Member &
Secretary.

S E A L

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION OF THE STATE OF NEW
MEXICO FOR THE PURPOSE OF
CONSIDERING:

CASE NO. 1308
Order No. R-1069-A

IN THE MATTER OF THE APPLICATION
OF SUNRAY MID-CONTINENT OIL COMPANY
FOR AN ORDER EXTENDING THE HORIZONTAL
LIMITS OF THE BISTI-LOWER GALLUP OIL
POOL IN SAN JUAN COUNTY, NEW MEXICO,
AND TEMPORARILY ESTABLISHING UNIFORM
80-ACRE WELL SPACING AND PROMULGATING
SPECIAL RULES AND REGULATIONS.

ORDER OF THE COMMISSION FOR REHEARING

BY THE COMMISSION:

This cause came on for consideration for a rehearing upon the petition of Sunray Mid-Continent Oil Company, Phillips Petroleum Company, Amerada Petroleum Corporation, The Texas Company, Skelly Oil Company, Sinclair Oil & Gas Company, British-American Oil Producing Company, Magnolia Petroleum Company, Anderson-Prichard Oil Corporation, Lion Oil Company, and Southern Union Gas Company.

NOW, on this 4th day of November, 1957, the Commission, a quorum being present, having considered the petitions for rehearing,

FINDS:

(1) That Order No. R-1069 was entered in Case No. 1308 on October 9, 1957.

(2) That petitions for rehearing in Case No. 1308, Order No. R-1069, were received by the Commission from the above-named companies within the time prescribed by law.

(3) That a rehearing should be held in Case No. 1308, Order No. R-1069, at 9 o'clock on December 18, 1957, at Mabry Hall, State Capitol, Santa Fe, New Mexico, to permit all interested parties to appear and present new evidence on the issues raised in the petitions for rehearing.

IT IS THEREFORE ORDERED:

That the above-styled cause be reopened, and a rehearing be held at 9 o'clock a.m. on December 18, 1957, at Mabry Hall, State Capitol, Santa Fe, New Mexico, at which time and place all interested parties may appear.

EXHIBIT B.

IT IS FURTHER ORDERED:

That testimony on rehearing shall be limited to new evidence on the issues raised in the petitions for rehearing.

IT IS FURTHER ORDERED:

That Order No. R-1069 shall remain in full force and effect until further order of the Commission.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

EDWIN L. MECHEM, Chairman

MURRAY E. MORGAN, Member

A. L. PORTER, JR., Member & Secretary

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BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO FOR THE PURPOSE OF CONSIDERING:

CASE NO. 1308
Order No. R-1069-B

APPLICATION OF SUNRAY MID-CONTINENT OIL COMPANY FOR AN ORDER EXTENDING THE HORIZONTAL LIMITS OF THE BISTI-LOWER GALLUP OIL POOL, IN SAN JUAN COUNTY, NEW MEXICO, AND TEMPORARILY ESTABLISHING UNIFORM 80-ACRE WELL SPACING AND PROMULGATING SPECIAL RULES AND REGULATIONS FOR SAID POOL.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9 o'clock a.m., on September 18, 1957, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission", and that this cause came on for rehearing before the Commission, upon the petition of Sunray Mid-Continent Oil Company et al., at 9 o'clock a.m. on December 18, 1957 at Santa Fe, New Mexico.

NOW, on this 17th day of January, 1958, the Commission, a quorum being present, having considered the application, the petitions for rehearing, and the evidence adduced at both the original hearing and the rehearing and being fully advised in the premises,

FINDS:

(1) That due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof.

(2) That Order No. R-1069 should be superseded by this order.

(3) That the Commission found in Order No. R-1069 that "...the Commission should continue to follow its established policy of extending the horizontal limits of oil and gas pools in the State of New Mexico to include only such acreage as has been proven productive by actual drilling operations."

(4) That the petitioners on rehearing failed to show cause why the Commission should deviate from the aforementioned policy in the Bisti-Lower Gallup Oil Pool.

(5) That sufficient evidence was adduced by the petitioners on rehearing, in addition to the evidence adduced at the original hearing, to justify the establishment of 80-acre proration units in the Bisti-Lower Gallup Oil Pool on a temporary basis.

EXHIBIT C.

(6) That 80-acre proration units should be temporarily established in the Bisti-Lower Gallup Oil Pool and that all wells drilled to or completed in said pool should be located on a unit containing 80 acres, more or less, which consists of either the North half or the South half of a single governmental quarter section; and further that all wells drilled in the Bisti-Lower Gallup Oil Pool should be located within 100 feet of the center of either quarter-quarter section; provided however, that the rules should not prohibit the drilling of a well on each of the quarter-quarter sections in an 80-acre proration unit.

(7) That the Secretary-Director of the Commission should have authority to grant exceptions to the foregoing spacing and well location requirements without the necessity of a formal hearing.

(8) That an 80-acre proration unit in the Bisti-Lower Gallup Oil Pool should be assigned an 80-acre proportional factor of two (2) for allowable purposes, and that in the event there is more than one well on an 80-acre proration unit, the operator should be permitted to produce the unit's allowable from said wells in any proportion.

(9) That any well which was projected to or completed in the Bisti-Lower Gallup Oil Pool prior to the effective date of this order should be granted an exception to the 80-acre spacing and well location requirements set forth above, and that any such excepted well should be assigned an allowable which is in the proportion to the standard 80-acre allowable that the well's dedicated acreage bears to 80-acres; provided however, that the allowable for any such excepted well should be increased to that of a standard unit upon receipt by the Commission of proper notice that such well has 80 acres dedicated thereto.

IT IS THEREFORE ORDERED:

(1) That Order No. R-1069 dated October 9, 1957, be and the same is hereby superseded by this order.

(2) That the application of Sunray Mid-Continent Oil Company to extend the horizontal limits of the Bisti-Lower Gallup Oil Pool to include acreage which has not been proven productive by actual drilling operations be and the same is hereby denied.

(3) That any well which was drilling to or completed in the Bisti-Lower Gallup Oil Pool prior to January 25, 1958, be and the same is hereby granted an exception to the well location requirements of Rule 3 of the Special Rules and Regulations for the Bisti-Lower Gallup Oil Pool hereinafter set forth, and that any such well which is located on a tract comprising either the North half or the South half of a governmental quarter section on which 80-acre unit there is located more than one well, be and the same is hereby granted an exception to the requirements of Rule 2 of the Special Rules and Regulations hereinafter set

forth; further, that all such excepted wells shall be assigned an allowable effective at 7 o'clock a.m. Mountain Standard Time, March 1, 1958, which allowable shall bear the same proportion to the standard 80-acre allowable for the Bisti-Lower Gallup Oil Pool that the acreage dedicated to such well bears to 80 acres; provided however, that the allowable for any such excepted well may be increased to that of a standard 80-acre unit by the dedication to the well of additional acreage sufficient to constitute a standard 80-acre proration unit, said allowable to become effective on the date of receipt by the Commission of an amended Form C-128, Well Location and Acreage Dedication Plat, showing the increased acreage dedication. Provided however, that no well shall be assigned an 80-acre allowable in the Bisti-Lower Gallup Oil Pool prior to March 1, 1958.

(4) That the effective date of this order shall be March 1, 1958.

(5) That this order shall be of no further force nor effect after February 28, 1959.

(6) That a case be called for the regular Commission hearing in January, 1959, to permit all interested parties to appear and show cause why the Special Rules and Regulations hereinafter set forth should be continued beyond February 28, 1959.

(7) That special pool rules for the Bisti-Lower Gallup Oil Pool be and the same are hereby promulgated as follows:

SPECIAL RULES AND REGULATIONS
FOR THE BISTI-LOWER GALLUP OIL POOL

RULE 1. Any well projected to or completed in the Lower Gallup formation within one mile of the boundaries of the Bisti-Lower Gallup Oil Pool shall be spaced, drilled, operated, and prorated in accordance with the Special Rules and Regulations hereinafter set forth.

RULE 2. All wells projected to or completed in the Bisti-Lower Gallup Oil Pool shall be located on a unit containing 80 acres, more or less, which consists of either the North half or the South half of a single governmental quarter section.

RULE 3. All wells projected to or completed in the Bisti-Lower Gallup Oil Pool shall be located within 100 feet of the center of either quarter-quarter section in the unit; provided however, that nothing contained herein shall be construed as prohibiting the drilling of a well on each of the quarter-quarter sections in an 80-acre unit.

RULE 4. The Secretary-Director of the Commission may grant exceptions to the requirements of Rule 2 and, for topographical reasons only, to the requirements of Rule 3 above without notice and hearing where the application is filed in due form, provided the applicants furnish all operators within a 2640-foot radius of the subject well a copy of the application to the Commission, and provided further that the Secretary-Director of the Commission shall wait at least twenty days before approving any such application and that no such application shall be approved over the objection of an offset operator. In the

event an offset operator objects to the application, the Commission shall consider the matter only after proper notice and hearing. The applicant shall include within his application a list of names and addresses of all the operators within the radius set forth above together with a stipulation that proper notice of the application has been given said operators.

RULE 5. An 80-acre proration unit in the Bisti-Lower Gallup Oil Pool shall be assigned an 80-acre proportional factor of two (2) for allowable purposes, and in the event there is more than one well on an 80-acre proration unit, the operator may produce the allowable assigned to the unit from said wells in any proportion.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

EDWIN L. MECHEM, Chairman

MURRAY E. MORGAN, Member

A. L. PORTER, JR., Member & Secretary

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BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE REHEARING CALLED BY THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO FOR THE PURPOSE OF CONSIDERING:

CASE NO. 1308
Order No. R-1069-C

APPLICATION OF SUNRAY MID-CONTINENT OIL COMPANY FOR AN ORDER EXTENDING THE HORIZONTAL LIMITS OF THE BISTI-LOWER GALLUP OIL POOL IN SAN JUAN COUNTY, NEW MEXICO, AND TEMPORARILY ESTABLISHING UNIFORM 80-ACRE WELL SPACING AND PROMULGATING SPECIAL RULES AND REGULATIONS FOR SAID POOL.

ORDER OF THE COMMISSION FOR REHEARING

BY THE COMMISSION:

This cause came on for consideration upon the petition of Shell Oil Company for a rehearing in Case No. 1308, Order No. R-1069-B, heretofore entered by the Commission on January 17, 1958.

NOW, on this 12th day of February, 1958, the Commission, a quorum being present, having considered the petition,

HEREBY ORDERS:

That the above-styled cause be reopened and a rehearing be held at 9 o'clock a.m. on March 13, 1958, at Mabry Hall, State Capitol, Santa Fe, New Mexico.

IT IS FURTHER ORDERED:

That the testimony on rehearing shall be limited to new evidence upon the issues raised in the petition for rehearing.

IT IS FURTHER ORDERED:

That Order No. R-1069-B shall remain in full force and effect pending the issuance of any further order in this case.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

EDWIN L. MECHEM, Chairman

MURRAY E. MORGAN, Member

A. L. PORTER, JR., Member & Secretary

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EXHIBIT D.

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION OF THE STATE OF NEW
MEXICO FOR THE PURPOSE OF
CONSIDERING:

CASE NO. 1308
Order No. R-1069-D

APPLICATION OF SUNRAY MID-CONTINENT
OIL COMPANY FOR AN ORDER EXTENDING
THE HORIZONTAL LIMITS OF THE BISTI
LOWER GALLUP OIL POOL, IN SAN JUAN
COUNTY, NEW MEXICO, AND TEMPORARILY
ESTABLISHING UNIFORM 80-ACRE WELL
SPACING AND PROMULGATING SPECIAL
RULES AND REGULATIONS FOR SAID POOL.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9 o'clock a.m. on September 18, 1957, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission", and this cause came on for rehearing before the Commission, upon the petition of Sunray Mid-Continent Oil Company, et al., at 9 o'clock a.m. on December 18, 1957, at Santa Fe, New Mexico, and this cause came on for rehearing before the Commission, upon the petition of Shell Oil Company at 9 o'clock a.m., on March 13, 1958, at Santa Fe, New Mexico.

NOW, on this 10th day of April, 1958, the Commission, a quorum being present, having considered the application, the petitions for rehearings, and the testimony and evidence adduced at both the original hearing and the subsequent rehearings, and being fully advised in the premises,

FINDS:

(1) That due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof.

(2) That in light of all the evidence, testimony and arguments presented at the rehearing in the subject case held on March 13, 1958, the Commission reaffirms each and every finding made in Order No. R-1069-B.

(3) That in deciding Case No. 1308, Order No. R-1069-B, the Commission determined that one well would efficiently and economically drain 80 acres in the Bisti-Lower Gallup Oil Pool and that such determination is inherent in finding No. (5) and finding No. (6) of Order No. R-1069-B; and further, that in making such determination the Commission took into consideration the economic loss caused by the drilling of unnecessary

EXHIBIT E.

wells, the protection of correlative rights, including those of royalty owners, the prevention of waste, the avoidance of the augmentation of risks from the drilling of an excessive number of wells, and the prevention of reduced recovery which might result from the drilling of too few wells.

(4) That in order to afford each owner in a pool the opportunity to produce his just and equitable share of the oil or gas, or both, in said pool, a well located on a smaller than standard proration unit must be assigned an allowable in the proportion that the acreage in said non-standard proration unit bears to the acreage in the standard-sized proration unit for the pool as established by the Commission.

(5) That the petition of Shell Oil Company to rescind or revoke Order No. R-1069-B should be denied and that Order No. R-1069-B should be continued in full force and effect until March 1, 1959, at which time said order expires by its own terms.

IT IS THEREFORE ORDERED:

That the petition of Shell Oil Company to rescind or revoke Order No. R-1069-B be and the same is hereby denied, and that Order No. R-1069-B shall remain in full force and effect until March 1, 1959.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

EDWIN L. MECHEM, Chairman

MURRAY E. MORGAN, Member

A. L. PORTER, JR., Member & Secretary

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SUMMONS

STATE OF NEW MEXICO

To New Mexico Oil Conservation Commission, composed of John Simms, Jr., Chairman, E. S. Walker and W. B. Macy, Secretary and Director; Frontier Refining Company, a corporation; Western Development Company, a corporation; New Mexico Western Oil and Gas Company, a corporation; Brookhaven Oil Company, a corporation.

....., Defendant

Greeting:

You are hereby commanded to be and appear before the First Judicial District Court of the State of New Mexico, sitting within and for the County San Juan, that being the County in which the complaint herein is filed, within thirty days after service of this Summons, then and there to answer the complaint of Stanolind Oil and Gas Company and George J. Darneille, Plaintiff in the above cause.

You are hereby notified that unless you appear and answer, the Plaintiff Stanolind Oil and Gas Company and George J. Darneille will apply to the court for the relief demanded in the complaint together with the costs of suit.

Witness the Hon. David W. Carmody, Judge of the First Judicial District Court of the State of New Mexico, and the seal of the District Court of San Juan County this 13 day of September, A. D., 19 55.

Virginia A. Kettell
Clerk of the District Court, First Judicial District

By .....
Deputy.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR SAN JUAN COUNTY, NEW MEXICO

STANOLIND OIL AND GAS COMPANY

vs.

No 4909

NEW MEXICO OIL CONSERVATION COMMISSION, Composed of John Simms, Jr., Chairman, E. S. Walker and W. B. Macy, Secretary and Director; FRONTIER REFINING COMPANY, a Corporation; WESTERN DEVELOPMENT COMPANY, a Corporation; and NEW MEXICO WESTERN OIL AND GAS COMPANY, a Corporation; and BROOKHAVEN OIL COMPANY, a Corporation.

N O T I C E

TO: New Mexico Oil Conservation Commission,
Composed of John Simms, Jr., Chairman,
E. S. Walker and W. B. Macy, Secretary
and Director;
Frontier Refining Company, a Corporation;
Western Development Company, a corporation;
New Mexico Western Oil and Gas Company, a corporation;
Brookhaven Oil Company, a corpoeation;

Please take notice that George J. Darneille and Stanolind Oil and Gas Company have taken an appeal from the action of the Oil Conservation Commission; the caption of said appeal appears above. Petitioners further have filed a petition for review.

Virginia A. Kittell
Clerk of the District Court

STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

STANOLIND OIL AND GAS COMPANY,

Plaintiff,

-vs-

No. 4909.

NEW MEXICO OIL CONSERVATION COMMISSION, Composed of John Simms, Jr., Chairman; E. S. Walker and W. B. Macy, Secretary and Director; FRONTIER REFINING COMPANY, a Corporation; WESTERN DEVELOPMENT COMPANY, a Corporation; and NEW MEXICO WESTERN OIL AND GAS COMPANY, a Corporation; and BROOKHAVEN OIL COMPANY, a Corporation.

PETITION FOR REVIEW OF ACTION OF THE OIL CONSERVATION COMMISSION OF NEW MEXICO

Comes now George J. Darneille and Stanolind Oil and Gas Company, hereinafter called Petitioners, and file this, their petition for Review of the Action of the Oil Conservation Commission of the State of New Mexico; said petition being filed within twenty days after the entry of the Order of the Commission complained of following rehearing; said entry of order being August 24, 1955. Petitioners herein would respectfully show the Court as follows:

I.

This Honorable Court has jurisdiction of these appellate proceedings by reason of the laws of New Mexico, being laws of the 1935 Legislature, Chapter 72, Section 17, as amended by the 1949 Legislature; Chapter 168, Section 19; 1941 Compilation, Section 69-223, as reflected in the New Mexico Statutes Annotated 1953 Edition, Chapter 65-3-22. Petitioners have property affected by the decision located in San Juan County, and have heretofore timely filed its Application for Rehearing in connection with the matters hereinafter set forth, and this Petition is timely filed after entry of order disposing of application of Petitioner, Stanolind Oil and Gas Company, for rehearing, with which disposition this Peti-

tioner is dissatisfied. The Commission and adverse parties upon whom service should be had, as reflected in the proceedings before the Commission are:

New Mexico Oil Conservation Commission, composed of John Simms, Jr., Chairman, E. S. Walker and W. B. Macy, Secretary and Director

Frontier Refining Company, a corporation

Western Development Company, a corporation

New Mexico Western Oil and Gas Company, a corporation

Brookhaven Oil Company, a corporation

II.

The nature of the proceedings before the Oil Conservation Commission of New Mexico with which this appeal is concerned have to do with the proration of gas in the West Kutz-Pictured Cliffs Pool, San Juan County, New Mexico. Under date of May 3, 1954, one J. D. Hancock, Jr. filed a petition with the Commission requesting that the Commission, after notice and hearing, enter its order requiring ratable take of gas from all gas wells in the West Kutz-Pictured Cliffs Gas Pool, San Juan County, New Mexico, or in the alternative prorating gas production in and from said pool. After appropriate notice had been issued by the New Mexico Oil Conservation Commission, said petition was brought on for hearing as Case No. 696 before the Commission on July 14, 1954, at which hearing various parties appeared and participated. Attached hereto as Exhibit "A" and incorporated herein by reference is the petition dated May 3, 1954, filed by J. D. Hancock, Jr. /At said hearing on July 14, 1954, reference was made to earlier hearings relating to the proper spacing of wells in the West Kutz-Pictured Cliffs Pool and the transcript, including the testimony and exhibits relating to such hearings, were offered and accepted in evidence by the Commission. These earlier hearings are denominated as Cases Nos. 237 and 377, before the Oil Conservation Commission of the State of New Mexico; said hearings being held prior to application by J. D. Hancock, Jr. for ratable take

or in the alternative, proration; and at a time when no petition nor other proceeding was pending before the Commission with reference to or concerning the restriction of production from individual wells in the West Kutz-Pictured Cliffs Pool in accordance with the authority to prorate gas under the laws of New Mexico.

III.

On December 23, 1954, entered December 31, 1954, the Oil Conservation Commission of New Mexico issued its Order R-566 establishing rules and procedures for the allocation of gas and defining proration units in and for the West Kutz-Pictured Cliffs Gas Pool, San Juan County, New Mexico. A copy of said order is attached hereto as Exhibit "B" and incorporated herein by reference for all purposes. Said Order was amended by Order R-566-A, being termed "Nunc Pro Tunc Order of the Commission", dated January 7, 1955. A copy of said Order R-566-A is attached hereto as Exhibit "C" and made a part hereof for all purposes.

IV.

Stanolind Oil and Gas company being the Operator of numerous wells in the West Kutz-Pictured Cliffs Pool, San Juan County, New Mexico, owning an interest in said wells, and thus being affected by the order of the Commission as aforesaid, timely filed its application for rehearing in accordance with the provisions of Paragraph (a) of Title 65-3-22 of the New Mexico Statutes Annotated, 1953 Edition, setting forth therein the respects in which said order is believed to be erroneous. A copy of said application for Rehearing is attached hereto as Exhibit "D", and made a part hereof for all purposes. By Order R-566-B, attached hereto as Exhibit "E", andmade a part hereof for all purposes, the Oil Conservation Commission of New Mexico entered its Order reopening and setting a rehearing to be held on March 17, 1955, at Santa Fe, New Mexico. Said Order limited consideration to the provisions of Order R-566 as amended pertaining and relating to the establishment of proration units and the other matters raised by Petitioner's Stanolind Oil and Gas Company, application for rehearing. Said

rehearing was concluded during May, 1955, subsequent to which time the Commission entered its Order No. 566-C on August 24, 1955. A copy of said order is attached hereto as Exhibit "F" and made a part hereof for all purposes.

V.

Petitioners complain of the action of the Oil Conservation Commission of New Mexico in 1) refusing to permit Petitioners to submit additional evidence; and 2) in establishing by its Rule 6A in Order No. 566 and by other provisions of such order, as amended, a standard proration unit of approximately 160 acres instead of establishing as a standard proration unit a tract of contiguous land containing approximately 320 acres; and 3) of the action of the Commission in affirming such order and in refusing to grant the relief requested in Petitioners' application for rehearing (Exhibit "D") as reflected in Commission Order No. 566-C (Exhibit "F"). The questions raised by the Application for Rehearing were confined to the size of the proration unit under authority of the laws of the State of New Mexico relating thereto, and failure of the Commission to grant administrative exceptions. Attached hereto as Exhibit "G" and made a part hereof for all purposes, is a copy of a proposed Order of the Commission submitted by Petitioner, Stanolind Oil and Gas Company, to the Commission with a request for its adoption, during the course of the hearing dated July 14, 1954. Its adoption was urged again during the rehearing. This Petitioner respectfully would show the Court that based on the physical facts then and now existing, the evidence as adduced before the Commission, and the undisputed testimony in the record, the Commission was not supported by the evidence in establishing a standard proration unit in the West Kutz-Pictured Cliffs Pool as being approximately 160 acres, and that such action by the Commission is invalid as being contrary to the provisions of the laws of New Mexico relating thereto; contrary to the standards established

by the Legislature for the Commission as contained in said laws; does not meet the requirements of the New Mexico Statutes; and that such action by the Commission constitutes a taking of property without due process of law.

VI.

Petitioners further complain that the Commission in failing to comply with the directions of the statute did not consider the testimony and evidence in the record, and the physical facts existing at the time of hearing and now, all of which establish beyond question that:

(1) One well in this Pool will efficiently and economically drain and develop an area of at least 320 acres.

(2) That the creation of standard proration units of 160 acres will result in the drilling of unnecessary wells in this Pool.

(3) That Petitioner and others will suffer economic loss caused by the drilling of such unnecessary wells.

(4) That correlative rights including those of royalty owners will be fully protected, and waste prevented if proration units are of 320 acres.

(5) That the risks arising from the drilling of an excessive number of wells will be greater when proration units are established at 160 acres rather than 320 acres.

(6) That ultimately no more gas would be recovered by establishing units of 160 acres rather than 320 acres. Thus, if petitioner and others are forced to drill more wells they can expect no more gas to be recovered than could now be recovered with wells already drilled.

Petitioner further shows that correlative rights are not protected because the action of the Commission complained of permits drainage between producing tracts in a pool which is not equalized by counter-drainage. This drainage can only be prevented when the proration unit is fixed at 160 acres rather than 320 acres by the drilling of unnecessary wells with the resultant economic loss.

VII.

Petitioners further complain of the action of the Oil Conservation Commission of New Mexico in rejecting its request contained in Paragraph 5 of its Application for Rehearing (Exhibit "D").

Rule 6(B) of Order R-566 provides for the establishment of non-standard proration units without notice and hearing provided applicant meets the seven requirements set forth in Rule 6(B). Said Rule 6(B) accords and affords preferential treatment to those parties having a proration unit consisting of less than 158 acres without granting the corresponding right to those parties having a non-standard proration unit as defined in said Order in excess of 162 acres but not to exceed 325 acres. Petitioners allege that there are no findings to support the order of the Commission, nor are there physical facts or testimony to support such preferential treatment; that the physical facts and the testimony support the same treatment for those parties in the latter situation as has been accorded those parties in the former; that for all of the reasons as stated hereinabove the rejection of Petitioners' request for administrative approval of a non-standard unit up to approximately 320 acres is invalid, contrary to the provisions of the Statutes as enacted by the Legislature of the State of New Mexico, is discriminatory and preferential as between parties occupying the same or similar position, and that said request of Petitioners should have been granted by the Commission.

WHEREFORE, Petitioners pray that the Oil Conservation Commission and the adverse parties as described in Paragraph I above be notified of this appeal in the manner provided by law and that after de novo hearing as provided by law they have judgment of this Court that Order No. 566, as amended, be modified in such manner as to establish standard proration units in the West Kuts-Pictured Cliffs Gas Pool at 320 acres in size, in accordance with the requested order of the Commission (Exhibit "G"), heretofore submitted to the Oil Conservation Commission of New Mexico, and particularly that this Honorable Court substitute as a part of Order No. 566

those provisions of "Rule 1 - Proration Unit" reflected in Exhibit "G". In the alternative, Petitioners pray judgment of this Court that they and others similarly situated be granted the privilege of obtaining exceptions to Rule 6(A) as presently written, in the same manner as is provided in Rule 6(B), such exceptions obtained in such manner to be for proration units which vary in size from approximately 162 acres to approximately 325 acres. Petitioners further pray for such other and further relief as this Court deems just and proper.

Respectfully submitted,

L. A. THOMPSON
J. K. SMITH

SETH AND MONTGOMERY

By_____
Attorneys for Petitioners
111 East San Francisco Street
Santa Fe, New Mexico

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION
OF J. D. HANCOCK, JR., FOR AN
ORDER REQUIRING RATABLE TAKE OF
GAS IN THE WEST KUTZ PICTURED CLIFFS
POOL, SAN JUAN COUNTY, NEW MEXICO,
OR FOR PRORATIONING OF GAS PRODUCTION
IN SAID POOL.

CASE 696

PETITION

To the Oil Conservation Commission of New Mexico:

Comes now J. D. Hancock, Jr., 1524 Fidelity Union Life Building, Dallas, Texas, and petitions the Commission for an order requiring ratable take of gas from wells producing from the Pictured Cliffs formation in the West Kutz Pictured Cliffs Pool, San Juan County, New Mexico, as defined by the Commission, or, in the alternative, to enter its order prorating the production of gas from said pool, and in support thereof would show:

1. That Petitioner is the operator of numerous gas wells located in the West Kutz Pictured Cliffs Pool, San Juan County, New Mexico.

2. That Petitioner's wells are connected to the Southern Union Gas Company's gathering and transmission lines.

3. That the Operator's wells offsetting those of Petitioner are connected to the gathering and transmission lines of El Paso Natural Gas Company.

4. That the Southern Union Gas Company operates its gathering and transmission lines at a pressure greatly exceeding that of El Paso Natural Gas Company's lines.

5. That, as a result of this pressure differential, wells of operator's offsetting those of Petitioner have produced large quantities of gas, whereas production of gas from Petitioner's wells have been greatly curtailed, to Petitioner's detriment and damage.

6. That Petitioner has not been, and is not being allowed to use his fair and equitable share of the reservoir energy and is being denied the opportunity to produce his just and equitable share of the gas in the pool.

Wherefore Petitioner requests that the Commission, after notice and hearing, as required by law, enter its order enforcing ratable take of gas from all gas wells in the West Kutz Pictured Cliffs Gas Pool, San Juan County, New Mexico, or in the alternative, prorate gas production in said pool.

Respectfully submitted,

J. D. Hancock, Jr.

By Jason W. Kellahin
Attorney

Jason W. Kellahin
Laughlin Building
Santa Fe, New Mexico

N. M. OIL & GAS ENGR. COMMITTEE
HOBBS, NEW MEXICO

En. Dec. 31, 1954

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

EXHIBIT "B"

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION OF NEW MEXICO FOR
THE PURPOSE OF CONSIDERING:

CASE NO. 696
Order No. R-566

THE APPLICATION OF J. D. HANCOCK, JR.
FOR AN ORDER REQUIRING RATABLE TAKE
OR PRORATION OF GAS PRODUCTION IN THE
WEST KUTZ-PICTURED CLIFFS GAS POOL,
SAN JUAN COUNTY, NEW MEXICO.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing on May 19, 1954, June 24, 1954, and July 14, 1954, at Santa Fe, New Mexico, before the Oil Conservation Commission, hereinafter referred to as the "Commission".

NOW, on this 23rd day of December, 1954, the Commission, a quorum being present, having considered the records and the testimony adduced and being fully advised in the premises,

FINDS:

(1) That due notice of the time and place of hearing and the purpose thereof having been given as required by law, the Commission has jurisdiction of this case and the subject matter thereof.

(2) That under the provisions of various orders the Commission has created and defined the vertical and horizontal limits of the West Kutz-Pictured Cliffs Gas Pool in San Juan County, New Mexico, and that by various other orders the Commission has extended the horizontal limits thereof.

(3) That there is a need for minor revisions of the horizontal limits of the West Kutz-Pictured Cliffs Gas Pool.

(4) That the producing capacity of the gas wells producing from the West Kutz-Pictured Cliffs Gas Pool exceeds the market demand for gas from said pool.

(5) That in order to prevent waste in the West Kutz-Pictured Cliffs Gas Pool and in order to protect correlative rights, certain rules and procedures should be adopted to provide a method of allocating gas among the proration units in the West Kutz-Pictured Cliffs Gas Pool.

IT IS THEREFORE ORDERED:

(1) That the horizontal limits of the West Kutz-Pictured Cliffs Gas Pool shall be that area described in Exhibit "A" attached hereto and made a part hereof.

(2) That the following shall be the:

SPECIAL RULES AND REGULATIONS FOR THE WEST KUTZ-PICTURED CLIFFS GAS POOL

Well Spacing and Acreage Requirements for Drilling Tracts:

RULE 1: Any well drilled a distance of one mile or more from the outer boundary of the West Kutz-Pictured Cliffs Gas Pool shall be classified as a wildcat well. Any well drilled less than one mile from the outer boundary of said pool shall be spaced, drilled, operated and prorated in accordance with the regulations in effect in the West Kutz-Pictured Cliffs Gas Pool.

RULE 2: Each well drilled or recompleted within the West Kutz-Pictured Cliffs Gas Pool shall be located on a tract consisting of not less than a quarter section of approximately 160 surface contiguous acres substantially in the form of a square which shall be a legal subdivision (quarter section) of the U. S. Public Land Surveys.

RULE 3: Each well drilled within the West Kutz-Pictured Cliffs Gas Pool shall not be drilled closer than 660 feet to any outer boundary line of such quarter section, nor closer than 330 feet to a quarter-quarter section or subdivision inner boundary, nor closer than 1320 feet to a well drilling to or capable of producing from the same pool.

RULE 4: The Secretary-Director of the Commission shall have authority to grant exception to the requirements of Rules 2 and 3 where application has been filed in due form and such exception is required because of conditions resulting from previously drilled wells in the area or, in the case of Rule 3, the necessity for exception is based upon topographic conditions.

Applicants shall furnish all operators of leases offsetting the lease containing subject well a copy of the application to the Commission, and applicant shall include with his application a list of names and addresses of all such operators, together with a written stipulation that all such operators have been properly notified by registered mail. The Secretary-Director of the Commission shall wait at least 20 days before approving any such exception, and shall approve such exception only in the absence of objection of any offset operators. In the event an operator objects to the exception, the Commission shall consider the matter only after proper notice and hearing.

RULE 5: The provision of Statewide Rule 104, Paragraph (k), shall not apply to the West Kutz-Pictured Cliffs Gas Pool.

Gas Proration and Allocation:

RULE 6: (A) The acreage allocated to a gas well for proration purposes shall be known as the gas proration unit for that well. For the purpose of gas allocation in the West Kutz-Pictured Cliffs Gas Pool, a standard proration unit shall consist of approximately 160 surface contiguous acres substantially in the form of a square which shall be a legal subdivision (quarter-section) of the U. S. Public Land Survey; provided, however, that a non-standard proration unit may be formed after notice and hearing by the Commission or under the provisions of Paragraph (B) of this Rule.

The allowable production from any non-standard gas proration unit as compared with the allowable production therefrom if such tract were a standard unit shall be in the ratio which the area of the non-standard proration unit bears to a standard proration unit of 160 acres. Any gas proration unit containing between 158 and 162 acres shall be considered to contain 160 acres for the purpose of computing allowables.

(B) The Secretary-Director of the Commission shall have authority to grant an exception to Rule 6 (A) without notice and hearing where application has been filed in due form and where the following facts exist and the following provisions are complied with:

1. The proposed non-standard proration unit consists of less than 158 acres.

2. The unorthodox size or shape of the tract is due to a variation in legal subdivision of the U. S. Public Land Surveys.

3. The acreage assigned the non-standard unit lies wholly within the legal section.

4. The acreage assigned the non-standard unit is contiguous with the acreage containing said well.

5. The entire non-standard gas proration unit may reasonably be presumed to be productive of gas.

6. The length or width of the non-standard gas proration unit does not exceed 2640 feet.

7. The operator making application for such exception to Rule 6 (A) includes with such application:

(a) Waivers from (1) all operators owning interests in the quarter sections in which any part of the non-standard gas proration unit is situated and which acreage is not included in said non-standard gas proration units; and (b) all operators owning interests in acreage offsetting the non-standard proration unit; or

(b) A list of names and mailing addresses of all operators outlined in paragraph (a), together with proof of the fact that said operators were notified by registered mail of the intent of the applicant to form such non-standard gas proration unit. The Secretary-Director of the Commission may approve such application if, after a period of 20 days following the mailing of said notice, no operator as outlined in paragraph (1) above has entered an objection to the formation of such non-standard gas proration unit.

RULE 7: At least 30 days prior to the beginning of each gas proration period, the Commission shall hold a hearing after due notice has been given. The Commission shall cause to be submitted by each gas purchaser "Preliminary Nominations" of that quantity of gas which each purchaser in good faith actually desires to purchase within the ensuing proration period, by months, from the West Kutz-Pictured Cliffs Gas Pool. The Commission shall consider the "Preliminary Nominations" of purchasers, actual production, and such other factors as may be deemed applicable in determining the amount of gas that may be produced without waste from said pool within the ensuing proration period. "Preliminary Nominations" shall be submitted on Form C-121-A as prescribed by the Commission.

RULE 8: In the event a gas purchaser's market shall have increased or decreased, purchaser may file with the Commission prior to the 10th day of the month a "Supplemental Nomination" showing the amount of gas the purchaser actually in good faith desires to purchase during the ensuing proration month from the West Kutz-Pictured Cliffs gas pool. The Commission shall hold a public hearing between the 13th and 20th days of each month to determine the reasonable market demand for gas from said pool for the ensuing proration month, and shall issue a proration schedule setting out the amount of gas which each well may produce during the ensuing proration month. "Supplemental Nominations" shall be submitted on Form C-121-A as prescribed by the Commission.

Included in the monthly proration schedule shall be (a) a summary of the total pool allocation for that month showing nominations, and adjustments made for underage or overage applied from a previous month, (b) a tabulation of the net allowable and production for the second preceding month together with a cumulative overage or underage computation, (c) a tabulation of the current and net allowables for the preceding month, (d) a tabulation of current monthly allowable for the ensuing proration month, and (e) a tabulation of the acreage and deliverabilities assigned each well, and the factors assigned each well for use in calculating individual well allowables. The Commission shall include in the proration schedule the gas wells in the West Kutz-Pictured Cliffs pool delivering to a gas transportation facility, or lease gathering system, and shall include in the proration schedule of said pool any well which the Commission finds is being unreasonably discriminated against through denial of access to a gas transportation facility which is reasonably capable of handling the type of gas produced by such well. The total allowable to be allocated to said pool each month shall be equal to the sum of the preliminary or supplemental nominations, whichever is applicable, together with any adjustment which the Commission deems advisable.

If, during a proration month, the acreage assigned a well is increased, the operator shall notify the Secretary-Director in writing of such increase. The increased allowable assigned the gas proration unit for the well shall become effective on the first day of the month following receipt of the notification by the Director. All communications shall be mailed to the Director, at Box 871, Santa Fe, New Mexico.

RULE 9: The monthly gas allocation to the West Kutz-Pictured Cliffs gas pool shall be divided and allocated among the wells connected to a gas transportation facility in the following manner:

The product obtained by multiplying each well's acreage factor by the calculated deliverability (expressed as MCF per day) for that well shall be known as the "AD" factor for that well. The acreage factor shall be determined to the nearest hundredth of a unit by dividing the acreage within the proration unit by 160. The "AD" factor shall be computed to the nearest whole unit.

A tentative allocation shall be made by dividing seventy-five percent (75%) of the pool allocation among the wells in the proportion that each well's "AD" factor bears to the sum of the "AD" factors of all wells in the pool.

The remaining twenty-five percent (25%) of the pool allocation shall be divided among wells in the proportion that each well's acreage factor bears to the sum of the acreage factors of all wells in the pool.

When the tentative allowable received by a well is in excess of its known producing ability, the well shall be classed as a marginal well and its allowable limited to its known producing ability. The sum of the difference between the tentative allowables and the limited allowables of all marginal wells on the proration schedule shall be reallocated to the non-marginal wells by application of the same formula. If such reallocation shall result in placing any other well within the marginal classification, the difference between the tentative allowable and the limited allowable of such marginal well shall be redistributed by application of the same formula until no well has received an allowable in excess of its known producing ability.

RULE 10: The calculated deliverability at the "deliverability pressure" shall be determined in accordance with the provisions of Order R-333-A; provided however, that the deliverability pressure shall be determined as follows:

"Deliverability pressure", as employed herein, shall be equal to fifty percent (50%) of the seven (7) day shut-in pressure of each respective well.

Balancing of Production:

RULE 11: Underproduction: The hours of 7 o'clock a.m., M.S.T. February 1, and 7 o'clock a.m., M.S.T., August 1, shall be known as balancing dates and the periods of time bound by these dates shall be known as gas proration periods. In order to effectively administer the prorationing of gas in the West Kutz-Pictured Cliffs pool,

it is advisable to have a portion of each proration period include both summer and winter months. Therefore, the first proration period shall commence on March 1, 1955, and shall continue for a period of eleven months until February 1, 1956. Future proration periods shall commence on the dates set out above. The amount of current gas allowable remaining unproduced at the end of each proration period shall be carried forward to and may be produced during the next succeeding proration period in addition to the normal gas allowable for such succeeding period; provided, however, that whatever amount thereof is not made up within the first succeeding proration period shall be cancelled.

If it appears that such continued underproduction has resulted from inability of the well to produce its allowable, it may be classified as a marginal well and its allowable reduced to the level of the well's ability to produce.

If, at the end of a proration period a marginal well has produced more than the total allowable assigned a non-marginal unit of corresponding size and deliverability, such marginal well shall be reclassified as a non-marginal well and its allowable prorated accordingly.

If, during a proration period a marginal well is reworked or recompleted in such a manner that its productive capacity is increased to an extent that said well should be reclassified as a non-marginal well, the reclassification shall be effective on the first day of the proration month following the date of recompletion.

The Secretary-Director may reclassify a well at any time if production data or deliverability tests reflect the need for such reclassification.

RULE 12: Overproduction: A well which has produced a greater amount of gas than was allowed during a given proration period shall have its allowable for the first succeeding proration period reduced by the amount of such overproduction and such overproduction shall be made up within the first succeeding proration period. If, at any time, a well is overproduced an amount equivalent to six times its current monthly allowable, said well shall be shut-in during the current month.

The Commission may allow overproduction to be made up at a lesser rate than would be the case if the well were completely shut-in if, upon public hearing after due notice, it is shown that complete shut-in of the well would result in material damage to said well.

Granting of Allowables:

RULE 13: No gas well shall be given an allowable until Form C-104 and Form C-110 have been filed, together with a plat showing acreage attributed to said well and the locations of all wells on the lease.

RULE 14: Allowables to newly completed gas wells shall commence on the date of connection to a gas transportation facility, such date to be determined from an affidavit furnished to the Commission by the purchaser, or the filing date of Form C-104 and Form C-110 and the above-described plat, whichever date is the later. Affidavits of connection will be submitted to the District Office of the Commission, Box 697, Aztec, New Mexico.

No well shall be assigned an allowable unless a deliverability test, or a potential test taken in conformance with the provisions of Order R-333-A has been submitted.

In the absence of deliverability test data on newly completed wells, the open-flow potential taken in conformance with Order R-333-A may be used in approximating the well's deliverability. In this instance, an assumed deliverability equal to 15% of the volume of gas produced in the initial potential test will be used. The allowable thus established using an estimated deliverability shall be a tentative allowable and such allowable will be recalculated using the deliverability test data upon the submission of such data to the Commission.

Deliverability tests shall be taken and calculated in conformance with Order R-333-A, the provisions of Rule 10 of this order and the testing schedule provisions of Order R-333-A.

Deliverability tests taken during 1954 shall be used in calculating allowables for the proration period commencing March 1, 1955. Subsequent annual tests shall be used in calculating allowables for proration periods commencing during the next ensuing year.

Reporting of Production:

RULE 15: The monthly gas production from each well shall be metered separately and the production therefrom shall be reported to the Commission on Form C-115, such form to reach the Commission on or before the 24th day of the month immediately following the month in which the gas reported was produced. The operator shall show on such report the disposition of the gas produced.

Each purchaser or taker of gas in the West Kutz-Pictured Cliffs gas pool shall submit a report to the Commission, such report to reach the Commission on or before the 24th day of the month immediately following the month in which the gas was purchased or taken. Such report shall be filed on either Form C-111 or Form C-114, whichever is applicable, and the wells shall be listed in approximately the same order as they are found listed on the proration schedule.

Forms C-111 and C-114 as referredto herein shall be submitted in triplicate, the original being sent to the Commission at Box 871, Santa Fe, New Mexico, remaining copies will be sent to Box 697, Aztec, New Mexico and Box 2045, Hobbs, New Mexico, respectively.

Forms C-115 shall be submitted in accordance with Rule 1114 of the Commission's Rules and Regulations.

The full production of gas from each well shall be charged against the well's allowable regardless of the disposition of the gas; provided, however, that gas used in maintaining the producing ability of the well shall not be charged against the allowable.

RULE 16: The term "gas purchaser" as used in these rules, shall mean any "taker" of gas either at the wellhead or at any point on the lease where connection is made to facilitate the transportation or utilization of gas. It shall be the responsibility of said "taker" to submit a nomination in accordance with Rules 7 and 8 of this order.

RULE 17: No gas, either dry gas or casinghead gas, produced from the West Kutz-Pictured Cliffs Gas Pool, except that gas used for "drilling-in" purposes, shall be flared or vented unless specifically authorized by order of the Commission after notice and hearing.

The following provisions shall apply to the West Kutz-Pictured Cliffs Gas Pool.

PROVIDED FURTHER, That in filing Form C-101, "Notice of Intention to Drill or Recomplete", or USGS Form 3-391-a, whichever is applicable, all operators shall strictly comply with the applicable provisions of Order R-397. Accompanying the above form shall be a plat of the acreage contained in the proration unit, together with a complete list of all working interest owners designating the acreage they hold within the communitized area dedicated to the well.

PROVIDED FURTHER, That failure to comply with the provisions of this order or the rules contained herein shall result in the cancellation of allowable assigned to the affected well. No further allowable shall be assigned to the affected well until all rules and regulations are complied with. The Secretary-Director shall notify the operator of the well and the purchaser, in writing, of the date of allowable cancellation and the reason therefor.

PROVIDED FURTHER, That all transporters of gas or users of gas shall file with the Commission a list of all wells within each pool connected to their gas transportation facility as of February 1, 1955, and shall furnish connection notices thereafter, in accordance with the provisions of Rule 14, as soon as possible after the date of connection.

The list required above shall contain the name of the operator, lease name, well number, unit, and location of the well (Section, Township and Range). Connection notices shall indicate the date of connection in addition to the above-listed data.

EXHIBIT "A"

Horizontal limits of the West Kutz-Pictured Cliffs Gas Pool,

TOWNSHIP 26 NORTH, RANGE 10 WEST
W/2 Sec. 4, all of Secs. 5, 6, 8 & 9,
NW/4 Sec. 10

TOWNSHIP 26 NORTH, RANGE 11 WEST
N/2 Sec. 1, N/2 Sec. 2, NE/4 Sec. 3

TOWNSHIP 27 NORTH, RANGE 10 WEST
SW/4 Sec. 29, S/2 Sec. 30, all of Secs. 31 & 32,
SW/4 Sec. 33.

TOWNSHIP 27 NORTH, RANGE 11 WEST
S/2 Sec. 4, all Secs. 5 thru 9, incl.,
SW/4 Sec. 10, SW/4 Sec. 14, all of Secs. 15,
16, 17 & 18, E/2 Sec. 20, all Secs. 21, 22 & 23
W/2 Sec. 24, W/2 & SE/4 Sec. 25, all Secs.
26, 27 & 28, E/2 Sec. 29, E/2 Sec. 34, all
Secs. 35 & 36.

TOWNSHIP 27 NORTH, RANGE 12 WEST
All of Secs. 1 thru 4, incl.
N/2 Sec. 5, N/2 Sec. 6, all of Secs. 10, 11, 12,
& 13, E/2 Sec. 14

TOWNSHIP 28 NORTH, RANGE 11 WEST
S/2 Sec. 29, S/2 Sec. 30,
All of Secs. 31 & 32

TOWNSHIP 28 NORTH, RANGE 12 WEST
All of partial Secs. 7, 8 and 9,
All Secs. 14 thru 30 incl., E/2 Sec. 31,
All Secs. 32 thru 36, incl.

TOWNSHIP 28 NORTH, RANGE 13 WEST
E/2 partial Sec. 10;
All of partial Secs. 11 & 12,
All of Secs. 13 & 14, E/2 Sec. 15,
N/2 Sec. 22, N/2 Sec. 23, N/2 Sec. 24

TOWNSHIP 29 NORTH, RANGE 12 WEST
All of Secs. 19, 29, 30, 31 & 32

EXHIBIT "A" (Continued)

TOWNSHIP 29 NORTH, RANGE 13 WEST
All of Secs. 25, 26, 27, 28, 33, 34, 35 & 36

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

EDWIN L. MECHEM, Chairman

E. S. WALKER, Member

W. B. MACEY, Member and Secretary

S E A L

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

EXHIBIT "C"

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION OF NEW MEXICO FOR
THE PURPOSE OF CONSIDERING:

CASE NO. 696
Order No. R-566-A

THE APPLICATION OF J. D. HANCOCK, JR.
FOR AN ORDER REQUIRING RATABLE TAKE
OR PRORATION OF GAS PRODUCTION IN THE
WEST KUTZ-PICTURED CLIFFS GAS POOL,
SAN JUAN COUNTY, NEW MEXICO.

NUNC PRO TUNC ORDER OF THE COMMISSION

BY THE COMMISSION:

It appearing to the Commission that Order R-566, dated December 23, 1954, does not correctly and accurately state the order of the Commission in certain particulars due to inadvertence and clerical error,

IT IS THEREFORE ORDERED:

That Order No. R-566, as the same appears in the records of the Commission, and the original of said order, be amended in the following respects and particulars:

Rule 3 of the Special Rules and Regulations for the West Kutz-Pictured Cliffs Gas Pool is ordered stricken and the following paragraph substituted therefor.

> "Any well drilled within the defined limits of the West Kutz-Pictured Cliffs Gas Pool shall be located on a designated drilling tract consisting of not less than a quarter section which is a legal subdivision of the U. S. Public Lands Survey, such quarter section to contain approximately 160 contiguous acres and to be substantially in the form of a square. Such well shall be located at least ~~900~~ 990 feet from the outer boundary of said quarter section, provided, however, that a tolerance of 200 feet is permissible."

IT IS FURTHER ORDERED [illegible] this order be entered nunc pro tunc [illegible], the date of said original order.

DONE at Santa Fe, New Mexico, [illegible].

STATE [illegible] COMMISSION

[illegible], Chairman

[illegible], Member

W. B. [illegible], Member & Secretary

SEAL

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BEFORE THE OIL CONSERVATION COMMISSION OF

THE STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION OF JAMES D. HANCOCK AND CO., LTD., FOR AN ORDER REQUIRING RATABLE TAKE OF GAS IN THE WEST KUTZ-PICTURED CLIFFS POOL, SAN JUAN COUNTY, NEW MEXICO, OR FOR PRORATION OF GAS PRODUCTION IN SAID POOL

CASE NO. 696

APPLICATION FOR REHEARING

TO THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO:

Now comes Stanolind Oil and Gas Company and moves the Oil Conservation Commission for a rehearing of Case No. 696 for the following reasons:

1. On the 31st day of December, 1954, the Commission entered its Order No. R-566 in said case, which order is dated December 23, 1954, and this application is made within twenty days from and after the date said order was entered in the records of the Commission.

2. Said Order No. R-566 establishes certain rules and procedures for the allocation of gas among the proration units in the West Kutz-Pictured Cliffs Gas Pool, San Juan County, New Mexico.

3. Rule 6(A) of said Order No. R-566 provides in substance that a standard gas proration unit in said Pool shall be approximately 160 acres and that a non-standard proration unit may be formed after notice and hearing by the Commission or under the provisions of paragraph (B) of said Rule 6. The rule further provides that allowable production from any non-standard gas proration unit shall be in a ratio which the area of the non-standard unit bears to a standard proration unit of 160 acres.

4. Movant would show the Commission that no evidence was offered by any party at any of the hearings of said case which showed, or tended to show, that the proration units in this Pool should be 160 acres; that, on the contrary, the only evidence which was offered by any party on this question as to the size which the proration unit should be was the evidence of Stanolind Oil and Gas Company and Benson and Montin to the effect that the proration units in this Pool should be approximately 320 acres; that under the state of the evidence in the record in this case, the standard gas proration unit should therefore be fixed at approximately 320 acres.

5. In the event, upon rehearing as herein requested, the Commission should determine that the standard proration unit should be 160 acres, then, and in such event, movant requests that the Commission amend its Rule 6(B) so as specifically to provide for non-standard proration units of a size greater than 160 acres, not to exceed 325 acres, without notice and hearing, following the identical procedures as therein prescribed for non-standard units of less than 158 acres.

WHEREFORE, Stanolind Oil and Gas Company prays that the Commission grant the rehearing herein requested for the reasons hereinabove stated, and upon rehearing, that Standard proration units in the West Kutz-Pictured Cliffs Pool be fixed at approximately 320 acres or, in the alternative, that the administrative procedure provided for in said rules for non-standard units of less than 158 acres be allowed for non-standard units consisting of approximately 320 acres.

Respectively submitted,

STANOLIND OIL AND GAS COMPANY

By_____
James K. Smith, Its Attorney

James K. Smith
P. O. Box 1410
Fort Worth, Texas

EXHIBIT "E"

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION OF NEW MEXICO FOR
THE PURPOSE OF CONSIDERING:

CASE NO. 696
Order No. R-566-B

THE APPLICATION OF J. D. HANCOCK, JR.
FOR AN ORDER REQUIRING RATABLE TAKE
OR PRORATION OF GAS PRODUCTION IN THE
WEST KUTZ-PICTURED CLIFFS GAS POOL,
SAN JUAN COUNTY, NEW MEXICO.

ORDER OF THE COMMISSION FOR REHEARING

BY THE COMMISSION:

This cause came on for consideration upon the petition of Stanolind Oil and Gas Company for rehearing on Order No. R-566, heretofore entered by the Commission on December 31, 1954.

NOW, on this 31st day of January, 1955, the Commission, a quorum being present,

IT IS HEREBY ORDERED:

That the above-entitled matter be reopened and a rehearing be held on March 17, 1955, at 9 o'clock a.m. on said day at Santa Fe, New Mexico, at which time and place all interested parties may appear.

IT IS FURTHER ORDERED:

That matters to be considered upon rehearing shall be limited to a reconsideration of the provisions of Order R-566 pertaining to the establishment of proration units and to matters raised by petitioner's application for rehearing.

IT IS FURTHER ORDERED:

That Order R-566 shall remain in full force and effect pending the issuance of any further order.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

JOHN F. SIMMS, Chairman

E. S. WALKER, Member

W. B. MACEY, Member and Secretary

SEAL

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BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

EXHIBIT "F"

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO FOR THE PURPOSE OF CONSIDERING:

CASE NO. 696
Order No. R-566-C

IN THE MATTER OF THE APPLICATION OF JAMES D. HANCOCK & CO., LTD., FOR AN ORDER REQUIRING RATABLE TAKE OF GAS IN THE WEST KUTZ-PICTURED CLIFFS POOL, SAN JUAN COUNTY, NEW MEXICO, OR FOR PRORATION OF GAS PRODUCTION IN SAID POOL.

ORDER OF THE COMMISSION ON REHEARING

BY THE COMMISSION:

This case came on regularly for hearing at 9:00 A.M., on May 19, 1955, at Santa Fe, New Mexico, on the petition of Stanolind Oil and Gas Company for a rehearing.

NOW, on this 17th, day of August, 1955, the Commission, a quorum being present, being fully advised in the premises,

FINDS:

(1) That the Commission heretofore entered its Order No. R-566 and No. R-566-A in this case providing for the allocation of gas production, and establishing pool rules for the West Kutz-Pictured Cliffs Gas Pool.

(2) That petitioner, Stanolind Oil and Gas Company, sought a review of the evidence offered in Case No. 696, insofar as said evidence pertains to the size of proration units in the West Kutz-Pictured Cliffs Gas Pool.

(3) That by Order No. R-566-B, the Commission granted a rehearing on the provisions of Order No. R-566, said rehearing being limited to a reconsideration of provisions pertaining to establishment of proration units and other matters raised by petitioner's application for rehearing.

(4) That due public notice having been given as required by law, the Commission has jurisdiction of this case, and the subject matter covered by the order for rehearing.

(5) That the Commission having reviewed the record, and exhibits offered, and having heard the arguments of counsel, and being fully advised, finds that its Order No. R-566 is supported by the evidence offered and the testimony and exhibits received.

(6) That amendment of Rule 6 (B) of Order No. R-566, as prayed for in petitioner's application for rehearing, should be denied.

IT IS THEREFORE ORDERED:

(1) That Order No. R-566, as amended by Nunc Pro Tunc Order of the Commission No. R-566-A, dated January 7, 1955, be, and the same hereby, in all respects affirmed.

(2) That the relief prayed for by Stanolind Oil and Gas Company in its application for rehearing in Case No. 696, be, and the same hereby is, in all respects denied.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

JOHN F. SIMMS, Chairman

E. S. WALKER, Member

W. B. MACEY, Member and Secretary

S E A L

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EXHIBIT "G"

BEFORE THE OIL CONSERVATION COMMISSION OF

THE STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION OF JAMES D. HANCOCK AND CO., LTD., FOR AN ORDER REQUIRING RATABLE TAKE OF GAS IN THE WEST KUTZ-PICTURED CLIFFS POOL, SAN JUAN COUNTY, NEW MEXICO, OR FOR PRORATION OF GAS PRODUCTION IN SAID POOL.

ORDER OF THE COMMISSION

BY THE COMMISSION:

This case came on for hearing at _____ o'clock a.m., on _____, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission".

NOW, on this _____ day of _____, 19___, the Commission, a quorum being present, having considered the testimony adduced, the exhibits received, the statements of interested parties, the official records of the Commission, and other pertinent data, and being fully advised in the premises,

FINDS:

(1) That due public notice of the time and place of hearing and the purpose thereof having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof.

(2) That the Commission, for the purpose of preventing waste and for the protection of correlative rights, should issue an order to provide for a definite method of allocating gas between proration units in the West Kutz-Pictured Cliffs Pool.

IT IS THEREFORE ORDERED:

That special pool rules applicable to the West Kutz-Pictured Cliffs Gas Pool, be, and the same hereby are, promulgated as follows:

RULE 1 -- PRORATION UNITS

A. For the purpose of gas allocation in the West Kutz Gas Pool, a standard proration unit shall consist of between 315 and 325 contiguous surface acres substantially in the form of a rectangle, which shall be a legal subdivision of the U. S. Public Land Surveys; provided, however, that a gas proration unit not conforming to the

above requirements may be formed after notice and hearing by the Commission or as outlined in paragraphs B or C below. Any proration unit containing less that 315 acres or more than 325 acres shall be a non-standard unit and its allowable shall be decreased or increased in accordance with the allocation formula. Any standard proration unit consisting of between 315 and 325 contiguous surface acres shall be considered as containing 320 acres for the purpose of gas allocation.

B. Upon compliance with Rule 6 below, an operator may, without notice and hearing:

(1) Drill and/or produce wells on a standard proration unit in conformance with applicable spacing rules for the West Kutz-Pictured Cliffs Pool; or

(2) Drill and/or produce a well on a legal quarter section consisting of 158 to 162 acres in conformance with spacing rules for the West Kutz-Pictured Cliffs Pool; or

(3) Produce all wells existing as of the date of this order on a standard proration unit; or

(4) Produce all wells existing as of the date of this order on less than a standard proration unit, provided there is insufficient acreage available to be attributed to the well or wells to form a standard proration unit;

PROVIDED, HOWEVER, that in each of the four cases mentioned above, the allowable for each well shall be decreased proportionately in accordance with the allocation formula applicable to this pool.

C. The Secretary of the Commission shall have authority to grant an exception to paragraph A without notice and hearing where application has been filed in due form and where the following facts exist and the following provisions are complied with:

(1) The non-standard unit consists of less acreage than a standard proration unit.

(2) The acreage assigned to the non-standard unit lies wholly within a legal quarter section and contains a well capable of producing gas into a gas transportation facility on the date of this order.

(3) The operator receives written consent in the form of waivers from all operators in the adjoining proration units.

RULE 2

At least 30 days prior to the beginning of each gas proration period, the Commission shall hold a hearing after due notice has been given. The Commission shall cause to be submitted by each gas purchaser its "Preliminary Nominations" of the amount of gas which each in good faith actually desires to purchase within the ensuing proration period, by months, from the West Kutz-Pictured Cliffs Gas Pool. The Commission shall consider the "Preliminary Nominations" of purchasers, actual production, and such other factors as may be deemed applicable in determining the amount of gas that may be produced without waste within the ensuing proration period. "Preliminary Nominations" shall be submitted on a form prescribed by the Commission.

RULE 3

Each month, the Commission shall cause to be submitted by each gas purchaser its "Supplemental Nominations" of the amount of gas which each in good faith actually desires to purchase within the ensuing proration month from the West Kutz Gas Pool. The Commission shall hold a public hearing between the 15th and 20th days of each month to determine the reasonable market demand for gas for the ensuing proration month, and shall issue a proration schedule setting out the amount of gas which each well may produce during the ensuing proration month. Included in the monthly proration schedule shall be a tabulation of allowable and production for the second preceding month together with an adjusted allowable computation for the second preceding month. Said adjusted allowable shall be computed by comparing the actual allowable assigned with the actual production. In the event the allowable assigned is greater than the actual production, the allowables assigned the top allowable units shall be reduced proportionately, and in the event the allowable assigned is less than the production, then the allowables assigned the top allowable units shall be increased proportionately. "Supplemental Nominations" shall be submitted on a form prescribed by the Commission.

The Commission shall include in the proration schedule the gas wells in the West Kutz Gas Pool delivering to a gas transportation facility or lease gathering system, and shall include in the proration schedule of this gas pool any well which it finds is being unreasonably discriminated against through denial of access to a gas transportation facility, which is reasonably capable of handling the type of gas produced by such well. The total allowable to be allocated to the pool each month shall be equal to the sum of the supplemental nominations together with any adjustment which the Commission deems advisable.

Marginal wells are defined as wells not capable of producing in excess of 100 MCF per day. In calculating the capacity of a well to produce, the average shut in pressure of all of the wells in the pool, as determined by the preceding year's deliverability test, shall be divided by two, and each well's ability to produce against such pressure shall establish its capacity to produce. All wells capable of producing in excess of 100 MCF per day shall receive an allowable of at least 100 MCF per day.

The allocation to a pool remaining after subtracting the capacity of marginal wells and assigned minimum allowables shall be divided and allocated ratably among the non-marginal units in the pool on the following basis:

A. Seventy-five (75) per cent of such remaining allowable shall be divided and allocated ratably among the non-marginal wells in the proportion that the product of the deliverability and acreage assigned each well for proration purposes bears to the summation of the products of these factors for all such non-marginal wells in the pool.

B. Twenty-five (25) per cent of such remaining allowable shall be divided and allocated ratably among the non-marginal wells in the proportion that the acreage assigned each such well for proration purposes bears to the summation of acreage assigned all such non-marginal wells in the field.

RULE 4

Underproduction: The dates 7:00 a.m., January 1, and 7:00 a.m., July 1, shall be known as balancing dates, and the periods of time bounded by these dates shall be known as gas proration periods. The amount of current gas allowable remaining unproduced at the end of each proration period shall be carried forward to and may be produced during the next succeeding proration period in addition to the normal gas allowable for such succeeding period; but whatever amount thereof is not made up within the first succeeding proration period shall be cancelled. If at the end of the first succeeding proration period, a greater amount of allowable remains unproduced than was carried forward as underproduction, the amount carried forward to the second succeeding period shall be the total underproduction less the amount carried forward to the first succeeding period.

If it appears that such continued underproduction has resulted from inability of the well to produce its allowable, it may be classified as a marginal well and its allowable reduced to the well's ability to produce.

RULE 5

Overproduction: A well which has produced a greater amount of gas than was allowed during a given proration period shall have its allowable for the first succeeding proration period reduced by the amount of such overproduction and such overproduction shall be made up within the first succeeding proration period. If, at the end of the first succeeding proration period, the well is still overproduced, it shall be shut in and its current monthly allowable charged against said overproduction until the well is in balance. If, at any time, a well is overproduced an amount equaling six times its current monthly allowable, it shall be shut in until it is in balance.

The Commission may allow overproduction to be made up at a lesser rate than would be the case if the well were completely shut in upon a showing at public hearing after due notice that complete shut in of the well would result in material damage to the well.

RULE 6

No gas well shall be given an allowable until Form C-104 and Form C-110 have been filed together with a plat showing acreage attributed to said well and the locations of all wells on the lease.

RULE 7

Allowables to newly completed gas wells shall commence on the date of connection to a gas transportation facility, as determined from an affidavit durnished to the Commission by the purchaser, or the date of filing of Form C-104 and Form C-110 and the plat described above, whichever date is the later.

RULE 8

The monthly gas production from each gas well shall be metered separately and the gas production therefrom shall be submitted to the Commission on Form C-115 so as to reach the Commission on or before the twentieth day of the month next succeeding the month in which the gas was produced. The operator shall show on such report what disposition has been made of the gas produced. The full production of gas from each well

shall be charged against the well's allowable regardless of what disposition has been made of the gas, provided, however, that gas used on the lease for consumption in lease houses, treaters, combustion engines and other similar lease equipment shall not be charged against the well's allowable.

RULE 9

The term "gas purchaser" as used in these rules, shall mean any "taker" of gas either at the wellhead or at any point on the lease where connection is made for gas transportation or utilization. It shall be the responsibility of said "taker" to submit a nomination.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

EDWIN L. MECHEM, Chairman

E. S. WALKER, Member

W. B. MACEY, Member and Secretary

STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

STANOLIND OIL AND GAS COMPANY,
Plaintiff,

vs. NO. 4909

NEW MEXICO OIL CONSERVATION COMMISSION, et al,
Defendants.

ACCEPTANCE OF SERVICE

The undersigned hereby accepts service of a true and correct copy of the complaint, summons and Notice issued in the above entitled cause, the same as though the same had been served upon it personally, as required by law.

DATED at Santa Fe, New Mexico, this 15th day of September, 1955.

NEW MEXICO OIL CONSERVATION COMMISSION,

By: _____

STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

STANOLIND OIL AND GAS COMPANY,

Plaintiff,

vs. No. 4909

NEW MEXICO OIL CONSERVATION COMMISSION, et al.,

Defendants.

ENTRY OF APPEARANCE AND JOINDER IN MOTIONS

Comes now the New Mexico Western Oil and Gas Company, a corporation, named as a defendant in the caption to the complaint in the above entitled cause, and by its attorney, hereby enters its appearance in said cause and joins with the movants in that certain motion to dismiss or in the alternative, alternative motions to strike, or in the alternative, motion for more definite statement filed herein on the 10th day of October, 1955.

Jason W. Kellahin
Attorney for New Mexico Western
Oil and Gas Company, a corporation
54½ East San Francisco Street
Santa Fe, New Mexico

CERTIFICATE

I certify that a true copy of the foregoing instrument was mailed to all opposing counsel of record this 13th day of October, 1955.

Jason W. Kellahin

STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

STANOLIND OIL AND GAS COMPANY,

Plaintiff,

vs. No. 4909

NEW MEXICO OIL CONSERVATION COMMISSION, et al.,

Defendants.

MOTION TO DISMISS OR IN THE ALTERNATIVE, ALTERNATIVE MOTIONS TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

I.

Come now the defendants Western Development Company, a corporation, and Frontier Refining Company, a corporation, by their attorney, and respectfully show the Court that the petition herein fails to state a claim upon which relief can be granted.

WHEREFORE, said defendants pray the Court for its order dismissing the petition herein, and for their costs.

II.

As an alternative to the foregoing motion to dismiss, said defendants, by their attorney, move the Court to strike plaintiff's petition in its entirety, and require plaintiff to replead, for the following reasons:

1. That said petition contains a large portion of matter which is redundant, immaterial and impertinent, and to which said petition defendants herein cannot reasonably frame a responsive answer without extreme difficulty.

2. That said petition does not comply with the requirements of Rule 8 (a) (2) of the Rules of Civil Procedure for the District Courts of New Mexico, Section 65-3-22, New Mexico Statutes, 1953, Annotated, or with Rule 10 (b), Rules of Civil Procedure for the District Courts of New Mexico.

III.

As an alternative to the foregoing motion to dismiss and the foregoing motion to strike plaintiff's petition in its entirety, said defendants, by their attorney, move the Court to strike the following portions of plaintiff's petition for the reasons stated:

1. That portion of the introductory, unnumbered, paragraph of said petition reading "George J. Darneille" for the reason that said name is not contained in the caption of the petition as required by Rule 10 (a) of the Rules of Civil Procedure for the District Courts of New Mexico.

2. That portion of Paragraph I of said petition which reads:

> "Petitioners have property affected by the decision located in San Juan County, and have heretofore timely filed its Application for Rehearing in connection with the matters hereinafter set forth, and this Petition is timely filed after entry of order disposing of Application of Petitioner, Stanolind Oil and Gas Company, for rehearing, with which disposition this Petitioner is dissatisfied."

for the reason that said portion of Paragraph I is redundant, immaterial, pleads the evidence, and presents allegations so general in nature that defendants are not informed of the grounds on which plaintiff complains of the order.

3. That portion of Paragraph II of said petition which reads:

> "Attached hereto as Exhibit "A" and incorporated herein by reference is the petition dated May 3, 1954, filed by J.D. Hancock, Jr. At said hearing on July 14, 1954, reference was made to earlier hearings relating to the proper spacing of wells in the West Kutz-Pictured Cliffs Pool and the transcript, including the testimony and exhibits relating to such hearings, were offered and accepted in evidence by the Commission. These earlier hearings are denominated as CasesNos. 237 and 377, before the Oil Conservation Commission of the Sate of New Mexico; said hearings being held prior to application by J. D. Hancock, Jr., for ratable take or in the alternative, proration; and at a time when no petition nor other proceeding was pending before the Commission with reference to or concerning the restriction of production from individual wells in the West Kutz-Pictured Cliffs Pool in accordance with the authority to prorate gas under the laws of New Mexico."

for the reason that said portion of Paragraph II is immaterial, and impertinent, and is a pleading of the evidence.

4. That portion of Paragraph IV of said petition which reads:

> "Stanolind Oil and Gas Company being the Operator of numerous wells in the West Kutz-Pictured Cliffs Pool, San Juan County, New Mexico, owning an interest in said wells, and thus being affected by the order of the Commission as aforesaid, timely filed its application for rehearing in accordance with the provisions of Paragraph (a) of Title 65-3-22 of the New Mexico Statutes Annotated, 1953 Edition, setting forth therein the respects in which said order is believed to be erroneous."

and that portion of Paragraph IV of said petition which reads:

> "By Order R-566-B, attached hereto as Exhibit "E", and made a part hereof for all purposes, the Oil Conservation Commission of New Mexico entered its Order reopening and setting a rehearing to be held on March 17, 1955, at Santa Fe, New Mexico. Said Order limited consideration to the provisions of Order R-566 as amended pertaining and relating to the establishment of proration units and the other matters raised by Petitioner's Stanolind Oil and Gas Company, application for rehearing."

for the reason that said portions of Paragraph IV are immaterial, redundant, argumentative, and pleads the evidence.

5. All of Paragraph V of said petition, or in the alternative, that portion of Paragraph V of said petition which reads:

a. In line 6 of said paragraph, the word: "contiguous";

b. beginning at line 11 of said paragraph, the words:

> "The questions raised by the Application for Rehearing were confined to the size of the proration unit under authority of the laws of the State of New Mexico relating thereto, and failure of the Commission to grant administrative exceptions. Attached hereto as Exhibit "G" and made a part hereof for all purposes, is a copy of a proposed Order of the Commission submitted by Petitioner, Stanolind Oil and Gas Company, to the Commission with a request for its adoption, during the course of the hearing dated July 14, 1954. Its adoption was urged again during the rehearing.";

c. beginning at line 20 of said paragraph, the words:

> "based on the physical facts then and now existing";

d. beginning at line 27 of said paragraph, the words:

> "contrary to the standards established by the Legislature for the Commission as contained in said laws; does not meet the requirements of the New Mexico Statutes";

for the reason that said paragraph, as a whole, and said portions

of said Paragraph IV, and each of them, are redundant, immaterial, impertinent, are a pleading of the evidence, and are argumentative.

6. All of that portion of Paragraph VI of said petition beginning with the words: "and the physical facts existing", on line 3, to the end of said paragraph, for the reason that said portion of Paragraph VI is immaterial, impertinent and argumentative, and pleads the evidence.

7. All of Paragraph VII, for the reason that said Paragraph VII is immaterial, impertinent, argumentative and redundant.

8. Exhibits "A", "B" and "C" attached to said petition, and made a part thereof by reference, for the reason that said exhibits are immaterial and impertinent.

IV.

As an alternative to the foregoing motion to dismiss and the foregoing motion to strike plaintiff's petition in its entirety, and the foregoing motion to strike portions of plaintiff's petition, said defendants, by their attorney, and with reference to the specific matters contained in the next preceding motion to strike, move the Court to order and direct plaintiff to file a more definite statement, for the reason that the petition, read as a whole, is so vague and ambiguous that it does not apprise defendants of the precise grounds of plaintiff's petition, and defendants cannot reasonably be required to frame a responsive pleading thereto.

Defendants pray that such order require plaintiff to:

1. State briefly the nature of the proceedings before the Oil Conservation Commission of New Mexico.

2. State precisely the grounds upon which they rely to show the invalidity of Oil Conservation Commission of New Mexico order or orders.

3. State precisely wherein they contend the Oil Conservation Commission of New Mexico erred in entering its said order or orders.

4. State specifically the matters raised in plaintiff's petition for review, Exhibit "D", in respect to which it is claimed the Oil Conservation Commission of New Mexico erred, and the grounds of such error, if any.

s/ Jason W. Kellahin
Attorney for Defendants
Western Development Company, a corporation, and
Frontier Refining Company, a corporation

54½ East San Francisco Street
Santa Fe, New Mexico

CERTIFICATE

I certify that true copies of the foregoing motions were mailed to opposing counsel of record this 10th day of October, 1955.

s/ Jason W. Kellahin
Jason W. Kellahin

STATE OF NEW MEXICO)
)
COUNTY OF SAN JUAN)

IN THE DISTRICT COURT

Stanolind Oil and Gas Company,

Plaintiffs,

vs. No. 4909

Oil Conservation Commission, et al,

Defendants.

O R D E R

For the convenience of the attorneys, in order that the motions and case may be heard at Santa Fe, and in order to save expense in the Court fund, the undersigned hereby recuses himself from further participation in the above-entitled cause.

C. C. McCulloh

District Judge

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR SAN JUAN COUNTY, NEW MEXICO

STANOLIND OIL AND GAS COMPANY

vs.

No. 4909

NEW MEXICO OIL CONSERVATION COMMISSION, et al.

MOTION TO DISMISS, MOTIONS IN THE ALTERNATIVE TO STRIKE, MOTION IN THE ALTERNATIVE FOR A MORE DEFINITE STATEMENT.

I.

Comes now the New Mexico Oil Conservation Commission, by its attorney, Willard F. Kitts, Santa Fe, New Mexico and moves the Court for an order dismissing the Petition heretofore filed in this cause, and as grounds for said motion would show the Court that the Petition fails to state a claim upon which relief can be granted.

II.

As an alternative to the foregoing motion to dismiss, the said defendant, by its attorney, moves the Court to strike the Petition in its entirety, and as grounds for said motion, would show the Court:

(1) That most or much of the matter contained in the said Petition is redundant, immaterial, and impertinent, and is so drawn that this defendant could not and cannot answer said Petition without extreme difficulty.

(2) That said petition fails to comply with the requirements and provisions of Sec. 65-3-22 NMSA, 1953 Comp, and Rules 8 (a) 2 and 10 (b) of the New Mexico Rules of Civil Procedure.

III.

As an alternative to the motions heretofore set forth, this defendant moves the Court to strike the following portions of the Petition for the reasons hereinafter stated:

1. The words "George J. Darneille" contained in the first and unnumbered paragraph on the first page of the Petition, for the reason that the name of said party is not contained in the caption of the Petition, in violation of Rule 10 (b), New Mexico Rules of Civil Procedure.

2. That portion of Paragraph II of the Petition which reads as follows:

> "At said hearing on July 14, 1954, reference was made to earlier hearings relating to the proper spacing of wells in the West Kutz-Pictured Cliffs Pool and the transcript, including the testimony and exhibits relating to such hearings, were offered and accepted in evidence by the Commission. These earlier hearings are denominated as Cases Nos. 237 and 377, before the Oil Conservation Commission of the State of New Mexico; said hearings being held prior to application by J. D. Hancock, Jr. for ratable take or in the alternative, proration; and at a time when no petition nor other proceeding was pending before the Commission with reference to or concerning the restriction of production from individual wells in the West Kutz-Pictured Cliffs Pool in accordance with the authority to prorate gas under the laws of New Mexico"

for the reason that said portion of Paragraph II is immaterial, impertinent, argumentative and constitutes a pleading of the evidence.

3. That portion of Paragraph IV of the Petition which reads as follows:

> "Stanolind Oil and Gas Company being the Operator of numerous wells in the West Kutz-Pictured Cliffs Pool, San Juan County, New Mexico, owning an interest in said wells, and thus being affected by the order of the Commission as aforesaid, timely filed its application for rehearing in accordance with the provisions of Paragraph (a) of Title 65-3-22 of the New Mexico Statutes Annotated, 1953 Edition, setting forth therein the respects in which said order is believed to be erroneous."

and that further portion of Paragraph IV which reads as follows:

> "By Order R-566-B, attached hereto as Exhibit "E", and made a part hereof for all purposes, the Oil Conservation Commission of New Mexico entered its Order reopening and setting a rehearing to be held on March 17, 1955, at Santa Fe, New Mexico. Said order limited consideration to the provisions of Order R-566 as amended pertaining and relating to the establishment of proration units and the other matters raised by Petitioner's Stanolind Oil and Gas Company, application for rehearing."

for the reason that these portions of Paragraph IV are immaterial, redundant, argumentative, and constitute a pleading of the evidence.

4. All of Paragraph V of the Petition, or, in the alternative, those portions of Paragraph V as follows:

a. The first 19 lines of the paragraph, except the last word in line 19: "This".

b. The words "based on the physical facts then and now existing", contained in Line 20 and 21 of the said paragraph.

c. Beginning on line 27 of said paragraph, the words:

> "contrary to the standards established by the Legislature for the Commission as contained in said laws; does not meet the requirements of the New Mexico Statutes."

for the reason that the paragraph, as a whole, and the particular portions thereof quoted above, are immaterial, impertinent, redundant, argumentative and constitute a pleading of the evidence.

5. All of that portion of Paragraph VI of the Petition beginning with the words "and the physical facts existing", on line 3, and continuing to the end of said paragraph, for the reason that said portion of the paragraph is immaterial, impertinent, argumentative, and constitutes a pleading of the evidence.

6. All of Paragraph VII, for the reason that said paragraph is immaterial, impertinent, argumentative, and redundant.

7. Exhibits "E" and "G", which are attached to the Petition, for the reason that said exhibits are immaterial and impertinent.

IV.

As an alternative to the foregoing motions, set forth in Paragraphs I, II, and III, supra, of this pleading, this defendant, with reference to those portions of the Petition referred to in the foregoing motion to strike portions of the Petition, moves the Court to order and direct plaintiff and petitioner to file a more definite statement, and as grounds therefor, states to the Court that said Petition, as a whole, is so vague and ambiguous as to fail to apprise this defendant of the precise grounds for the Petition, thus preventing and precluding this defendant from framing an answer thereto

This defendant prays that such order require plaintiff to:

1. State briefly the nature of the proceedings before the Commission, in compliance with Sec. 65-3-22 (b), NMSA, 1953 Comp.

2. State precisely and plainly the grounds of invalidity of the order or orders of this defendant upon which they rely, in compliance with Rule 8 a (2) and Rule 10 (b) of the New Mexico Rules of Civil Procedure.

3. State specifically the matters raised in plaintiff's Petition for review, Exhibit "D", in respect to which it is claimed this defendant erred, and the basis for urging said claimed errors, if any.

WILLARD F. KITTS
116 East Palace Avenue
Santa Fe, New Mexico

Attorney for the Defendant
New Mexico Oil Conservation
Commission

CERTIFICATE

I certify that true copies of the foregoing motions were mailed to Seth and Montgomery, Attorneys at Law, Santa Fe, attorneys of record for plaintiff, on this 10th day of October, 1955.

WILLARD F. KITTS

STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

STANOLIND OIL AND GAS COMPANY,

Plaintiff,

vs. No. 4909

NEW MEXICO OIL CONSERVATION COMMISSION, et al.,

Defendants.

O R D E R

This matter having come on for hearing upon the Motions to Dismiss, To Strike and for a More Definite Statement all directed to the Petition for Review and filed by the New Mexico Oil Conservation Commission, Western Development Company, Frontier Refining Company and New Mexico Western Oil and Gas Company; the parties having appeared by their attorneys, and the Court having considered the Motions and argument of counsel,

IT IS ORDERED AND DECREED that all the motions be denied and that the moving parties shall have thirty days in which to answer the Petition for Review.

District Judge

STATE OF NEW MEXICO COUNTY OF SAN JUAN

IN THE DISTRICT COURT

STANOLIND OIL AND GAS COMPANY

Plaintiff,

vs. No. 4909

NEW MEXICO OIL CONSERVATION COMMISSION, et al.,

Defendants.

ENTRY OF APPEARANCE

Come now John W. Gurley, attorney at law, and hereby enter his appearance herein as attorney for the New Mexico Oil Conservation Commission.

JOHN W. GURLEY

Attorney at Law
P. O. Box 871
Santa Fe, New Mexico

CERTIFICATE

I certify that a true copy of the foregoing Entry of Appearance has been personally served on all counsel of record this 17th day of July, 1956.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR SAN JUAN COUNTY, NEW MEXICO

STANOLIND OIL AND GAS COMPANY

vs.

No. 4909

NEW MEXICO OIL CONSERVATION COMMISSION, et al.

MOTION TO DISMISS, MOTIONS IN THE ALTERNATIVE TO STRIKE, MOTION IN THE ALTERNATIVE FOR A MORE DEFINITE STATEMENT.

I.

Comes now the New Mexico Oil Conservation Commission, by its attorney, Willard F. Kitts, Santa Fe, New Mexico and moves the Court for an order dismissing the Petition heretofore filed in this cause, and as grounds for said motion would show the Court that the Petition fails to state a claim upon which relief can be granted.

II.

As an alternative to the foregoing motion to dismiss, the said defendant, by its attorney, moves the Court to strike the Petition in its entirety, and as grounds for said motion, would show the Court:

(1) That most or much of the matter contained in the said Petition is redundant, immaterial, and impertinent, and is so drawn that this defendant could not and cannot answer said Petition without extreme difficulty.

(2) That said petition fails to comply with the requirements and provisions of Sec. 65-3-22 NMSA, 1953 Comp, and Rules 8 (a) 2 and 10 (b) of the New Mexico Rules of Civil Procedure.

III.

As an alternative to the motions heretofore set forth, this defendant moves the Court to strike the following portions of the Petition for the reasons hereinafter stated:

1. The words "George J. Darneille" contained in the first and unnumbered paragraph on the first page of the Petition, for the reason that the name of said party is not contained in the caption of the Petition, in violation of Rule 10 (b), New Mexico Rules of Civil Procedure.

2. That portion of Paragraph II of the Petition which reads as follows:

> "At said hearing on July 14, 1954, reference was made to earlier hearings relating to the proper spacing of wells in the West Kuts-Pictured Cliffs Pool and the transcript, including the testimony and exhibits relating to such hearings, were offered and accepted in evidence by the Commission. These earlier hearings are denominated as Cases Nos. 237 and 377, before the Oil Conservation Commission of the State of New Mexico; said hearings being held prior to application by J. D. Hancock, Jr. for ratable take or in the alternative, proration; and at a time when no petition nor other proceeding was pending before the Commission with reference to or concerning the restriction of production from individual wells in the West Kuts-Pictured Cliffs Pool in accordance with the authority to prorate gas under the laws of New Mexico"

for the reason that said portion of Paragraph II is immaterial, impertinent, argumentative and constitutes a pleading of the evidence.

3. That portion of Paragraph IV of the Petition which reads as follows:

> Stanolind Oil and Gas Company being the Operator of numerous wells in the West Kutz-Pictured Cliffs Pool, San Juan County, New Mexico, owning an interest in said wells, and thus being affected by the order of the Commission as aforesaid, timely filed its application for rehearing in accordance with the provisions of Paragraph (a) of Title 65-3-22 of the New Mexico Statutes Annotated, 1953 Edition, setting forth therein the respects in which said order is believed to be erroneous."

and that further portion of Paragraph IV which reads as follows:

> By Order R-566-B, attached hereto as Exhibit "C", and made a part hereof for all purposes, the Oil Conservation Commission of New Mexico entered its Order reopening and setting a rehearing to be held on March 17, 1955, at Santa Fe, New Mexico. Said order limited consideration to the provisions of Order R-566 as amended pertaining and relating to the establishment of proration units and the other matters raised by Petitioner's Stanolind Oil and Gas Company, application for rehearing."

for the reason that these portions of Paragraph IV are immaterial, redundant, argumentative, and constitute a pleading of the evidence.

4. All of Paragraph V of the Petition, or, in the alternative, those portions of Paragraph V as follows:

a. The first 19 lines of the paragraph, except the last word in line 19: "This".

b. The words "based on the physical facts then and now existing", contained in Line 20 and 21 of the said paragraph.

c. Beginning on line 27 of said paragraph, the words:

> "contrary to the standards established by the Legislature for the Commission as contained in said laws, does not meet the requirements of the New Mexico Statutes."

for the reason that the paragraph, as a whole, and the particular portions thereof quoted above, are immaterial, impertinent, redundant, argumentative and constitute a pleading of the evidence.

5. All of that portion of Paragraph VI of the Petition beginning with the words "and the physical facts existing", on line 3, and continuing to the end of said paragraph, for the reason that said portion of the paragraph is immaterial, impertinent, argumentative, and constitutes a pleading of the evidence.

6. All of Paragraph VII, for the reason that said paragraph is immaterial, impertinent, argumentative, and redundant.

7. Exhibits "B" and "C", which are attached to the Petition, for the reason that said exhibits are immaterial and impertinent.

IV.

As an alternative to the foregoing motions, set forth in Paragraphs I, II, and III, supra, of this pleading, this defendant, with reference to those portions of the Petition referred to in the foregoing motion to strike portions of the Petition, moves the Court to order and direct plaintiff and petitioner to file a more definite statement, and as grounds therefor, states to the Court that said Petition, as a whole, is so vague and ambiguous as to fail to apprise this defendant of the precise grounds for the Petition, thus preventing and precluding this defendant from framing an answer thereto

This defendant prays that such order require plaintiff to:

1. State briefly the nature of the proceedings before the Commission, in compliance with Sec. 65-3-22 (b), NMSA, 1953 Comp.

2. State precisely and plainly the grounds of invalidity of the order or orders of this defendant upon which they rely, in compliance with Rule 8 a (2) and Rule 10 (b) of the New Mexico Rules of Civil Procedure.

3. State specifically the matters raised in plaintiff's Petition for review, Exhibit "D", in respect to which it is claimed this defendant erred, and the basis for urging said claimed errors, if any.

WILLARD F. KITTS
116 East Palace Avenue
Santa Fe, New Mexico

Attorney for the Defendant
New Mexico Oil Conservation
Commission

CERTIFICATE

I certify that true copies of the foregoing motions were mailed to Seth and Montgomery, Attorneys at Law, Santa Fe, attorneys of record for plaintiff, on this _____ day of October, 1955.

WILLARD F. KITTS

STATE OF NEW MEXICO COUNTY OF SAN JUAN

IN THE DISTRICT COURT

STANOLIND OIL AND GAS COMPANY,

Plaintiff,

vs. No. 4909

NEW MEXICO OIL CONSERVATION COMMISSION, et al.,

Defendants.

O R D E R

Upon oral stipulation of counsel, and good cause therefor appearing,

It is hereby ORDERED that the time for filing an answer herein is extended to August 27, 1956.

s/ David W. Carmody
DISTRICT JUDGE

Entered:
Aug. 15, 1956

STATE OF NEW MEXICO COUNTY OF SAN JUAN IN THE DISTRICT COURT

STANOLIND OIL AND GAS COMPANY

Plaintiff,

vs. No. 4909

NEW MEXICO OIL CONSERVATION COMMISSION, et al,

Defendants.

MOTION TO DISMISS

Comes now the plaintiff herein , Stanolind Oil and Gas Company, now known as Pan American Petroleum Corporation, and states that the gas reservoir concerned in this action has been the subject of further study by the plaintiff and others. It is expected that the results of interference tests taken in various gas fields in San Juan County and Rio Arriba County will be presented to the New Mexico Oil Conservation Commission this Fall. It is also expected that the San Juan Basin Gas Allowable Committee Report will be presented at the same time. With this availability of additional data in view plaintiff has filed an application with the Oil Conservation Commission for a hearing to be held in October to consider optional 320 acre proration units and allowables for the West Kutz Pictured Cliffs Gas Pool.

Since all of the above matters relate to the issues which are the subject of this appeal Petitioner respectfully requests and moves the Court to dismiss this appeal.

SETH AND MONTGOMERY

By_____
Attorneys for Plaintiff

STATE OF NEW MEXICO COUNTY OF SAN JUAN

IN THE DISTRICT COURT

STANOLIND OIL AND GAS COMPANY

Plaintiff,

vs. No. 4909

NEW MEXICO OIL CONSERVATION COMMISSION, et al.,

Defendants.

ENTRY OF APPEARANCE

Come now John W. Gurley, attorney at law, and hereby enter his appearance herein as attorney for the New Mexico Oil Conservation Commission.

JOHN W. GURLEY

Attorney at Law
P. O. Box 871
Santa Fe, New Mexico

CERTIFICATE

I certify that a true copy of the foregoing Entry of Appearance has been personally served on all counsel of record this 17th day of July, 1956.

March 4, 1958

SPUDDING DATES AND LOCATIONS OF SHELL WELLS

(All in San Juan County, New Mexico.)

Well No. 14 - SW¼SW¼, Section 17, Township 25 North, Range 11 West
Spudded: July 31, 1957

Well No. 23 - NE¼SW¼, Section 17, Township 25 North, Range 11 West
Spudded: February 25, 1957

Well No. 34 - SW¼SE¼, Section 17, Township 25 North, Range 11 West
Spudded: June 2, 1957

Well No. 4 - NE¼NW¼, Section 20, Township 25 North, Range 11 West
Spudded: September 10, 1956

Well No. 23 - NE¼SW¼, Section 20, Township 25 North, Range 11 West
Spudded: March 10, 1957

Well No. 12 - SW¼NW¼, Section 9, Township 25 North, Range 12 West
Spudded: September 6, 1956

Well No. 21 - NE¼NW¼, Section 9, Township 25 North, Range 12 West
Spudded: November 27, 1956

Well No. 32 - SW¼NE¼, Section 9, Township 25 North, Range 12 West
Spudded: September 20, 1956

Well No. 34 - SW¼SE¼, Section 10, Township 25 North, Range 12 West
Spudded: June 28, 1957

Well No. 14 - SW¼SW¼, Section 10, Township 25 North, Range 12 West
Spudded: August 20, 1956

Well No. 14 - SW¼SW¼, Section 13, Township 25 North, Range 12 West
Spudded: April 12, 1957

Well No. 41 - NE¼NE¼, Section 13, Township 25 North, Range 12 West
Spudded: January 27, 1957

Well No. 43 - NE¼SE¼, Section 13, Township 25 North, Range 12 West
Spudded: January 12, 1957

Well No. 14 - SW¼SW¼, Section 14, Township 25 North, Range 12 West
Spudded: September 24, 1957

Well No. 32 - SW¼NE¼, Section 14, Township 25 North, Range 12 West
Spudded: April 24, 1957

Well No. 41 - NE¼NE¼, Section 14, Township 25 North, Range 12 West
Spudded: May 23, 1957

Well No. 12 - SW¼NW¼, Section 15, Township 25 North, Range 12 West
Spudded: May 11, 1956

Well No. 14 - SW¼SW¼, Section 15, Township 25 North, Range 12 West
Spudded: May 24, 1957

Well No. 31 - NW¼NE¼, Section 15, Township 25 North, Range 12 West
Spudded: August 19, 1957

JASON W. KELLAHIN
ATTORNEY AT LAW
54½ EAST SAN FRANCISCO STREET
POST OFFICE BOX 597
SANTA FE, NEW MEXICO
TELEPHONE 3-9396

August 16, 1956

Mr. Jack Gurley, Att'y
New Mexico Oil Conservation Commission
P. O. Box 871
Santa Fe, New Mexico

Dear Jack:

I am enclosing a copy of the order entered by the court, extending the time for filing answer in the case of Stanolind v. Oil Conservation Commission, et al., to August 27. The order was signed by Judge Carmody on August 15.

Yours sincerely,

Jason

Jason W. Kellahin

JWK:ss
Encl.

Well No. 32 - SW¼NE¼, Section 15, Township 25 North, Range 12 West
Spudded: June 6, 1957

Well No. 41 - NE¼NE¼, Section 15, Township 25 North, Range 12 West
Spudded: June 19, 1957

Well No. 41 - NE¼NE¼, Section 21, Township 25 North, Range 12 West
Spudded: October 23, 1957

Well No. 21 - NE¼NW¼, Section 23, Township 25 North, Range 12 West
Spudded: October 4, 1957

Well No. 41 - NE¼NE¼, Section 23, Township 25 North, Range 12 West
Spudded: May 3, 1957

Well No. 1 - NE¼NE¼, Section 24, Township 25 North, Range 12 West
Spudded: July 19, 1956

Well No. 12 - SW¼NW¼, Section 24, Township 25 North, Range 12 West
Spudded: October 10, 1957

Well No. 33 - NW¼SE¼, Section 24, Township 25 North, Range 12 West
Spudded: December 29, 1957

Well No. 2 - NW¼NW¼, Section 25, Township 25 North, Range 12 West
Spudded: August 7, 1956

Well No. 34 - SW¼SE¼, Section 13, Township 25 North, Range 12 West
Spudded: May 13, 1957

Well No. 14 - SW¼SW¼, Section 11, Township 25 North, Range 12 West
Spudded: September 4, 1957

Well No. 12 - SW¼NW¼, Section 14, Township 25 North, Range 12 West
Spudded: September 14, 1957

Well No. 43 - NE¼SE¼, Section 17, Township 25 North, Range 11 West
Spudded: July 21, 1957

Well No. 34 - SW¼SE¼, Section 18, Township 25 North, Range 11 West
Spudded: August 17, 1957

Well No. 12 - SW¼NW¼, Section 19, Township 25 North, Range 11 West
Spudded: August 25, 1957

Well No. 21 - NE¼NW¼, Section 19, Township 25 North, Range 11 West
Spudded: June 22, 1957

Well No. 34 - SW¼SE¼, Section 19, Township 25 North, Range 11 West
Spudded: July 12, 1957

Well No. 12 - SW¼NW¼, Section 20, Township 25 North, Range 11 West
Spudded: June 13, 1957

Well No. 3 - NW¼SW¼, Section 7, Township 25 North, Range 11 West
Spudded: August 25, 1956

Well No. 41 - NE¼NE¼, Section 20, Township 25 North, Range 11 West
Spudded: September 4, 1957

Well No. 14 - SW¼SW¼, Section 16, Township 25 North, Range 11 West
Spudded: July 2, 1957

Well No. 23 - NE¼SW¼, Section 16, Township 25 North, Range 11 West
Spudded: October 1, 1957

Well No. 34 - SW¼SE¼, Section 16, Township 25 North, Range 11 West
Spudded: September 22, 1957

Well No. 11 - NW¼NW¼, Section 9, Township 25 North, Range 12 West
Spudded: November 9, 1957

Well No. 22 - SE¼NW¼, Section 9, Township 25 North, Range 12 West
Spudded: November 1, 1957

Well No. 31 - NW¼NE¼, Section 9, Township 25 North, Range 12 West
Spudded: November 8, 1957

Well No. 41 - NE¼NE¼, Section 9, Township 25 North, Range 12 West
Spudded: July 18, 1957

Well No. 42 - SE¼NE¼, Section 9, Township 25 North, Range 12 West
Spudded: October 31, 1957

Well No. 13 - NW¼SW¼, Section 10, Township 25 North, Range 12 West
Spudded: October 23, 1957

Well No. 23 - NE¼SW¼, Section 10, Township 25 North, Range 12 West
Spudded: February 10, 1957

Well No. 31 - NW¼NE¼, Section 10, Township 25 North, Range 12 West
Spudded: December 10, 1956

Well No. 33 - NW¼SE¼, Section 10, Township 25 North, Range 12 West
Spudded: October 15, 1957

Well No. 44 - SE¼SE¼, Section 10, Township 25 North, Range 12 West
Spudded: August 28, 1957

Well No. 23 - NE¼SW¼, Section 15, Township 25 North, Range 12 West
Spudded: May 25, 1957

Well No. 21 - NE¼NW¼, Section 15, Township 25 North, Range 12 West
Spudded: August 10, 1957

Well No. 43 - NE¼SE¼, Section 10, Township 25 North, Range 12 West
Spudded: July 7, 1957

Well No. 21 - NE¼NW¼, Section 22, Township 25 North, Range 11 West
Spudded: September 13, 1957

Well No. 13 - NW¼SW¼, Section 16, Township 25 North, Range 11 West
Spudded: November 29, 1957

Well No. 32 - SW¼NE¼, Section 18, Township 25 North, Range 11 West
Spudded: November 17, 1957

Well No. 23 - NE¼SW¼, Section 14, Township 25 North, Range 12 West
Spudded: December 15, 1957

Well No. 43 - NE¼SE¼, Section 15, Township 25 North, Range 12 West
Spudded: January 7, 1958

Well No. 23 - NE¼SW¼, Section 14, Township 25 North, Range 12 West
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Spudded: December 19, 1957

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Spudded: November 25, 1957

Well No. 34 - SW¼SE¼, Section 14, Township 25 North, Range 12 West
Spudded: December 6, 1957

Well No. 44 - SE¼SE¼, Section 14, Township 25 North, Range 12 West
Spudded: December 23, 1957

Well No. 33 - NW¼SE¼, Section 14, Township 25 North, Range 12 West
Spudded: January 2, 1958

RE-CAP: NUMBER OF WELLS PER MONTH

1956	1957	1958
	January - 2	January - 2
	February - 2	
	March - 1	
	April - 2	
May - 1	May - 5	
	June - 6	
July - 1	July - 6	
August - 3	August - 5	
September- 3	September - 6	
	October - 7	
November - 1	November - 6	
December - 1	December - 6	
10	54	2

BEFORE THE OIL CONSERVATION COMMISSION

OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION OF SUNRAY MID-CONTINENT OIL COMPANY (BISTI POOL SPACING REHEARING).

CASE NO. 1308

SHELL

BRIEF

This Brief is submitted to supplement the application for rehearing filed by Shell Oil Company in this action. The application for rehearing is directed to Order No. R-1069-B of January 17, 1958.

A brief consideration of the facts established during the hearings is necessary before considering the legal consequences of the action taken by the Commission and by the applicant.

As shown by Shell's rehearing Exhibits Nos. 1 and 2 at the Shell rehearing, 40-acre wells were drilled by Shell, the first commencing about the middle of August, 1957, and thereafter an additional well was drilled prior to October 9, 1957, which is the date of Order No. R-1069. Between October 9 and November 4, 1957, four (4) 40-acre wells were commenced, and between November 4, 1957, which is the date of Order No. R-1069-A, and January 17, 1958, the date of Order No. R-1069-B, eight (8) 40-acre wells were commenced. As established at the hearing, the total cost of these fourteen wells to the applicant was $565,600.00, exclusive of lease facilities. It was further established during the hearings the Commission was officially advised of the commencement of drilling of each of these wells on the regular Commission forms.

The initial 40-acre wells drilled were, of course, drilled under the State-wide Rule No. 104, which had been in effect for many years. About August 5, 1957, Sunray Mid-Continent Oil Company applied for an exception to this State-wide Rule and the exception

was denied by Order No. R-1069; consequently the State-wide Rule remained in effect as theretofore. On November 4, 1957, Order No. R-1069-A was issued which granted a rehearing to Sunray. This Order expressly recites that Order No. R-1069 shall remain in full force and effect, consequently it recites that the State-wide Rule shall remain in effect. The State-wide Rule remained in effect until Order No. R-1069-B of January 17, 1958, was issued.

The facts developed at the hearing further show that the applicant drilled the 40-acre wells in reliance on the State-wide order of the Commission. None of the facts listed above are in any way controverted by the parties opposing the Shell rehearing.

In this Brief, we would like to discuss four principal points and refer to other points raised in the application for rehearing. These points briefly are:

First: Order No. R-1069-B is retroactive in effect and, consequently, violates the due process clause of the Constitution.

Second: The action of the applicant in reliance on the orders of the Commission, coupled with the knowledge of the Commission that the wells were being drilled, invokes the doctrine of estoppel against the Commission to prevent it changing the regulations as they pertain to the wells already drilled.

Third: The action of the Commission in issuing Order No. R-1069-B constitutes an impairment of the obligation of contracts; the contracts being those arising in and from the Carson Unit Agreement.

Fourth: The next points relate to the general matter of discrimination against the applicant in the issuance of the Order and other related points.

ORDER NO. R-1069-B OF THE COMMISSION IS RETROACTIVE, AND IN VIOLATION OF THE DUE PROCESS CLAUSE

The New Mexico Oil Conservation Commission was created by the State Legislature as an administrative agency to which has

been delegated power to regulate development and production of oil and gas. The Commission has the express power to make rules, regulations and orders (New Mexico Statutes 1943 Annotated, Section 65-3-11).

The application for rehearing is concerned with the State-wide spacing Rule and the field-wide Rule R-1069-B. These State-wide and field-wide Rules probably have the force and effect of law. In any event, there is a penalty for the violation of such rules. We are dealing with rules, regulations and orders which do not merely interpret the statute, but which constitute an exercise of the delegated legislative power.

The power here exercised and the acts performed do not involve adjudication of rights. The regulations here are prescribed by the Commission pursuant to a specific delegation of power as above indicated. This type of regulations prescribes for the future within the scope of the standards set down by the Legislature and the rules are of general application.

The Supreme Court of New Mexico has made the distinction between administrative proceedings which determine policy and those which adjudicate rights. This distinction is made in Phillips vs. City of Albuquerque, 60 N.M. 1, 287 P. (2d) 77. This case dealt with the question of notice to be given to parties concerned in an administrative proceeding and the Court defines legislative proceedings as those involving a determination of policy rather than an adjudication of rights. This distinction is of great importance in considering the matters involved in this hearing.

The Supreme Court of New Mexico has also held an administrative agency performing functions similar to those involved in this hearing was exercising a legislative function. This case is Continental Bus System vs. State Corporation Commission, 56 N.M. 158, 241 P. (2d) 829. The case involved the issuance of a

certificate of public convenience and necessity to a bus company. The Court there said:

> "The State Corporation Commission in these matters is an administrative board exercising a legislative function ***."

We believe that this is a necessary and reasonable distinction in the analysis of the functions of an administrative agency to distinguish between legislative and judicial powers and acts. If a delegation of authority to the Oil Conservation Commission is valid, it must be limited to the exercise of legislative functions. This distinction between functions of an administrative agency is especially important in the State of New Mexico where the matter of delegation of judicial powers has been very severely curtailed. This strict rule is especially apparent in the recent case of Hovey Concrete Products Company vs. Mechem, 63 N.M. 250, 316 P. (2d) 1069. In this case, the New Mexico Supreme Court struck down the creation of an administrative agency on the ground that it could exercise judicial functions. In so doing, the Court regarded it as being in conflict with Section 1, Article 6 of the New Mexico Constitution. The Court said:

> "Here the Legislature has attempted to create an executive agency, clothed it with judicial power, on a parity with district courts, and invested it with state-wide jurisdiction. This cannot be done."

Thus, in the matter we are now considering, if the acts creating this Commission are valid, it must be exercising a legislative function and not a judicial function.

Since New Mexico is very strict in its construction of the delegation of powers by the Legislature, we do not feel that the case of State vs. Bond, 172 Okla. 415, 45 P. (2d) 712, which was cited by those opposing the rehearing, is applicable. This case related to a cancellation of under-production, and the Court there said in part:

> "*** to exercise discretion, judicial in nature, and to make and modify its orders ***."

The Court further says, at page 715, with regard to the underproduction in question:

> "It was not accumulated then through any reliance upon any order of the Commission, nor did it accumulate under any provisions of the act, for there was none."

The parties opposing the application further cite the case of Rieckhoff vs. Consolidated Gas Co., 123 Mont. 555, 217 P. (2d) 1076. This case again concerns parties involved in private litigation and the position of parties during an appeal of a case in Court. This, again, is an entirely different question.

Other cases which relate to the exercise of judicial functions which are permitted in other States and which are permitted by some Federal agencies cannot be regarded as pertinent in this situation. This distinction between legislative and judicial functions must always be borne in mind in considering the cases on this subject and in any analysis of the powers and duties of the New Mexico Oil Conservation Commission. The Legislature, or any agency to which legislative powers have been delegated, cannot issue retroactive rules, laws or regulations, for to do so is to take property without due process of law.

We believe that it is apparent without the citation of authority that the exercise of a delegated legislative power is subject to the same limitations as imposed on the Legislature itself, which delegated the authority.

Thus, if the Legislature cannot do so, this Commission cannot issue an order or rule which has the force and effect of a law and which has a retroactive effect, to deprive a party of its property. This basic problem of retroactive regulations has been considered in other States and by the United States Supreme Court.

As we have seen from the brief description of the Orders which are concerned in this case, they are of general application

and, in fact, the Orders under which the wells were drilled are of State-wide application; consequently, it is more apparent in this case than in the usual situation that the matter here concerned is one of legislative character. Certainly these rules are of general application and do not, by any stretch of the imagination, constitute an adjudication of rights or an interpretation of any statute, and cases involving such matters cannot be considered at all applicable in this case. Next, to consider some cases involving the same principle as is here concerned in other jurisdictions:

In the case entitled Utah Hotel Company vs. Industrial Commission, 107 Utah 24, 151 P. (2d) 467, 153 A.L.R. 1176, the question involved was whether the hotel had to contribute to the unemployment compensation fund. The Court drew the distinction between acts or orders of an administrative board which only interpret and those which are legislative. Those which are made pursuant to an express delegation of legislative power and which prescribe for the future a rule of general application are considered legislative. The Court indicates that the different types of acts and orders are reviewed differently, and that the distinction is otherwise important.

In the case of Helvering vs. R. J. Reynolds Tobacco Company, 306, U.S. 110, 83 L. Ed. 536, the United States Supreme Court considered the application of income tax laws to the sale by a corporation of its own stock. The corporation had acted under a Treasury Regulation which was later amended. Following issuance of the original regulation, Congress re-enacted the Revenue Act. The Court felt that a regulation by virtue of the re-enactment had the force of law and, further, that Congress did not intend to authorize the Treasury Department to repeal the rule of law during the period during which the tax was imposed. This problem considered by the United States Supreme Court is somewhat similar

in principle to the matter involved in this hearing. And we believe that the Commission does not have authority to repeal the "rule of law" which was in effect and which existed during the period that the applicant did the drilling in reliance thereon. The Helvering case has been very fully treated by a number of writers. These include articles appearing at 49 Yale Law Journal, Page 660, 40 Columbia L.R., Page 252, 88 U. Pa. L. R., Page 556, and 54 Harv. L. R. 377, 398, 1311. The danger of permitting administrative agencies to issue retroactive regulations and orders is treated in 29 Ga. L.J., Page 1.

With further reference to the question raised by the case of Helvering vs. R. J. Reynolds Tobacco Company, the writer of the article entitled "Treasury Regulations and the Wilshire Oil Case," appearing at 40 Columbia L. R., Page 252, summarizes as follows:

> "The power to change legislative regulations offers no serious difficulties. So long as the delegated legislative power is in effect, there should be no doubt that authority exists to amend prospectively, subject, of course, to the limitation that the amended regulation shall be reasonable, and within the granted power. Re-enactment of the section containing such a power, moreover, constitutes a new grant of the power to make regulations, and should be conclusive of the issue, New Problems and constantly changing conditions require prospective amendments. A retroactive amendment of legislative regulations, however, stands on a different footing. The retroactive application of an amendment of a legislative regulation, precisely as in the case of the retroactive application of a statute, should be avoided; and, as in the case of a statute, an amendment of a legislative regulation should be construed if at all possible to have prospective application only. As a matter of policy, an administrative official should not have power to amend retroactively a legislative regulation adverse to the individual. As a matter of law, it would seem sound to require specific statutory authority. In any event, any attempt by Congress to delegate such a power to an administrative official would necessarily be subject to the same rigid limitations which the due process clause imposes upon retroactive legislation by Congress. Axiomatically, Congress can delegate no greater power than it itself possesses."

The matter has also been considered at some length by the Supreme Court in the case of Arizona Grocery Company vs. A.T.S.F. Railroad, 284 U.S. 370, 76 L. Ed. 348. This case concerned rates for shipments imposed by the Interstate Commerce Commission and also the matter of award of reparations under such approved rates. The Court here made the following significant statement (76 L. Ed. 356):

> "The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future it was performing a legislative function, and that when it was sitting to award reparation it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of res judicata, it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."

The California District Court of Appeals, in the case of Strother vs. P. G. & E., 94 Cal. App. (2d) 525, 211 P. (2d) 624, refused to give retroactive effect to a Civil Aeronautics Authority rule relating to notice of intention to erect poles and wires near an airport, and again the Supreme Court of Florida, in the case of York vs. State ex rel Schwaid, 10 S. (2d) 813, refused to give retroactive effect to certain action of the Dental Board in the issuance of a license. The Court said, at Page 815:

> "Administrative regulations are binding on those affected by them only when promulgated in due course. They will not be permitted to be used in ex post facto as charged in this case."

In the annotation appearing at 153 A.L.R. 1188, the writer considers this problem briefly and clearly sets forth the distinction between legislative and interpretive regulations issued by administrative agencies.

The Supreme Court of Washington, in the case of Hansen Packing Company vs. City of Seattle, 48 Wash. (2d) 737, 296 P.

(2d) 670, concerned itself with an assessment of excise taxes. The case involved administrative rulings and acts of the City authorities. The Court said in part, at Page 675:

> "An administrative agency may not retroactively impeach itself on general rules because of asserted errors of fact, judgment or discretion on its own part. If it were permissible for a taxing agency to challenge years later, such rules promulgated by its own enforcement agency, taxpayers would never be able to close their books with assurance."

We feel that the same considerations apply in this matter, and operators in this situation would never have any assurance that when proceeding with a development plan, there might be a change of mind by the regulatory authorities causing them a large loss of investment.

One of the more interesting cases on this point is the case of Hercules Powder Company vs. State Board of Equalization, 66 Wyo. 268, 208 P. (2d) 1096. In this case, the Supreme Court of Wyoming considered an assessment for sales taxes against the powder company. It does not seem necessary to quote from this case in detail, but to note that the Court found that as a general proposition, regulations of administrative agencies should be compared to judgments of a court of final appeal. We would, however, like to make the following quotation from the opinion (208 P. (2d) 1112):

> "The editorial comment concerning the conduct of administrative agencies in the note in 153 A.L.R. 1194 appears to us as not only practically sound but also in accord with what is just and fair. That comment points out that:
>
> "'In view of the important part played by administrative agencies in modern life, and their expertness and wide experience in matters confided to their administration, it is believed that as a general proposition their regulations should, as concerns the effect of a retroactive change, be likened to judgments of a court of final appeal, rather than to judgments of a trial court, particularly if it is taken into consideration that the individual citizen has practically no choice in carrying on activities in reliance upon such regulations, prior to their being sanctioned by judicial decision.'

> "To this may we add briefly that there is no good reason in this day and era that we can perceive why the agencies of the state - unless clearly by statute commanded to act otherwise - should not be held to the same standards of morality, equity and fair dealing that are expected by the established courts of the land from the citizenry of the several states."

There is no question that rights of parties which have been established pursuant to a judgment may not be divested by subsequent legislative action. Missengill vs. Downs, 7 How. 758, 12 L. Ed. 903, McCullough vs. Commonwealth of Virginia, 172 U.S. 102, 43 L. Ed. 382.

Thus, we notice that under a variety of circumstances and in a number of separate jurisdictions, the Courts have felt that regulations of the type which we are here considering should not be given retroactive effect.

We have considered in this Brief a variety of cases in order to show that the principle is of universal application, whether oil or any other subject of governmental regulation is concerned. We again point out the general application and prospective effect of the State-wide orders under which the action by the applicant was taken.

No one is arguing in this case that the Commission does not have the power to change its rules and regulations. Shell is the first one to recognize such power and freedom on the part of the Commission to regulate the oil and gas production and development in New Mexico. Such power is necessary for the proper functioning of the Commission in its mission to promote conservation; however, it is equally apparent that when an operator has acted in accordance with the requirements of the Commission's regulations, if the Commission feels that they should be changed for the future, this operator should not be penalized thereby. The new rules and regulations should look only to the future and should not attempt to affect the action

taken under the old rules. In any situation of this nature and in any statute, provision is made to protect those who have rights acquired under the old regulations. This applies in any situation, not only in this spacing case or any other spacing case, but it can apply to casing regulations, tankage and any other production or development activity that has been carried on by any producer in the State of New Mexico. The Commission heretofore has recognized the fact that its rules when changed must only relate to the future, and this is done in the same Rule No. 104 which is under discussion in this case. In sub-section (k), the Rule states: "The provisions of (i) and (j) above shall apply only to wells completed after the effective date of this rule. Nothing herein contained shall affect in any manner any well completed prior to the effective date of this Rule, and no adjustment shall be made in the allowable production for any such wells by reason of these Rules."

Thus, we notice that in the adoption of Rule 104, express provision was made to recognize the existing rights. The same must be done in the case we are now considering. As a matter of principle, law and everyday fairness, orders should not be given retroactive effect to penalize in any manner persons who have in good faith relied upon previous regulations and policy of the same agency.

THE APPLICANT HAD ACQUIRED VESTED PROPERTY RIGHTS.

In the application for rehearing the applicant sets out in some detail the fact that it had acquired vested property rights by reason of the drilling of wells pursuant to the requirements of the State-wide spacing rules. These rules not only permitted but required the spacing which was followed by the applicant. The applicant in such spacing acquired this vested right to a full unit allowable. It was entitled to such

a full unit at the time the wells were commenced and it is still entitled to such a property right. Under this point we will discuss the cases which clearly hold that the applicant did acquire such a right and that it may not be taken away by the action of the Commission. First to consider what is a vested right under our laws:

In the case of Rubalcava vs. Garst, 53 N.M. 295, 206 P. (2d) 1154, the New Mexico Supreme Court had occasion to consider the nature of vested rights. In this case the court was called upon to determine whether a 1947 enactment, requiring that a claim against a decedent's estate to impose a trust or equitable interest therein must be based upon an agreement in writing, would be applicable to a claim based upon an oral agreement which arose prior to 1947. In concluding that the statute would violate vested rights if it were to be applied retroactively to claims which originated prior to the date of its enactment, the court stated:

> '"A 'vested right' is the power to do certain actions or possess certain things lawfully, and is substantially a property right, and may be created either by common law, by statute, or by contract. And when it has been once created, and has become absolute, it is protected from the invasion of the Legislature by those provisions in the Constitution which apply to such rights. And a failure to exercise a vested right before the passage of a subsequent statute, which seeks to divest it, in no way affects or lessens that right."'

and also noted:

> '"***Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."'

This matter of the duration of vested rights in spacing has not received the attention of the courts in many cases. We are unable to find any expression of opinion by courts of any state except in Texas. This is a very important factor in this

particular case and this point constitutes an independent ground for invalidity of Order No. R-1069-B. As has been demonstrated during the previous hearings the petitioner drilled a number of wells on 40-acre tracts and has acquired property rights which it is entitled to have protected.

This matter of vested rights and spacing has been considered by the Court of Civil Appeals of Texas in the case of Chenoweth vs. Railroad Commission, 184 S.W. (2d) 711. This case was a so-called Rule 37 case and concerned the changes in the Texas Spacing Rule Number 37. The Court, in a detailed opinion, held that when an owner or operator invests money and drills a well in keeping with an existing valid order of the Railroad Commission he acquires property rights thereby, and further that such operator is entitled to have those rights protected as against subsequent changes in the Rule by the Commission. The Court in this case at Page 715 stated:

> "It is settled law that when an owner or operator invests his money and drills a well in keeping with an existing valid order of the Commission he acquires property rights which he is entitled to have protected. The most common instance in such cases is where an owner has drilled his tract to a density authorized by the old oil spacing provisions of 150-300 feet. Change of the spacings to 330-660 feet cannot operate to destroy his property rights legally acquired in the wells already drilled under the former spacing provisions."

In this case the Court and the parties were clear that no one was asserting any vested rights as against the proration of the output of the wells concerned. Likewise the applicant in this case makes no contention that it has vested rights to the continuation of any particular proration. However, it is clear that the applicant cannot be discriminated against as regards other producers in the same field by this proration.

As in the Chenoweth case, the applicant here acquired a vested right in the spacing of its wells which were drilled under valid existing orders of the Commission.

The Texas Court in the case of Atlantic Refining Company vs. Gulf Land Company, 122 S.W. (2d) 197, considered another spacing case under the Rule 37 and again recognized that there is a vested right entitled to protection. In this case the Court carefully considers the particular spacing rule that was in effect at the various times concerned. Thus in this case, as in other Texas cases, the Courts are careful to protect the vested rights of the parties under such circumstances. We notice also that at one time the Texas Spacing Rule 37 made reference expressly to vested rights. There was, consequently, a clear recognition of such rights incorporated in the Rule itself.

In the case of Humble Oil & Refining Co. vs. Railroad Commission, 94 S.W. (2d) 1197, the Court of Civil Appeals again considered a spacing case and again the Court refers to the danger of destroying property rights if the Commission is not required to recognize the creation and vesting of rights under the Spacing Rule. At Page 1198 the Court made the following statement:

> "It requires no departure from the rules laid down in those cases to sustain the action of the commission in the instant case. It is true that when the permit here attacked was granted, it required an exception to rule 37 as that rule existed when said permit was granted. At that time the spacing provisions required were 466-933 feet. But at the time the 2.5 acres were segregated, spacings under said rule of only 150-300 feet were required. A subsequent amendment to such spacing rule should not, however, be permitted to destroy a property right duly acquired in keeping with the provisions of such rule as they existed at the time such property was so acquired. And the right to develop said 2.5 acre tract should be determined, we think by the provisions of rule 37 as they applied at the time the tract in question was segregated. Otherwise, an amendment to such rule, by increasing such spacings between wells, would in effect work a confiscation of vested property rights legally acquired in good faith and in keeping with such rule."

The parties opposing the application cite the cases of Alston vs. Southern Production Co. 207 LA. 370, 20 So. (2d) 383, and Texas Trading Co. vs. Stanolind Oil & Gas Co. 161 SW. (2d) 146, as applicable to the vested rights issued involved in this rehearing.

The former case arose from an action between private parties to cancel oil and gas leases because of improper royalty payments. The defense was that royalties were paid in accordance with an order of the Commission increasing the size of gas drilling units. The decision was predicated upon the fact that the government had promulgated a wartime order which provided "No material may be used for the drilling of any oil well on less than 40 acres, or any gas well on less than 640 acres". The court concluded that the Commission's authority was subordinate to that of the Federal Government during the emergency caused by war and that, accordingly, the size of the drilling unit must conform to that prescribed by such wartime emergency order.

The latter decision involved a Rule 37 case where the operator was contending that it acquired a vested right in the spacing rule in existence at the time it acquired its lease. As previously mentioned, Shell is not contending that it acquired a vested right in spacing rules as they existed at the time it acquired its leases in the Carson Bisti Area, or at any other time, nor that the Commission may not amend such rules insofar as future wells are concerned. However, any such amendment must not penalize Shell as to wells previously drilled under prior rules. Thus it is obvious that neither of these decisions is applicable to the instant situation.

It would not seem necessary to cite further authorities on the treatment of this matter in Texas, and there is no reason why vested property rights should not be protected in the same manner in New Mexico. The applicant in this instance clearly acquired such rights by the drilling of the wells which has been brought to the attention of the Commission. As in the consideration of the doctrine of estoppel it should be borne in mind that the Commission was advised and had knowledge of the drilling being conducted by the petitioner.

At the time the 40-acre wells in question were drilled they were each entitled to the same allowable as adjoining 80-acre competitor wells. Under Order R-1069-B, such 40-acre wells are discriminated against and given half the allowables of 80-acre wells which were drilled to the same depth. The net effect of Order R-1069-B is to deprive the petitioner of any allowables for fourteen (14) of its 40-acre wells drilled in accordance with State-wide rules, confirmed by orders of the Commission. It is no answer to say, as does the Commission's memorandum 3-58 of January 17, 1958, that such wells will be permitted to produce all or a portion of the allowable given petitioner's well on an adjoining 40-acre location. The fact remains that fourteen (14) of these 40-acre wells will not earn any additional allowables under Order R-1069-B. The result is the same as if this order had required that these fourteen (14) wells be entirely shut in for a one-year period.

As indicated under State-wide Rule 104 the 40-acre spacing was proper and was in fact required. This State-wide rule was not affected by Order No. R-1069 which only served to refuse an exception to the rule. Also, as we have noted above, Order No. R-1069-A of November 4, 1957 likewise confirmed the applicability of the State-wide rules, and such State-wide rules were consequently in effect until January 17, 1958 when Order No. R-1069-B was issued. This order of January 17 is, of course, the one which purports to affect the vested property rights of the applicant. We feel for this reason alone that the order is invalid and should be set aside.

IMPAIRMENT OF OBLIGATION OF CONTRACTS

In the application for rehearing, petitioner also pointed out that Order R-1069-B violates the provisions of Section 10, Article I of the United States Constitution and Section 19 of Article 2 of the Constitution of the State of New Mexico relating to

impairment of obligations of contracts. Since the principles of law involved are well established, it is not necessary to review them at great length. However, it is interesting to note that the Supreme Court of the United States has held that orders of State commissions or other State agencies, exercising delegated authority which is legislative in character, constitute "laws" within the meaning of these constitutional prohibitions. Grand Trunk Western Railway Company vs. Railroad Commission of Indiana, 221 U.S. 400, 55 L. Ed. 786; Prentis vs. Atlantic Coast Line Railroad Company, 211 U.S. 210, 53 L.Ed. 150.

The contract involved in this situation is, of course, the Carson Unit Agreement which was established during the course of the hearings. The Unit Agreement contemplates supplemental plans of development which become a part of the contract obligations. The testimony and evidence established that the third supplemental plan provided for the drilling of forty acre unit wells. This point, of course, concerns only those wells within the Carson Unit Area.

In the case of Rubalcava vs. Garst, the Supreme Court of New Mexico quoted with approval the following statement from Volume 1, Cooley's Constitutional Limitations, 8 Ed., Page 583:

> "'The obligation of a contract,' it is said, 'consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operations amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.'"

The three (3) 40-acre wells included in the aforementioned third supplemental plan of development, which have been drilled pursuant to the Carson Unit Agreement, were drilled when the State-wide 40-acre spacing and proration rules were in full force and effect. Consequently each of these 40-acre wells was entitled to a full unit allowable at the time it was drilled. The United States Geological Survey, the Commissioner of Public Lands and the State Oil Conservation Commission were aware that Shell's assumption of the obligation to drill 40-acre wells under such plan of development was based upon the State-wide rules under which a full unit allowable would be granted to each 40-acre well. Under Order R-1069-B, the three (3) 40-acre wells will receive one-half of the allowable given wells drilled to the same depth on adjoining competitor lands on an 80-acre spacing pattern. It is obvious that under Order R-1069-B performance of Shell's obligations under the third supplemental plan of development will be burdensome and onerous in that the wells will receive one half of the allowable that they would have received at the time of approval of this plan of development pursuant to which they were drilled. In the above quoted language of Rubalcava vs. Garst, Order R-1069-B clearly amounts to a "denial or obstruction" of "the right" to a full unit allowable which existed at the time of creation of the contract arising from approval of the Carson Unit Agreement and such plan of development and, therefore, impairs obligations of contracts contrary to the above-mentioned constitutional prohibitions contained in the United States Constitution and the Constitution of the State of New Mexico.

THE COMMISSION IS ESTOPPED BY ITS ACTION FROM THE ISSUANCE OF ORDER NO. R-1069-B

In the application of Shell Oil Company for rehearing, reference is made to the drilling of wells in good faith in reliance on the existing orders of the Commission and with the

further statement that as a matter of equity and justice, the Commission is estopped from establishing spacing and proration units which discriminate against the applicant's wells so drilled.

As we noticed above, it was established at the hearings, and not controverted, that the wells in question were drilled in reliance upon the State-wide order of the Commission. It was further established that the Commission had knowledge that these wells were being so drilled, by reason of the official notice forms furnished to the Commission, and we have also seen that the order granting the rehearing expressly provided that the State-wide rule would not be altered. Thus, all action was taken pursuant to and in reliance upon the State-wide orders of the Commission.

The parties opposing this application have cited the New Mexico Supreme Court decision of Chambers vs. Bessent, 17 N.M. 487, 134 Pac. 237, as setting forth the elements of equitable estoppel:

> "(1) There must be conduct -- acts, language or silence -- amounting to a representation or concealment of material facts. (2) These must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concernint these facts must be unknown to either party claiming the benefit of the estoppel at the time when such conduct was done and at the time when it was acted upon by him. (4) The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and proper that it will be acted upon. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse; in other words, if he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights consistent with it."

In discussing this New Mexico decision the United States Court of Appeals for the Tenth Circuit in the case of Houtz vs.

General Bonding & Insurance Co., 235 Fed. (2d) 591, at Page 597, commented:

> "In Chambers vs. Bessent, 17 N.M. 487, 134 P. 237, the New Mexico Court set out in great detail the elements necessary to bring into play equitable estoppel. Reduced to simple terms, its holding, consistent with the general holding of other courts, is that equitable estoppel results from a course of conduct which precludes one from asserting rights he otherwise might assert against one who has in good faith relied upon such conduct to his detriment. The court did not hold that actual knowledge of facts must be had by one relying thereon for estoppel."

However, it is readily apparent that all of the elements set forth in Chambers vs. Bessent are present in this case. Following the corresponding numerical sequence in that case, they may be briefly summarized as follows:

1. The acts or representations of the Commission, which constitute the basis for estoppel consist of the issuance of Orders R-1069 and R-1069-A, which provide for continuation of State-wide 40-acre spacing and proration rules. Such representations were supplemented by the actual establishment of 40-acre proration units in the Carson-Bisti Area for the months of December of 1957 and January of 1958.

2. The New Mexico Oil Conservation Commission was at all times aware of the fact that 40-acre wells were being drilled by Shell, and of the further fact that such wells were being drilled on the basis that they would receive a full unit allowable in accordance with existing State-wide rules.

3. Shell did not at any time prior to January 17, 1958, receive information indicating, nor did it have reason to believe that, the Commission would issue a retrospective order purporting to nullify the provisions of prior Orders R-1069 and R-1069-A, that State-wide rules would remain in full force and effect until changed; under Order R-1069-B such provisions of R-1069 and R-1069-A were treated as if nonexistent.

4. The Commission, in providing for continuation of

State-wide rules under Orders R-1069 and R-1069-A, knew that Shell would proceed with its 40-acre development program in reliance upon the State-wide rules. As previously noted, copies of its notices of intention to drill each of the 40-acre wells in question were filed with the State of New Mexico.

5. As established by the uncontroverted testimony in the rehearing, Shell drilled the 40-acre wells in question in reliance upon State-wide 40-acre rules as affirmed by Orders R-1069 and R-1069-A.

6. As a result Shell expended in excess of $565,600.00 in drilling fourteen (14) 40-acre wells which, under Order R-1069-B, will earn no additional allowable whatsoever.

This is the doctrine of estoppel. There is no question whatever of its application as between private individuals, and there is little question under modern authorities for its application against Governmental agencies.

There is a general consideration of the application of the doctrine as to Governmental agencies in 1 A.L.R. (2d) at Page 346. At this place, the following rule is set forth:

> "Assuming, however, the presence of all the prerequisites for the application of the doctrine of estoppel as between individuals, under some circumstances the public or the United States or the State may be held estopped if an individual would have been held estopped; as when acting in a proprietary or contractual capacity; or when the acts of its public officials alleged to constitute the ground of estoppel are done in the exercise of powers expressly conferred by law, and when acting within the scope of their authority."

There are few decisions in the State of New Mexico concerning the application of the doctrine to Governmental agencies; however, in the case of City of Carlsbad vs. Neal, 56 N.M. 465, 245 P. (2d) 384, the Court considered the matter and held that the doctrine should be applied against a municipality. This case constitutes a clear holding that the doctrine will be applied against Governmental agencies. This case concerned the

dedication of a street, the City bringing an action against an individual to recover possession of land claimed to be part of a street. The Court stated, with reference to the matter of estoppel, at Page 389:

> "With regard to the estoppel question, it has been generally held that the doctrine of equitable estoppel may be invoked against the public depending upon the circumstances of the particular case and the requirements of justice and that, under certain circumstances, a municipality may be estopped from asserting that it owns a street or from opening and accepting a street although it has been previously dedicated to the use of the public. See the annotations on this subject in 171 A.L.R., Pgs. 94 to 171."
>
> "But, as stated in the case of Dabney v. City of Portland, 124 Or. 54, 263 P. 386, 388, 'No hard and fixed rule can be stated for determining when this principle should be applied. Each case must be considered in the light of its own particular facts and circumstances.' And, in order that an estoppel may arise, there must be inequitable conduct on the part of the city, and irreparable injury to parties honestly and in good faith acting in reliance thereon,"

We feel that this doctrine is entirely applicable to the situation in which Shell Oil Company finds itself in this hearing. The previous cases in New Mexico, which are Ross vs. Daniel, 53 N.M. 70, 201 P. (2d) 993, and Durell vs. Miles, 53 N.M. 264, 206 P. (2d) 547, recognize the existence of the doctrine, but do not present a clear holding on the point as does City of Carlsbad vs. Neal.

This matter has, of course, been considered in other States. It has received considerable attention in the State of California. In the case of Market Street Railway Company vs. California State Board, 137 Cal. App. (2d) 87, 290 P. (2d) 20, the Court was concerned with an action brought by a street railway company to recover sales tax. In this instance, when the company sold its properties, the State Board of Equalization had in effect a ruling that a bulk sale of property was not subject to the sales tax. During the course of the liquidation of the company, the Board changed its rule. The Court held that the Board was

estopped and could not collect penalty and interest, the Court thereby deciding that under proper circumstances, estoppel can be applied against a Governmental agency, and the Court, with reference to this point, made the following statement:

> "As was said in Baird v. City of Fresno, 97 Cal. App. (2d) 336, 342, 217 P. (2d) 681, 685: 'Ordinarily a governmental agency may not be estopped by the conduct of its officers and employees but there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it.'. See for a good discussion, Farrell v. County of Placer, 23 Cal. (2d) 624, 145 P. (2d) 570, 153 A.L.R. 323. In Cruise v. City and County of San Francisco, 101 Cal. App. (2d) 558, 565, 225 P. (2d) 988, 993, this court had the following comment to make: 'Whether an estoppel exists against the government should be tested generally by the same rules as those applicable to private persons. The government should not be permitted to avoid liability by tactics that would never be countenanced between private parties. The government should be an example to its citizens, and by that is meant a good example and not a bad one.'"

The California Court, in the case of Sawyer vs. City of San Diego, 138 Cal. App. (2d) 652, 292 P. (2d) 233, also considered the application of the doctrine of estoppel. The Court held that the doctrine would be applied against Governmental bodies. This case concerned the question of whether property owners located outside the City had the right to water service. The Court, in its decision at Page 239, made the following statement:

> "Whether or not the doctrine of estoppel is applicable is a question of fact unless but one inference can be drawn from the evidence. (Citing cases). The trial court's finding in this connection is also supported by substantial evidence. The doctrine of estoppel will be applied against governmental bodies where justice and right require it. (Citing cases.) In City of Coronado v. City of San Diego, 48 Cal. App. (2d) 160, 172, 119 P. (2d) 359, supra, the doctrine of estoppel was applied against the city of San Diego where it acquiesced for many years in the taking of water under contract and a new agreement and consideration of settling other litigation was entered into modifying the original contract. This court there held that the city was estopped to insist upon a different interpretation of the new contract."

The Supreme Court of Colorado, in the case of Piz v. Housing Authority, 132 Col. 457, 289 P. (2d) 905, considered

the application of the doctrine in condemnation proceedings. The Court applied the doctrine, and stated:(Page 912 Pac.)

> "It was suggested by the trial court that estoppel against a governmental agency should be permitted only in extreme cases. Whether the Housing Authority is a governmental agency we need not decide. We have in this state ample authority for the proposition that estoppel against such an agency may be applied in a proper case. (Citing cases.) Estoppel was applied against the City of Denver in an eminent domain proceeding. Heimbecher v. City and County of Denver, supra. If estoppel applies to the City and County of Denver, it surely applies to the Housing Authority."

Thus under the brief consideration of these cases applying estoppel against governmental agencies, we feel that it is clear that all of the elements are present in this case.

There has been some discussion of good faith by those who oppose the application for rehearing. They apparently misunderstand our assertion of good faith in this situation. We simply assert that we relied on the orders of the Commission, that we had a right to rely on the orders of the Commission and that this constitutes our good faith. There is not in any way involved in this case the question of good faith as in those many cases which involved disputes between private individuals and trespass cases. As is well established by the authorities, the matter of whether a person trespasses in good faith upon the property of another involves a question of notice given by the true owner of the land to the trespasser, but we fail to see how this is in any way concerned in this case. The cases cited by their oral argument indicate that they are relying on this unrelated doctrine. For example, they cited the case of Liles vs. Thompson, 85 S.W. (2d) 784 (Texas Court Civil Appeal 1935). This case was relied on by the opposition but involves a dispute between two individuals and the question is whether the trespass was innocent or willful This is clearly not involved in our case. Also at the oral argument much was made about the fact that certain parties to the Carson

Unit Agreement did not agree to the forty-acre unit spacing, but this again obviously makes no difference in this case. Under a unit agreement the objections or disagreements among working interest owners on technical matters cannot have any effect on an operator who is conducting his business in accordance with the official rules and regulations of the State and Federal agencies having jurisdiction over such matters.

It was clearly established at the hearings that Shell received no advice, recommendations or any other indication from any official agency that its action in developing on a forty-acre basis was in any way improper. This is the good faith. This is the reliance upon the official action of the appropriate governmental agency. Just because an attorney in some other company writes a letter to Shell does not mean that it should disregard the official rules and regulations of the Oil Conservation Commission, although such an attorney may have been practicing from a very early age.

It has been contended by the parties opposing Shell's application that because of Sunray's application for an exception to the State-wide spacing and proration rules which was filed August 5, 1957, Shell should not have proceeded with the drilling of 40-acre wells. It must be recognized that this application did not seek to amend such rules or in any way contest their validity, but merely requested an exception thereto. Obviously a request for an exception to State-wide rules does not serve to render them inoperative. This was clearly recognized by the language in Orders R-1069 and R-1069-A continuing such rules. If the Commission were to take the position that every time an application for an exception to State-wide rules was filed, all operators must immediately cease operations which might be affected by the application, for such time as may be necessary to finally dispose of such application, oil and gas drilling and other development operations would be seriously hindered and impeded. This would be inconsistent with the Commission's function to foster conservation. If the

Commission were to follow the position, urged by the parties opposing this application, with regard to the effect of filing an application for an exception to State-wide rules, it would be a simple matter for a group of individuals or companies to thwart and hinder development of a particular field or area by filing successive applications for exceptions to State-wide rules.

In this situation we believe that the authorities clearly hold that the doctrine of estoppel will be applied against the Oil Conservation Commission under the facts of this particular case. Obviously, the facts as they were developed at the hearings are significant on this matter of estoppel, since it is an equitable matter. It is apparent that the applicant relied upon the orders of the Commission and, in reliance thereon, drilled a considerable number of wells, and further that the Commission thereafter has attempted to change these rules to the detriment of the applicant. Consequently, in order to prevent this damage to the applicant, the Commission should be estopped from asserting such contrary position as to the wells so drilled. This matter of estoppel is necessarily an independent reason for the basis of the invalidity of Order No. R-1069-B. Each and any of the grounds raised in this memorandum would constitute of itself a basis for the invalidity of this Order.

OTHER POINTS

In the application for rehearing, the petitioner refers to other matters related to the invalidity of the order complained of. It would not seem necessary to cite cases on these several points, although they are of importance. The applicant, in its petition for rehearing, refers to a discrimination against it as a result of the issuance of Order R-1069-B. We believe that this discrimination is apparent from the effect upon the applicant of this order complained of and it would not seem necessary to discuss the matter at any particular length here. This discrimination is

a matter related to the retroactive effect of the order and to the effect of the order upon the vested rights of the applicant. It is sufficient to establish this discrimination by merely pointing out the fact that by reason of the order fourteen (14) wells of the applicant will be shut in for a period of one year and that these wells were properly located, legally drilled and entitled to a full unit allowable prior to the issuance of the order.

The applicant believes that any one of the several points upon which this brief is based is sufficient in itself to warrant revocation of the order and to establish that the order, insofar as this applicant is concerned and insofar as action already taken by it, is invalid. The order as to the future is clearly valid, but any operator in the state must be protected in a situation such as Shell finds itself here. Therefore, the applicant respectfully urges the Commission to reconsider its order and to rescind and revoke it.

Respectfully submitted,

SHELL OIL COMPANY

By Oliver Seth
Oliver Seth

Leslie E. Kell
Leslie E. Kell

BEFORE THE OIL CONSERVATION
COMMISSION OF THE STATE OF
NEW MEXICO

IN THE MATTER OF THE APPLICATION OF SUNRAY MID-CONTINENT OIL COMPANY FOR AN ORDER EXTENDING THE HORIZONTAL LIMITS OF THE BISTI-LOWER GALLUP OIL POOL IN SAN JUAN COUNTY, NEW MEXICO, AND TEMPORARILY ESTABLISHING UNIFORM 80-ACRE WELL SPACING AND PROMULGATING SPECIAL RULES AND REGULATIONS FOR SAID POOL.

CASE NO. 1308

SUNRAY

RESPONDENTS MEMORANDUM BRIEF IN SUPPORT OF
OCC ORDER NO. R-1069-B

The Application for Rehearing filed by the applicant, Shell Oil Company, alleges that this Commission erred in entering its Order No. R-1069-B which granted an optional 40-80 acre well spacing unit in the Bisti-Lower Gallup Oil Pool as an exception to the statewide 40-acre spacing pattern. Various grounds as a basis for the invalidity of this Order are contained in the body of the Petition for rehearing. However, the prayer reads as though Petitioner had abandoned its allegations set forth in the Petition for the relief sought in the prayer is entirely foreign to and inconsistent with the issues raised in the Petition for Rehearing. Moreover, the requested affirmative relief if granted would necessarily affirm in all respects the validity of the Order complained of with the modification that Petitioner's fourteen 40-acre wells be given a double unit allowable.

We fully appreciate that the prayer of a petition or pleading does not constitute any part of the pleading either under common law or code pleading.

See

Burnham-Hanna-Munger Dry Goods Co. v. Hill,
17 N.M. 347, 168 P. 662, syllabus

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> "Under code pleading the prayer for relief is no part of the statement of the cause of action."

But, one cannot likely pass over the real objective the Petitioner is seeking to accomplish by the instant rehearing. It cannot be seriously argued nor did the Petitioner set forth any facts in the Petition to entitle it to such relief. Obviously their muteness in this respect is because the objective relief is beyond the power of the Commission to grant.

See

Section 65-3-14 (c), N.M.S.A. (1953) Anno.

which reads in part:

> "the owner of any tract that is smaller than the drilling unit established for the field, shall not be deprived of the right to drill on and to produce from such tract, if the same can be done without waste; but in such case the allowable production from such tract as compared with the allowable production therefrom if such tract were a full unit shall be in ratio of the area of such tract to the area of a full unit."
>
> (Emphasis ours.)

We call the Commission's attention to the apparent real objective of Petitioner's rehearing because it should be strongly pointed up before disposing of the merits of the allegations contained in the body of the Petition.

As alleged in the Petition, Shell Oil Company drilled fourteen wells each upon a 40-acre unit under the then existing rules and regulations of the Commission and by so doing now claims that Order No. R-1069-B by granting an optional 40-80 acre drilling unit and in establishing a proportionate unit allowable for an 80-acre drilling unit is invalid. Petitioner alleges the subject Order to be improper in the following respects:

1. The Order is arbitrary, unreasonable, and discriminatory against Shell who "in good faith" drilled the subject wells on a 40-acre density. (Paragraphs 1, 2, 3 and 4 of the Petition).

2. That the Order is not supported by a finding that one well will

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efficiently and economically drain 80 acres. (Paragraph 5 of Petition).

3. That the Order confiscates Petitioner's alleged vested property rights in violation of the constitutional State and Federal due process clauses. (Paragraph 7 of Petition).

4. The Order impairs the obligation of contracts in violation of the State and Federal constitutional provisions. (Paragraph 8 of Petition).

5. The Order is contrary to OCC Rule 505 relating to the depth factor in the allocation of production. (Paragraph 9 of Petition).

And, last,

6. That by reason of the action and representations made by the Commission to the Petitioner prior to the issuance of the Order complained of, the Commission should now be estopped from establishing an 80-acre drilling unit with the given proportionate allowable.

Each of these contentions will be discussed in the above order. However, Petitioner's contention as set forth in Paragraph 6 of the Petition does not warrant any argument and it will be recalled that Petitioner itself did not see fit to argue this contention at the re-rehearing on March 13, 1958.

POINT I.

IN ORDER NO. R-1069-B ARBITRARY, UNREASONABLE, AND DISCRIMINATORY AS TO THE PETITIONER WHO ALLEGEDLY "IN GOOD FAITH" DRILLED THE SUBJECT WELLS AT THE TIME AND UNDER THE CIRCUMSTANCES THEN PREVAILING?

It will be recalled that the Application by Sunray Mid-Continent Oil Company to establish an 80-acre spacing unit in the Bisti-Lower Gallup Oil Pool was filed before this Commission on August 5, 1957 and the hearing thereon was held September 18-19, 1957. As of the date of the original hearing, Shell apparently had no plans to drill any 40-acre unites for the remainder of the year. On Pages 280-281 of the transcript, their witness, Mr. Robinson, stated in answer to a question by Mr. Seth--"The balance of

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this year we have planned and our budget approved and calls for the drilling of twenty-nine additional wells in addition to the thirty-seven listed on exhibit shown as 13-b (referring to the drilling on an 80-acres pattern). For the next year under 40-acre spacing we have tentative planned in our budget and incidentally our budget is on a calendar year basis, etc." And in response to a question by Mr. Campbell, on Page 282 of the transcript, Mr. Robison states -- "To what we consider proven now, there would be enough 80-acre wells for the remainder of 1957 there would be twenty-nine wells to keep us going for the balance of the year the same as the 40, but next year there would be eleven wells." And on Page 285, Mr. Cooley asks Mr. Robison -- "You stated that Shell has not commenced any 40-acre wells since the filing of this Application. Would you be in a position to state whether they anticipate commencing any until there is a final decision in this case?" And Mr. Robison replies -- "I think that is right, that we will defer, we will like to and probably will defer drilling until there is a decision in this case."

At this point we refer to the abundance of correspondence had between Shell and other interested parties in the Carson Unit Area which were introduced at the oral hearing as Respondents' Exhibits Rx1-20. These Exhibits demonstrate how fully aware Shell must have been of the consequence of their acts and doings and how the interested parties pled with Shell not to develop on a 40-acre unit.

The legality of Shell's drilling of the twelve wells on a 40-acre pattern between October 9, 1957 and October 17, 1958 is not questioned in view of the existence of the statewide spacing rule and Order No. R-1069, but it may be questioned whether the drilling of 40-acre wells prior to "a final decision in this case" demonstrated the exercise of ordinary sound judgment. Shell admitted at the hearing on March 13, 1958, through Mr. Robison, that it was well aware of the statutory provisions for rehearing and would not one expect that they would not have abruptly changed their avowed plans not to

drill anymore 40-acre locations during the 20-day period permitted for filing applications for rehearing and the 10-day period within which the Commission had the right to rule on such applications. After the applications for rehearing were filed and surely after the rehearing was granted Shell certainly must have been aware of the fact that 80-acre spacing for the Bisti-Lower Gallup was at least within the realm of possibility. That possibility existed until the Commission entered the subject Order No. R-1069-B and the fact that such Order was entered surely demonstrates how good the possibility was. Shell's change of plans and their rapid acceleration of developing their properties upon a 40-acre spacing pattern suggests the thought that their actions were designed to accomplish the very result that they pleaded in the Application for Rehearing -- that the accomplished drilling of more 40-acre locations could serve to dissuade the Commission to depart from their ruling in the original hearing.

If Petitioner feels Order No. R-1069-B adversely affects it, it is only because of their own knowledgeable actions in the premises. We further submit that Shell is in no worse position now than it was before the granting of the Order for it is permitted under Rule No. R1069-B to do precisely that which it could do under the statewide spacing rule. It may drill one well to each of its 40-acres and receive therefor one 40-acre allowable. This is exactly what Shell has advocated in this cause from the beginning.

Nor is Shell in a position to say that it had not been apprised of the possibility that 80-acre locations would be given two 40-acre allowables. This is borne out by the correspondence above referred to as Respondents' Exhibit No. 1-20 and, in fact, the attorneys for Shell at the original hearing seemed to be apprehensive of that very result. Reference is made to the remarks by Mr. Cooley and Mr. Porter, Pages 320-321 of transcript; Mr. Seth's statement, Page 332; and that of Mr. Kell's, Page 337. Refer also to the discussion at the first rehearing, Pages 68-69 of transcript by Mr. Grenier

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and Mr. Brinkley; The recommendations made by Sinclair, Pages 90-91-99 and 118, and the statement of Mr. Campbell, Page 305, and the statement of Mr. Dutton, Pages 307-309.

If, for the sake of argument, we were to assume that Shell did act "in good faith" as it so strenuously urges, is Shell under the law entitled to relief? There is an abundance of law to the contrary. For example, in the case of

Reickhoff v. Consolidated Gas Co., (Montana 1950) 217 P. 2d 1076

wherein the Plaintiff owned an oil and gas lease. The Defendant purchased the fee title to the tract and brought a quiet title suit against the Plaintiff. The decree favored the Plaintiff Gas Company in that action and the Gas Company entered upon the lands and drilled a producing gas well. Plaintiff Reickhoff appealed the quiet title suit to the Supreme Court and got a reversal of the lower court's decision (151 P. 2d 588, 590). Plaintiff Reickhoff then brought this action for an accounting and an injunction against the Gas Company. The lower court held that his lease had terminated and he again appealed to the Supreme Court. The Supreme Court stated, with regard to the Gas Company's actions -

> "but the company says it was not a willful trespasser for it entered under the District Court's decree assumed to annul the lease and to quiet title in it. However, it knew the law gave to Reickhoff the right of appeal and that on such appeal the decree might be either reversed, modified, affirmed, or the case be sent back for the taking of further evidence or a new trial. It knew Reickhoff had vigorously fought the suit and that he was likely to appeal from the judgment entered against him. In misjudging the law and Reickhoff the gas company acted at its peril. It assumed the attendant risk of drilling the well in the lands leased to Reickhoff and of having the trial court's judgment reversed on appeal, but it took the chance and lost."
>
> (Emphasis ours.)

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"It is ordinarily held that the court will not relieve from the prejudicial effects of a mistake of law introduced by an erroneous decision of an inferior court."
(Citing authorities.)

"As was said in a case involving similar facts 'entirely good faith, it occurs to us, would have dictated to them that the proper course would be to wait until the controversy had been finally determined before expending large sums of money in drilling upon the land.' "
(Citing cases.)

Quoting further, the Court said:

"Why should one be treated as acting in good faith when dealing with property as his own, when he knows all of the facts which constitute his claim as well as the claim of his adversary, which facts, when properly construed, give him no title to the land. Such a holding would make every man a judge of the law in his own case, instead of being bound by the law as interpreted by those charged with that duty. We must therefore conclude that the defendants, when they drill the wells on these lands, were willful trespassers just as much as though there had been no question but that the plaintiff had the superior right. They could not decide the disputed question in their own favor, and then proceed with the hope that their acts would be characterized by this court as in good faith even though their judgment upon the law of the case should not be approved."

(Emphasis ours.)

Other cases could likewise be cited, such as,

Liles v. Thompson,
85 S.W.2d 784

wherein the Court stated, at Page 784:

"But it seems to us a serious impeachment of the good faith of the lessees when they persisted in developing the land for oil over the vigorous protest of an adverse claimant who was then suing; of which adverse claim and suit such lessees had full notice. It would seem in such a case the lessees should be held to have expended their money at their own risk and cannot be justly considered as innocent trespassers."

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POINT II.

PETITIONER'S CONTENTION THAT ORDER NO. R-1069-B "IS CONTRARY TO LAW IN THAT IT IS NOT SUPPORTED BY A FINDING THAT ONE WELL WILL EFFICIENTLY AND ECONOMICALLY DRAIN 80 ACRES" IS NOT SUPPORTED BY THE LAW APPLICABLE TO THE INSTANT CASE.

Petitioner construes Section 65-3-14 (b), N.M.S.A. (1953) Anno. as requiring an Order to be bottomed upon such a finding. The statute in question provides:

> "The Commission may establish a proration unit for each pool, such being the area that can be efficiently and economically drained and developed by one well, and in so doing the Commission shall consider the economic loss caused by the drilling of unnecessary wells, the protection of correlative rights including those of royalty owners, the prevention of waste, the avoidance of the augmentation of risks arising from the drilling of an excessive number of wells and the prevention of reduced recovery which might result from the drilling of too few wells."

(It is hard to follow Petitioner's reasoning that if such a finding as they insist upon be made why they would not by the same reasoning insist that all the other considerations recited in the statute should not also be made findings of fact as a prerequisite for the validity of an Order.)

It will be observed that this provision of the statute makes no requirement that the Commission make any finding whatever. It is merely permissive in nature and defines the factors which control the permissive action.

The Commission in entering its Order No. R-1069-B made certain general findings, particularly Findings Nos. 5, 6, and 8 which, it is submitted, effectively show the Commission concluded that sufficient evidence was adduced to justify the establishment of 80-acre proration units on a temporary basis, that 80-acre proration units should be temporarily established, and that a proportional factor of two should be assigned to each such 80-acre unit for allowable purposes.

Our United States Supreme Court, in the case of

United States v. Louisiana,
290 U.S. 70

where the statute under which the agency is operating requires a finding be made, the Court held that it is essential that this be done but where the statute is indefinite on the question of findings or makes no requirement, the Court held that findings are not essential to the validity of the Order.

In a suit to enjoin an I.C.C. rate increase, it was held in

Montana v. United States,
2 F. sup. 448

> "The statute provides that, in exercise of its authority the Commission shall report in writing, but only when damages are awarded does it stipulate findings shall be included. * * * In all other investigations, if justification otherwise clearly appears formal and precise findings are not necessary."

Where an ultimate finding has been made, a subordinate finding results by necessary implication.

Truck Ins. Exchange v. Industrial Accident Commission,
226 P.2d 583

A case raising an almost identical question as the one at issue is that of

Humble Oil & Refining Co. v. Bennett,
149 S.W. 2d 220

wherein the Court held that the creation of a drilling unit implied a finding that one well would drain a unit. This involved a Rule 37 question. In answer to a contention that wells drilled on 10-acre spacing would have a drainage advantage over wells drilled on 20-acres, the Court pointed out that Rule 37 authorized drilling of wells on 10-acres and its application to the Pool in question "implies a finding by the Commission that a well would drain 10-acres instead of 20 as insisted by Appellants."

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Where the scope of review in the District Court encompasses the entire record as it does under Oil Conservation Commission statutes, findings are not necessary to sustain the Order and are in no wise binding upon the reviewing court.

Seaward v. D&R.G. Ry.,
17 N.M. 557

Harris v. State Corporation Commission,
46 N.M. 352

The New Mexico Supreme Court in

Ferguson-Steere Motor Co. v. State Corporation Commission,
60 N.M. _____, 288 P.2d 440

passed on many of the questions involved in this Application and ruled that lack of or insufficiency of findings should not be raised unless the party complaining of their absence or insufficiency has made a request for findings. A distinction between the instant case and the Ferguson-Steere case might be raised upon the ground that the ruling in the Ferguson-Steere case is based upon the fact that the Corporation Commission had adopted the rules of procedure of the District Court, but the court in the Ferguson-Steere opinion went to some pains to point out that this fact merely strengthened its conclusion in regard to the point involved.

The best means of presenting a conclusion is to quote from the Ferguson-Steere opinion. This was a motor transportation case where the contention was raised that the Corporation Commission in making its Order failed to make findings of fact upon the issues raised in the proceedings before it and failed to make appropriate findings relative to the adequacy of existing transportation facilities.

The Court in its opinion first held that the absence of specific findings did not render the Order of the Commission invalid.

> "We think the better reasoned decisions hold and absence of specific findings does not render void an order granting a certificate such as that here

> involved. More specifically is this true, when there was no request made on the Board or Commission whose acts are challenged to make specific findings.
> * * *
> If findings, more adequate findings, by the Administrative Board or Commission be desired, a duty rests on the party complaining of their absence to have made a request for them."

The Court then quoted with approval the opinion in

Railroad Commission v. Great Southern Ry. Co., 185 Ala. 354, 64 Southern 15

to the effect that the Court accepts the making of the Order by a Commission as a finding by the Commission that the circumstances are such as to justify the making of the Order.

It is thus seen that there is no necessity under the statute under consideration here for the Commission to make specific findings; that the Commission did in fact make the ultimate finding in creation of a proration unit and the question of drainage by one well flows from that finding by necessary implication since it cannot be presumed that the Commission did not follow the mandate of the statute; and that the applicant for rehearing is in no position now to complain as to the sufficiency of findings in this case, having submitted no request to the Commission for more specific findings.

POINT III.

THE PETITIONER HAD NO VESTED RIGHT AND THE ORDER COMPLAINED OF DOES NOT CONFISCATE ANY OF PETITIONER'S PROPERTY RIGHTS.

As alleged in Paragraph 7, Shell Oil Company drilled fourteen wells upon 40-acre units under the then existing rules and regulations of the Commission and by so doing it now claims that Order No. R-1069-B by creating 80-acre spacing, setting well locations, and in establishing proration units confiscates the Petitioner's alleged vested property rights in violation of the State and Federal due process clauses.

The questions thus posed under Paragraph 7 would appear to be:

1. Did the Applicant acquire a vested property right by the drilling of these wells?

2. Does the Commission have the power and authority to alter their spacing rules and regulations from time to time?

3. Is the Order complained of an arbitrary and unreasonable rule and regulation?

The opinions in the cases hereinafter cited deal with all three of these questions simultaneously. The wholesale litigation involving these issues beyond question support the action of the Commission in the issuance of its Order No. R-1069-B.

Did the Petitioner acquire any "vested" property right by the drilling of any well upon a 40-acre spacing unit prior to the Order complained of?

In the case of

Texas Trading Co., et al., v. Stanolind,
161 S.W. 2d 1046 (1942)

the Texas Trading Co. appealed from an Order of the Commission which cancelled Appellant's permit to drill an additional well within a drilling unit. The Plaintiff contended as a matter of law it was entitled to drill the additional well because under the then spacing rules and regulations in existence at the time the subject land was segregated and when it acquired the lease the Plaintiff had the right to drill the additional well. To this contention, the Texas Court of Appeals had this to say:

> "The contention is overruled. Spacing rules must be subject to change from time to time to permit fair and equitable adjustment of the machinery of oil proration to meet changing conditions. If a lease owner could acquire a 'vested right' in the spacing rules existing at any particular time, then the power of the Railroad Commission to make new rules for regulating drilling and oil production equitably and fairly among lease owners, and properly to conserve the oil resources of the State, would be greatly hindered. In the very nature of the police powers from which the State derives its right to regulate the production of oil and gas, the oil operators can acquire no 'vested right' in the mere rules by which the power is exercised from time to time."

Also see

Railroad Commission v. Rowan and Nichols Oil Co., 310 U.S. 573, 84 L.Ed. 1368

Similarly in the case of

Patterson v. Stanolind Oil & Gas Co., 77 P. 2d 83 (Okla. 1938)

certain royalty owners contested the constitutionality of the Oklahoma Well Spacing Act (1952 Oklahoma Stat. Anno. Section 85-87) with regard to their interests in a well completed prior to the spacing order of the Commission. Among the issues raised were the due process clause, impairment of contractual obligations, and the retroactive effect of the well spacing order. The statute in question, provided, among other things, that the different royalty owners within a drilling unit shall share in the production in proportion that their acreage bears to the entire drilling unit.

The Supreme Court of Oklahoma in overruling the Plaintiff's contention said:

> "The decision of the United States Supreme Court in the case of Ohio Oil Company v. State of Indiana, 177 U.S. 190, 44 L.Ed. 729, was based upon the theory that the right of the owner of land to the oil and gas thereunder is not exclusive but is common to and merely co-equal with the rights of other land owners to take from the common source of supply, and therefore that his property rights to said oil and gas are subject to the legislative power to prevent the destruction of the common source of supply. It has already been decided that this police power of the State to prevent the destrictuon of the common source of supply may be exercised by regulation of production therefrom."

In support of this contention, the Court cited the case of

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 76 L.Ed. 1062

viz:

"Every person has the right to drill wells on his own land and take from the pools below all the gas and oil that he may be able to reduce to possession including that coming from land belonging to others, but the right to take and thus acquire ownership is subject to the reasonable exertion of the power of the state to prevent unnecessary loss, destruction, or waste. And that power extends to the taker's unreasonable and wasteful use of natural gas pressure available for lifting the oil to the surface, and the unreasonable and wasteful depletion of a common supply of gas and oil to the injury of others entitled to resort to and take from the same pool." (Citing many authorities.)

The Court then further said:

"From the foregoing authorities, it is obvious that it is not beyond the police power of the state to restrict the individual owner's taking from the common source of supply, as well as to authorize a 'just distribution' among the various owners of mineral rights in land overlying the common source of supply, of that portion of said supply so taken or reduced to possession by the individual owner. The restriction of drilling by the spacing of wells seems to be a much more feasible and effective method of securing a just distribution for such owners than restrictions upon production after same has already commenced, for it tends to eliminate many distinct faults apparent in such regulations. One of these was pointed out by Judge Kennamer when the case of Champlin Refining Co. v. Corporation Commission, supra, was before the federal District Court, 51 F.2d 823, 834. He said the following of the 1915 conservation law:

'Acreage is ignored and an operator with two 5,000-barrel wells on 5 acres may take out of the common source of supply, under the provisions of section 4, as much oil as an operator with two 5,000-barrel wells on 20 acres in the same field. Proportionate taking per well is wholly inequitable if the Legislature intends to secure 'a just distribution, to arise from the enjoyment * * * of their privilege to reduce to possession', because the operation with 20 acres has four times as much privilege as the operator with 5 acres in the same field.'

The 'wasteful necessity of drilling off-set wells' is another vice which is minimized by such restrictions on drilling. Helmerich & Payne v. Roxana Petroleum Corp., 136 Kan. 254, 14 P.2d 663. One of the essentials to the preservation of the common source of supply or the prevention of its waste is the preservation of the reservoir energy necessary to production therefrom by the natural process of flowing. This has been recog-

nized by the courts and the power of the state to prevent the waste of said reservoir energy is beyond successful contradiction.

* * *

The restriction of drilling limits the number of penetrations in the reservoir and it seems logical that the less the reservoir is punctured, the less the supply of reservoir energy is likely to be depleted."

In upholding the constitutionality of the rule and regulation, the Court concluded by saying:

"And this would be true even though the plaintiff were able to prove a distinct loss to himself through the operation of the statutes putting said police power into force and effect.

In Brown et al. v. Humble Oil & Refining Company, supra, the following words were quoted with approval from Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W. 2d 475, 478:

'All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exertion of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law.'

* * *

Regulation, of course, includes a determination of the location of the wells and the amount of oil each should be allowed to produce, so that the reservoir energy will not be exhausted before all of the recoverable oil is wrested from the common source of supply."

(Emphasis ours.)

In the case of

Hunter Oil Co. v. McHugh,
11 So.2d 495 (La. 1942)

Plaintiff drilled a well on a 190-acre tract at a cost of $44,000.00 and the installation of a pipeline at a cost of $12,380.16. Thereafter, the Commission established a compulsory drilling unit of 320 acres. Thereafter, Plaintiff contended that it should be permitted to produce from its well the allowable permitted at the time the well was drilled and the Commission's

Order requiring it to unitize its 190 acres with other acreage to conform with the required drilling unit of 320 acres was unconstitutional. The Court in upholding the Commission's Order cited an array of authorities and cited with approval the above mentioned case of Patterson v. Stanolind, Supra.

It is of interest to note the comment in the Court's opinion as to the relationship of the number of wells drilled to the market demand.

> "The evidence in this case shows that the establishing of the 320-acre drilling unit will allow for at least 28 wells and possibly 34 wells, according to the estimated area, on the Louisiana side of the Logansport gas field; and that that number of wells will produce many times the present market facilities or demand for many years to come. The evidence shows also that if a larger number of wells were allowed to be drilled on the Louisiana side of the Logansport field they could not produce eventually more gas from the common reservoir than the volume that can be produced from the number of wells which the 320-acre drilling unit allows. It goes without saying that the drilling of more wells than are necessary to drain a gas field efficiently and economically causes waste; it is a waste of valuable material and skill and labor; a waste of gas for fuel in the drilling of the unnecessary wells; and a waste of gas in the allowing of the unnecessary wells to clean themselves out before being placed on production."

There is no Supreme Court decision in New Mexico defining the authority or powers of the New Mexico Oil Conservation Commission. However, it is believed that considerable weight and substance can be given to the text writer of Summers Oil and Gas, Volume I, Page 352, Section 85, which reads:

> "§ 85. SPACING OF WELLS-POOLING-NEW MEXICO
> The New Mexico oil and gas conservation statute authorizes the conservation agency of that state to make regulations governing the spacing of wells and issue orders creating proration units for each pool. A proration unit is defined as an area which may be efficiently and economically drained by one well. The pooling of separate tracts within a proration unit is permitted and the conservation agency is authorized to require pooling of such tracts where necessary to afford the owners the opportunity to produce their just and equitable share of the oil or gas in the pool. The owner of a tract smaller than a drilling unit may drill and produce oil or gas, provided it can be done without waste, but in such a case the allowable

> production for the tract shall be with respect to the allowable production for the unit shall be in the ratio of the area of the tract to the area of the unit. * * * An owners' just and equitable share of the oil and gas in a pool is defined as being 'an amount, so far as can be practically determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas or both in the pool, and for this purpose to use his just and equitable share of the reservoir energy.' The conservation agency is authorized to adopt a well spacing plan agreed by the owners in a pool, if it has the effect of preventing waste and is fair to the royalty owners, although the agency may modify such plan for the prevention of waste upon a hearing and after notice."

The author further says:

> "The oil and gas conservation statutes of twenty-two states authorize their conservation agencies to regulate the spacing of wells, to establish drilling units, to permit agreements for the pooling of separately owned tracts within a drilling unit and in all of these states, with one exception, (Oregon) the conservation agencies are authorized to require the pooling of tracts within a drilling unit."
>
> Volume I, Page 280,
> Sections 65-3-11 N.M.S.A. (1953)
> and 65-3-14 N.M.S.A. (1953)

Also, the Petitioner in Paragraph 7 of the Petition for Rehearing claims that the "Order R-1069-B is a retrospective regulation and the retroactive effect of it is to confiscate and violate the vested property rights of the Applicant."

Our New Mexico Supreme Court has defined a "vested right" as the power to do certain actions or possess certain things lawfully and this right may be created by common law, by statute or by contract, and upon principle every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already passed must be deemed retrospective.

See

Rubal Cava v. Garst,
53 N.M. 295, 206 P.2d 1154

We submit, in what way or manner does the Order complained of take away or impair any right which Petitioner acquired under any prior rule or regulation of this Commission? In what respect does the Order create any new obligation in respect to any prior transaction or consideration? Order No. R-1069-B does not set forth a compulsory drilling unit but is permissive in nature only. Now, as before the adoption of the Order, cannot the Petitioner and all other operators similarly situate develop any or all their acreage upon a 40-acre drilling unit? Now, as before, is not the proration formula on an acreage basis and the same full allowable given to a 40-acre unit as before the adoption of the Order?

Is the Order retrospective in nature when the rights exercised by the Petitioner were subject to Rule 104-L of the Commission, which reads, in part:

> "In order to prevent waste the Commission may after notice and hearing fix different spacing requirements and require greater acreage for drilling tracts in any defined oil pool or in any defined gas pool * * * ."

And, in further view of Rule 501 (b):

> "After notice and hearing, the Commission, in order to prevent waste and protect correlative rights, may promulgate special rules, regulations or orders pertaining to any pool."

Is not the Petitioner now as before the issuance of the Order afforded the same right and opportunity to recover its just and equitable share of the oil in the pool? In reality and in truth and fact, all the Petitioner is asking by the instant Petition is: We have spent twice as much money in the pool as any other operator, although unnecessarily, but having done so we now want to receive twice as much oil as the other

operators.

In conclusion, we refer to the recent New Mexico Supreme Court case decided in April, 1957,

> State v. McLean,
> 62 N.M. 264, 308 P.2d 983

where it upheld the power of the State in the State Engineer to enforce rules and regulations regarding the appropriation of water and in so doing, said:

> "All water within the State whether above or beneath the surface of the ground belongs to the State which authorizes its use and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is of beneficial use. The State as owner of water has a right to prescribe how it may be used. This the State has done by the enactment of Section 75-11-2 * * *. Water appropriators and appropriations on each of the Artesian basins of the State are numerous. The State is vitally concerned in every appropriation. The need for water is imperative and often the supply is insufficient. Such conditions lead inevitably to many serious controversies, and demand from the State an exercise of its police power, not only to ascertain rights but also to regulate and protect them. Regulation, however, is not confiscation."

This pronunciation by our Supreme Court would undoubtedly be applied to the instant case were it to review the same.

POINT IV.

THE ORDER COMPLAINED OF DOES NOT IMPAIR THE OBLIGATION OF ANY CONTRACT IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONAL PROVISIONS AND PARTICULARLY THE CARSON UNIT AGREEMENT.

Shell, in Paragraph 8 of their Petition, contends that Order No. R-1069-B,

> "impairs obligations under contracts between the State of New Mexico, the United States Geological Survey and Shell Oil Company as operator which contracts were created by the Carson Unit Agreement. * * * ."

It is indeed a novel argument that the approval of the Carson Unit Agreement and the plans for development by the State of New Mexico and by the USGS, ipso facto, make such governmental agencies contracting parties to the agreement. No such governmental agency can act in such matters except in its capacity of regulation and its sole contact with the unit is but an approval. None of these agencies by their own limited creation can go beyond regulation and approval. See

21 F.Sup. 989, 83 L.Ed. 352

The State Land Commissioner has no such power to contract as Petitioner contends and his only authority and power to act in the premises in regard to the Carson Unit Agreement is under Section 7-11-39, N.M.S.A. (1953) Anno. which reads, in part:

> "For the purpose of more properly conserving the oil and gas resourves of the State, the Commissioner of Public Lands may consent to and approve the development or operation of State lands under agreements made by lessees of State land jointly or severally with other lessees of State lands, with lessees of the United States, or with others, including the consolidation or combination of two or more leases of State lands held by the same lessee."

Moreover, the authorities consulted indicate that an Order of a State Conservation Commission relating to spacing is an exercise of the police power and any contracts or rights of parties are subject to the exercise of this police power. This question regarding impairment of obligation of contracts has been raised in numerous cases and in each instance it appears that the Court has stated that the police power is a limitation on all contracts. See

Henderson Company v. Thompson,
14 F.Sup. 328
affirmed on appeal, 300 U.S. 258, 81 L.Ed. 632

In

Croxton v. State,
97 P.2d 11 (Okla. 1939)

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the Corporation Commission entered an Order for 20-acre spacing in the form of triangular tracts. The protestants alleged that this impaired their contractual rights to drill on their own land. The Court stated that the real objection of the protestant was as to the limitation on production which is a valid exercise of police power unless arbitrary and unreasonable.

Also, in the case of Patterson v. Stanolind Oil and Gas Co., Supra, (Pages 13, 14, and 15 of Brief) is another example where a 10-acre spacing order was upheld as against the same falacious impairment of obligation of contract argument.

In

Alston v. Southern Production Co.,
21 So.2d 383 (La. 1945)

the Court passed upon the power of the conservation department to increase the size of drilling units theretofore prescribed from 320 acres to 640 acres and the effect such order would have upon existing pooling agreements. The Court in upholding the power of the regulatory body to so amend their orders, said:

> "Order 28-C, increasing the drilling units to 640 acres in the Logansport Field, and the unitization Orders 28-C-6 and 28-C-8 are valid orders. Act 157 of 1940 authorizes the Commissioner to change the established units if conditions require it. In Paragraph 3 of Section 3 of the act it is provided that 'the Commissioner shall have authority to make, after hearing and notice as hereinafter provided, such reasonable rules, regulations and orders as may be necessary from time to time.' The only restriction on the authority of the Commissioner to establish drilling units is that such an order must be reasonable and the unit prescribed must not exceed the maximum area which one well can efficiently and economically drain. In the absence of a showing to the contrary, we assume that the Commissioner's finding, in this instance, which was preceded by the notice and hearings required by the statute, determined correctly that one well could efficiently and economically drain 640 acres.
> * * *
> An order of the Department of Conservation increasing the size of the drilling units theretofore established by an order of the department, in a given oil or gas

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> field, may supersede contracts made between landowners or leaseholders in the oil or gas field under authority of the previous order of the department, without being subject to the objection that the later order is unconstitutional for impairing the obligations of such contracts."
>
> (Citing numerous cases.)

Shell particularly calls attention to the fifty-three well program of the third plan of development which they aver was unconditionally approved by the USGS on October 15, 1957. We do not agree with Shell's conclusion that the approval was unconditional but rather that it was based upon supposition that the 40-acre spacing pattern had been finally determined. We invite the Commission's review of the subject letters on this point, namely, Shell's letter dated October 22, 1957, letter from Skelly dated October 31, and letter from Phillips dated November 4, being Exhibits Rx 12, 13, and 16. Also see letter dated December 6, telegrams dated December 24 and December 27, Exhibits Rx 18, 19, and 20, indicating Carson Unit development on an 80-acre unit basis. Attention is further directed to the fact that the terms of the Carson Unit Agreement specifically provide that the agreement is subject to the orders, rules, and regulations of the Commission. See Paragraphs 8 and 9 of Agreement. We submit that the contention of Petitioner that the Order violates the obligation of any contractual right is equally without merit as the other points raised by it.

POINT V.

PETITIONER'S CONTENTION THAT THE ORDER COMPLAINED OF IS CONTRARY TO OCC RULE 505 RELATING TO THE DEPTH FACTOR IN THE ALLOCATION OF PRODUCTION IS INAPPLICABLE TO THE CASE AT HAND.

Paragraph 9 of the Application for Rehearing alleges that Order No. R-1069-B is contrary to Rule 505 of the Commission's Rules and Regulations. Rule 505 provides a proportional factor for wells on 80-acre spacing for wells below 5,000 feet.

It seems apparent from the reading of Rule 505 that, in the first place, it never was intended and does not now provide for any 80-acre proportional factor in pools where the depth range is from 0 to 5,000 feet. In the absence of any provision for a factor in such a pool for 80-acre spacing, Rule 1 would seem to apply. This Rule is as follows:

> "SCOPE OF RULES AND REGULATIONS
>
> (a) The following General Rules of statewide application have been adopted by the Oil Conservation Commission to conserve the natural resources of the State of New Mexico, to prevent waste, and to protect correlative rights of all owners of crude oil and natural gas. Special rules, regulations and orders have been and will be issued when required and shall prevail as against General Rules, Regulations and Orders if in conflict therewith. However, whenever these General Rules do not conflict with special rules heretofore or hereafter adopted, these General Rules will apply in each case.
>
> (b) The Commission may grant exceptions to these rules after notice and hearing, when the granting of such exceptions will not result in waste but will protect correlative rights or prevent undue hardship."

Under this Rule 1, even if there were some factor provided in Rule 505 for wells of this depth, certainly after notice and hearing, the Commission, upon application, can establish any reasonable rules, including the allocation of production.

It should also be noted that Rule 505 (h) provides as follows:

> "The allocation to each pool shall in turn be prorated or distributed to the respective units in each pool in accordance with the proration plan of the particular pool, whereby any such plan exists. Where no proration plan exists, then the pool allocation shall be distributed or prorated to the respective marginal and non-marginal units therein as determined hereinabove."

This seems to contemplate that the statewide rule with reference to allocation is applicable only when there has been no proration plan for a particular pool.

POINT VI.

THE QUESTION OF ESTOPPEL CANNOT BE RAISED AGAINST A STATE OR SOVEREIGN IN REFERENCE TO ITS ACTS IN THE EXERCISE OF ITS POLICE POWERS.

Petitioner's contention of estoppel is without merit for the reason that two of the essential elements of estoppel are lacking, namely, any acts, language or other representation or concealment of any material fact made by the Commission to mislead the Applicant in doing what it did and, secondly, good faith on the part of the Petitioner in relying upon such acts, language or conduct of the Commission. The question of good faith has been fully covered in Point I of this Brief. Surely, Petitioner does not claim, nor do we attempt to assert that it so claims, that the Commission made any false representation or concealed any material fact that could have misled the Petitioner. Petitioner did say, however, at the rehearing on March 13th, that they relied upon Order No. R-1069; and further admitted that they realized the Order could be altered, amended or modified.

There are many New Mexico decisions against Petitioner's contention that estoppel can be asserted against the State in its exercise of its police powers. For example, in State v. McLean, Supra, where the State under its police power was regulating the appropriation of water in answer to the contention of estoppel said:

> "Defendant claims that the action against him is barred on ground of estoppel by reason of laches on the part of the Artesian water supervisor who had knowledge of the method employed by him in watering his native grass and livestock. The plaintiff (State) contends that estoppel and laches do not run against the State to prevent its acting in a governmental capacity and we agree with this contention."

Our Supreme Court, in the case of

First Thrift & Loan Association v. State,
304 P.2d 502 (1956)

passed upon the question of estoppel against the State where a corporation acted upon reliance to an Attorney General's ruling. Briefly, the facts were that the First Thrift & Loan Association incorporated under the New Mexico general corporation statutes instead of in accordance with the banking incorporation statutes. Years later the Attorney General brought an injunction to prohibit them from conducting the banking business. The Association based its right to so incorporate under the general corporation statutes and its right to do banking business thereunder upon a series of opinions previously issued by the New Mexico Attorney General's office which purportedly gave it the right to conduct such business. The Association contended the State should now be estopped to deny it the right to do business under its general charter because it had relied, among other things, upon the Attorney General's opinion. The Supreme Court answered this contention by saying:

> "Whatever the effect of the opinions mentioned * * * in any event the State cannot be estopped from the exercise of its police power. 'A State cannot estop itself by grant or contract from the exercise of the police power.' Sanitary District of Chicago v. United States, 266 U.S. 405, 69 L.Ed. 352."

The Court then cited

Town of Gallup v. Constant,
36 N.M. 211, 11 P.2d 962

and numerous other authorities.

In conclusion, by reason of the authorities above cited and the statutes applicable, we respectfully submit that none of the contentions made by Petitioner are well taken; that the Order complained of OCC R-1069-B is reasonable, lawful and just and that the Commission acted within its power and authority by promulgating the same and for the reasons heretofore stated the Order should be affirmed.

Respectfully submitted,

SUNRAY MID-CONTINENT OIL COMPANY
for itself and on behalf of

MAGNOLIA PETROLEUM COMPANY

HUMBLE OIL AND REFINING COMPANY

BRITISH-AMERICAN OIL PRODUCING CO.

SKELLY OIL COMPANY

AMARDA PETROLEUM CORPORATION

and

PHILLIPS PETROLEUM COMPANY

BY GILBERT, WHITE AND GILBERT

By _____
L. C. White, Attorney

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Scope of Review

TEXAS PACIFIC COAL & OIL COMPANY

MEMORANDUM BRIEF
IN CHIEF

SCOPE OF REVIEW

THE NATURE AND SCOPE OF THE REVIEW BY THE DISTRICT COURT OF AN ORDER OF THE OIL CONSERVATION COMMISSION INCLUDING THE QUESTION OF WHAT EVIDENCE MAY BE PRESENTED UPON APPEAL.

This case represents the first appeal ever taken in the State of New Mexico from an order of the Oil Conservation Commission. It is taken under the provisions of the oil and gas conservation law of this State which was enacted in 1935 and which was re-enacted by the 1949 Legislature with certain amendments. Included in the amendments was one which changed the appeal and review sections under which this appeal is taken.

At the outset it would seem proper to state specifically the position of the Texas Pacific Coal and Oil Company in this case and its attitude concerning the power of the District Court to review matters decided by the Commission, including the nature of the evidence which may properly be heard by this Court.

The original application herein was filed by Amerada Petroleum Corporation and in its application it requested that it be granted an exception from the state-wide rules concerning the spacing of oil and gas wells. The general spacing program in New Mexico has for a number of years been upon a forty acre basis, and deviations from that spacing pattern have been granted from time to time upon application for an exception to the rule. It is of some significance to note that heretofore exceptions have been requested for spacing patterns for less than forty acres, but this appears to be the first instance in this State in which application has been made for an exception requesting a spacing pattern for more than forty acres. It should be noted in passing that Amerada is not being forced by Commission or anyone else to drill on forty acre locations. Texas Pacific Coal and Oil Company is the owner of certain leases in the field here involved, and it entered the hearing before the Commission protesting the granting of the exception to the state-wide rule. The Commission, after hearing the evidence, denied the application for the exception, by its order No. R-2, in which it found in effect that the evidence submitted by the applicant was insufficient to prove what the Commission considered to be necessary matters of proof for the granting of an exception to the state-wide rule. The applicant then filed its petition for rehearing

setting out the respects in which it considered the Commission in error, as required by the statute, and upon the denial of the motion for rehearing it takes this appeal to the Court, in which appeal, under the statute, it is limited to the same questions which were presented to the Commission in its application for rehearing. There is no constitutional question presented in the petition for Review.

The first matter which Texas Pacific Coal and Oil Company would like to call to the attention of the Court, with the request that it be determined at this time, is the nature and extent of the review of the Commission's order which may be obtained before this Court. We consider this proposition fundamental, both from a substantive and a procedural point of view. It is a proposition which we raise at the outset, in order to avoid the possibility of delay in the disposition of this matter by the introduction of evidence and the inevitable objection to its admissiability. It is our position that the so-called "de novo" provisions in the New Mexico appeal statute violate the Constitution of the State of New Mexico, and that this Court, if review is to be granted, is limited upon review to the transcript of evidence before the Conservation Commission and only such other evidence as may bear upon the power of the Commission to act. It is our further position that this Court can only inquire into whether or not the decision of the Commission is supported by substantial evidence, or is arbitrary or capricious, or beyond the power of the Commission to make, or violates some constitutional right of the appellant.

Applicable Constitutional and Statutory Provisions

In order that the Court may bear in mind through this argument the basis of the position of the Texas Pacific Coal and Oil Company, we wish to call to the attention of the Court the constitutional and statutory provisions to which we will make reference and which we consider pertinent to this matter.

As has heretofore been stated, the Oil Conservation Commission was created and its power defined by the re-enactment of the 1935 Statute by the 1949 Legislature, which Statute now appears at Chapter 69 of the 1949 Accumulative Pocket Supplement of the New Mexico Statutes 1941 Annotated. Section 69-210 of that Act defines the general powers of the Commission as follows:

"The commission is hereby empowered, and it is its duty, to prevent the waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the commission is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof."

Section 69-211 enumerates certain specific powers of the Commission, including the one which is pertinent to this case by stating:

"Apart from any authority, express or implied, elsewhere given to or existing in the commission by virtue of this act or the statute of this state, the commission is hereby authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated herein, viz:

. . . . . .

"(10) To fix the spacing of wells;

. . . . . .

It should be apparent that the Legislature has delegated to the Oil Conservation Commission wide powers to deal with matters involving the production of oil and gas in this State, and that such powers are legislative powers which could be exercised by the Legislature itself or through committees, except for the fact that the Legislature obviously considered it more practical to delegate these powers to an administrative body composed of the Governor of the State, the Commissioner of Public Lands and the State Geologist, as a member and director. In connection with this legislative power invested in the Oil Conservation Commission, the provision of the Constitution of New Mexico relating to separation of powers must be considered. This provision is found in Section 1, Article III of the Constitution of the State, and is as follows:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted."

Certainly this is an unequivocal separation of power.

Finally, in considering this matter, it is necessary to realize that when the conservation act was amended by the 1949 Legislature, the provision for judicial review was completely revised in an effort to provide a "de novo" hearing before the Court. This statute, under which the present appeal is taken is found in Section 69-223 of the amended law, and it provides as follows:

"(b) Any party to such rehearing proceeding, dissatisfied with the disposition of the application for rehearing, may appeal therefrom to the district court of the county wherein is located any property of such party affected by the decision, by filing a petition for the review of the action of the commission within twenty (20) days after the entry of the order following rehearing or after the refusal or rehearing as the case may be. Such petition shall state briefly the nature of the proceedings before the commission and shall set forth the order or decision of the commission complained of and the grounds of invalidity thereof upon which the applicant will rely; provided, however, that the questions reviewed on appeal shall be only questions presented to the commission by the application for rehearing. Notice of such appeal shall be served upon the adverse party or parties and the commission in the manner provided for the service of summons in civil proceedings. The trial upon appeal shall be de novo, without a jury, and the transcript or proceedings before the commission, including the evidence taken in hearings by the commission, shall be received in evidence by the court in whole or in part upon offer by either party, subject to legal objections to evidence, in the same manner as if such evidence was originally offered in the district court. The commission action complained of shall be prima facie valid and the burden shall be upon the party or parties seeking review to establish the invalidity of such action of the commission. The court shall determine the issues of fact and of law and shall, upon a preponderance of the evidence introduced before the court, which may include evidence in addition to the transcript of proceedings before the commission, and the law applicable thereto, enter its order either affirming, modifying, or vacating the order of the commission. In the event the court shall modify or vacate the order or decision of the commission, it shall enter such order in lieu thereof as it may determine to be proper. Appeals may be taken from the judgment or decision of the district court to the supreme court in the same manner as provided for appeals from any other final judgment entered by a district court in this state. The trial of such application for relief from action of the commission and the hearing of any appeal to the supreme court from the action of the district court shall be expediated to the fullest possible extent."

Thus, it will be seen that in this argument we must consider first, that the general powers of the Commission are derived from the Legislature and that the power to fix the spacing of wells has been specifically delegated to it. Second, that the Constitution of New Mexico contains a specific and unambiguous provision providing for separation of powers of government. Third, that the review statute, under which this appeal is taken, undertakes to authorize the court to conduct a "de novo" hearing, and to enter an order in lieu of the Comission's order, after hearing new and additional evidence which was not before the Commission.

General Applicable Principles of Administrative Law

Before proceeding with a discussion of the cases concerning the question here involved, we consider it proper to briefly mention some general principles of administrative law which are discussed in these cases and which we consider to be pertinent to the matter here under discussion.

As is stated in 42 American Jurisprudence, Public Administrative Law, Section 35:

> "The necessity for vesting administrative authorities with power to make rules and regulations because of the impracticability of the lawmakers providing general regulations for various and varying details of management, has been recognized by the court, and the power of the Legislature to vest such authority in administrative officers has been upheld as against various particular objections."

Questions such as are present in the instant case arise not so much from the authority of the Legislature to confer power upon the administrative board, but rather upon the nature of the power exercised by the board and extent to which judicial review may be had. This proposition involves the question of whether the power exercised by the administrative body is legislative or judicial. The distinciton between these types of powers is sometimes difficult to make, but in general it is, as stated in 42 American Jurisprudence, Public Administrative Law, Section 36, as follows:

> "Legilsative power is the power to make, alter, or repeal laws or rules for the future, to make a rule of conduct applicable to an individual, who but for such action would be free from it is to legislate. The judicial function is confined to injunctions, etc., preventing wrongs for the future, and judgments giving redress for those of the past."

The broad general powers delegated to the Oil Conservation Commission by the statutes which have been quoted, coupled with specific power to regulate the spacing of wells indicates to us that this is a wide discretionary authority, a legislative authority granted by the lawmakers to the Oil Conservation Commission. It obviously affects the actions of persons in the oil and gas industry in the future and has no reference to the protection of private rights as of the present or for the redress against wrongs which have been done in the past. In other words it appears to us that this is clearly a legislative rather than a judicual function. This brings us to the meat of the proposition insofar as the general applicable principles of administrative law are concerned. As is stated in 42 American Jurisprudence, Public Administrative Law, Section 190:

> "It is a well settled general principle that non-judicial functions cannot be exercised by or imposed upon courts, and statutes which attempt to make a court play a part in the administrative process by conferring upon it administrative or legislative, as distinguished from judicial, functions may contravene the principles of separation of powers among the different branches of our government."

And in Section 191, American Jurisprudence, follows this line of reasoning by stating:

> "The statute which provides or permits a court to revise the discretion of a commission in a legislative matter by considering the evidence and full record of the case, and entering the order it deems the commission ought to have made, is invalid as an attempt to confer legislative powers upon the courts."

Decisions of the Courts of other States

There are several decisions of the courts of the western States concerning the power of the court to review the action of an administrative official or an administrative board. Before passing to the New Mexico cases, we would like to review briefly some of the language in these cases in other States which touch upon the subjects here involved.

The first case to which we wish to call the court's attention is the case of Manning V. Perry, 62 P. 2d 693 (Ariz.). This case involved an action between two parties who sought to obtain from the State Land Department a lease upon certain State land. After investigation and hearing, the Commissioner approved the application of one of the parties and the other party appealed. In the State of Arizona the Land Department consists of the Governor, the Secretary of State, Attorney General, State Treasurer, and State Auditor. After hearing this Land Department approved the decision of the Commissioner, and the party who had lost the application appealed to the court under the Constitution and statutes of Arizona. The case was tried in the superior court of one of the counties of Arizona without the aid of a jury and de novo as the statute seemed to contemplate that it should. The case was taken to the Supreme Court of Arizona upon appeal, the appellant contending that under the law of facts he was entitled to have his lease renewed. Concerning the question of the extent of the "trial de novo" as provided in the statute, the Arizona Supreme Court had this to say:

> "While the superior court on appeal from the Land Department tries the case de novo, it should not be forgotten that the court is not the agency appointed by law to lease state lands. The Legislature has vested that power in the Land Department. If it investigates

> and determines which of the two or more applicants appears to have the best right to a lease, its decision should be accepted by the court, unless it be without support of the evidence, or is contrary to the evidence, or is the result of fraud or misapplication of the law."

The Arizona court discussed with approval the decisions from the State of Wyoming which have held a similar vein:

> "In speaking of the functions of the court on an appeal from the Land Department it is said, in Miller v. Hurley, 37 Wyo. 334, 262 P. 238, 'the discretion of the Land Department in leasing the public lands should be controlling' except in a case of the illegal exercise thereof, or in the case of fraud or grave abuse of such discretion.' It was further said in that case: 'In the first place, nowhere in the Constitution or statutes is the district court or judge therof, granted power to lease state lands. Both the Constitution and the statutes repose that power in the land board. In exercising such power, the land board exercises a wide discretion. (Citing Wyoming cases) If, by the simple expedient of an appeal from the decision of the land board, that discretion can be taken from the board and vested in the district court, as contended by appellant, then the discretion of the land board amounts to nothing on a contested case. It is an empty thing, a mere ignis fatuus'."

The Arizona court continues:

> "And, we may add, a practice which permits the court to substitute its discretion for that of the Land Department would give us as many leasing bodies as there are superior courts in the state, or fourteen in number, instead of one as provided for by the Legislature ---an intolerable situation."

This same view is followed in Denver & R. G. W. R. Co. v. Public Service Commission 100 P. 2d 552 (Utah). In that case the applicant for a motor carrier permit and the protestant both applied for rehearings after the Public Service Commission of Utah had granted an application with certain limitations. The matter was appealed to the District Court under the statutes of Utah. The court called attention to the fact that prior to the enactment of the 1935 statute the court's review of the action of the commission was limited to questions of law and the commission's findings of fact were final and not subject to review. However, in 1935 the Legislature changed the statute and provided that the District Court "shall proceed after a trial de novo." The Arizona court in considering the extent of the authority of the District Court had this to say:

> "The expression 'trial de novo' has been used with two different meanings (3 Am. Jur. p. 356,

> sec. 815): (1) A complete retrial upon new evidence; (2) a trial upon the record made before the lower tribunal. Locally we find an example of the first in Section 104-77-4, R.S.U. 1933, covering appeals from the justice court to the district court—the case is tried in the district court as if it originated there. An example of the second meaning we find locally in our treatment of equity appeals wherein we say that the parties are entitled to a trial de novo upon the record."

In considering the effect of the amended Utah statute, as applied to these two different meanings, the court said:

> "To review an action is to study or examine it again. Thus, 'trial de novo' as used here must have a meaning consistent with the continued existence of that which is to be again examined or studied. If, in these cases, the first meaning were applied to the use of the term 'trial de novo' then one could not consistently speak of it as a review, as the Commission's action would no longer exist to be re-examined or restudied. There would be no reason for making the Commission a defendant to defend something that had been automatically wiped out by instituting the district court action.
>
> "What the Legislature has done by Section 9 is to increase the scope of the court's review of the record of the Commission's action to include questions of fact as well as questions of law. A submission to the court of the application, together with testimony other than the record of the testimony before the Commission was not contemplated. The Legislature had in mind the second meaning when it used the word 'trial de novo' here."

In the Wyoming case of Banzhaf v. Swan Co. 148 P. 2d 225, the Wyoming Supreme Court had before it an appeal from the District Court of a Wyoming county, which had reversed the decision of the State Board of Land Commissioners on the question of to whom a state lease upon certain lands should be issued. Conflicting applications were filed in the office of the Commissioner of Public Lands. The Commissioner of Public Lands awarded the lease to Banzhaf, and upon appeal to the Board of Land Commissioners under the statute that award was set aside and a lease issued to Swan Company. Upon appeal to the District Court, the District Court reversed the Board of Land Commissioners, and the appeal here is taker by Banzhaf from the order of the District Court.

Under the Wyoming Constitution certain state officials constitute the Board of Land Commissioners and have the power to lease state lands. The statute concerning the leasing of state lands provides that any party aggrieved by the decision of the board may have an appeal to the District Court, and upon the appeal the contest proceeding "shall stand to be heard and for trial de nove, by said court."

In Miller v. Hurley, 262 p. 238, the court said as follows:

> "In the former decisons of this court above set forth, it has been held that the discretion of the land board is a substantial thing, and cannot be interfered with by the court, except in case of fraud or grave abuse, resulting in manifest wrong or injsutice. Yet if appellant's contention were upheld, it would be necessary to hold that the discretion of the land board, conferred on it by the Constitution and statutes of this state, and heretofore recognized by the decisions of this court, is completely wiped out by an appeal. We cannot concur in such contentions, but hold that that discretion should be controlling, except in the case of an illegal exercise thereof, or in case of fraud or grave abuse of such discretion."

The case which we consider to have almost the same factual situation as the case here involved is the recent case of California Co. v. State Oil & Gas Board, 27 Sc. 2d. 542 (Miss.) This was an appeal to the Supreme Court of Mississippi from a final judgment of the Circuit Court of Adams County, Mississippi, which had dismissed an appeal taken by the California Company from an order of the State Oil & Gas Board. The order had granted to T. F. Hodge, the appellee, an exception to general rule concerning the spacing of oil wells, which was the same type of order as is here involved. The Circuit Court had dismissed the appeal on constitutional grounds and no opportunity was offered the California Company to offer proof as to whether the Oil & Gas Board should have passed such an order. The Mississippi Statute at Section 6136, Code 1942, provides that anyone "being a party to such petition may appeal from the decision of the board within ten days from the date of the rendition of the decision to the circuit court of Hinds county, or of the county in which the petitioner is engaged in business or drilling operations . . . .and the matter shall be tried de novo by the circuit court and the circuit court shall have full authority to approve or disapprove the action of the board."

The question raised here was that the requirement that the matter be tried de novo unconstitutional and void because it undertook to confer nonjudicial functions upon the circuit court. It should be noted here that the Mississippi statute does not go as far as the New Mexico statute, since it gives the court authority to approve or disapprove while our statute gives the court authority to modify, or in fact to enter any order in lieu of the commissions's order which the court deems to be proper. The Mississippi court called attention to the fact that the provision of the Mississippi statute for a de novo trial was inconsistant with the provision authorizing the court to approve or disapprove the action of the board. No such incon-

sistency appears to exist under the New Mexico statute. The Mississippi court found it possible under their statute "to hold the de novo provision unconstitutional but to sustain the power of the court to 'approve or disapprove' the action of the board." In so doing the court had this to say:

> "The decision of the foregoing questions is found to involve the question (1) or whether or not a trial de novo in the Circuit Court in the instant case would permit the Circuit Court to substitute its own findings and judgment for that of the State Oil and Gas Board on a purely legislative or administrative matter, and, (2) if so, whether or not the right of appeal should nevertheless be preserved by striking down the provision for a trial de novo and retaining the power of the Circuit Court to merely approve or disapprove the action of the State Oil and Gas Board, upon the theory that to permit said Court on a trial de novo to substitute its own ideas as to the proper spacing of oil wells for those of this administrative or legislative body is unconstitutional, while the mere right to approve or disapprove its action is a valid exercise of judicial power on a hearing as to whether or not the decision of said Board in that regard is supported by substantial evidence, is arbitrary or capricious, beyond the power of the Board to make, or violates some constitutional right of the complaining party.
>
> "We are unable to say that except for the provision granting a trial de novo the Legislature would not have given the right of appeal at all from any action of the Oil and Gas Board. It has made provision for appeals in many instances from the decisions of administrative boards created by statute in this State without requiring that the testimony taken before such boards be reduced to writing for such purpose. But it is unnecessary that we shall here digress to illustrate.
>
> "The Legislature itself had the right in the first instance to prescribe the general rule and regulation as to the spacing of oil and gas wells and to provide for exceptions therto under given circumstances, and it had the right to delegate this legislative power to a special administrative agency, composed of the State Oil and Gas Supervisor, who is to be a competent petroleum engineer or geologist with at least five years experience in the development and production of oil and gas, and therfore presumed to have expert knowledge as to the proper rules and regulations for the spacing of oil and gas wells, and also the Governor, Attorney General, and State Land Commissioner, as it has done by Section 5 of Chapter 117, Laws of 1932, now Section 6136, Code 1942. And it is to be conceded that in adopting such general rule and regulation, the Oil and Gas Board was acting in a legislative capacity; and we are of the opinion that in granting the exception involved in the instant case to the said general rule and regulation the said Board was likewise acting in at least a quasi legislative capacity. In order that any hearing shall be judicial in character, it must proceed upon

> past or pr ent facts as such, which are of such nature that a judicial trial tribunal may find that they do or do not exist, while in making these conservation rules and the exceptions thereto the larger question is one of state policy. So that what is to be made of the facts depends upon their bearing upon a legislative policy for which persons of special training and special responsibility have been selected.

There appeared to be little doubt in the minds of the Mississippi court, and there is little doubt in ours, that if the Legisla- ture had seen fit it could have adopted this general spacing rule and regulation and could also have heard testimony as to whether exceptions should be provided for, and the fact that it may have conducted such a hearing would not have rendered its action judicial. The Mississippi court concluded that:

> "And since the Legislature had the power to delegate this function to a Board composed of the officials hereinbefore mentioned, we are of the opinion that the action of said Board in adopting both the general rules and regulations, as provided for by the statute, and the exceptions thereto after a hearing, was as heretofore stated likewise legislative; that, therefore, the Circuit Court would be without constitutional power on appeal to substitute its own opinion as to what are proper oil conservation measures for that of the State Oil and Gas Board, on a legislative or administrative question. since the separation of executive, legislative and judicial powers,.....forbid."

In view of the presumption of validity of statutes, the Mississippi court held that the authority of the court to approve or disapprove the action of the board may be upheld by

> "limiting its authority in that behalf to the right to conduct a hearing to the extent only of determining whether or not the decision of the administrative agency is supported by substantial evidence, is arbitrary or capricious, beyond the power of the Board to make, or violates some constitutional right of the complaining party....."

The court further held that in determining these questions the circuit court would be acting judicially and to that end it might hear evidence to the extent of determining what state of facts the administrative body acted on. But the court specifically limited the evidence which might be introduced by saying:

> "But to allow an appellant to present to the Circuit Court a different state of case or one based on additional facts would merely tend to becloud the issue as to whether or not the administrative body had based its decision on substantial evidence, had acted arbitrarily or capriciously, beyond its power, or violated some constitutional right of the party affected thereby. In other words, to permit a trial de novo in the Circuit Court on a legislative or administrative

> decision of the State Oil and Gas Board, within the common acceptance of the term 'tried de novo' would permit a party to withold entirely any showing of these facts, as he contends them to be, from the original board composed of experts and of those charged with the responsibility of a great public policy of the State, and wait until on appeal when he will make his full disclosure for the first time before nonexperts in that field to determine as to the proper spacing of oil and gas wells. In such case the Court would be departing from its proper judicial function into the realm of things about which it has no such knowledge as would form the basis for intelligent action."

After disposing of the decisions of the Texas Courts, as not applicable to the Mississippi statute because based upon a statute providing for an independent action rather than an appeal, the opinion as a part of its conclusion recites:

> "Therefore, the only sound, practicable or workable rule that can be announced by the Court is to hold that when the appeal is from either a general rule and regulation or from an exception granted thereto, the Court to which the appeal is taken shall only inquire into whether or not the same is reasonable and proper according to the facts disclosed before the Board, that is to say, whether or not its decision is supported by substantial evidence or is arbitrary or capricious, or beyond the power of the Board to make, or whether it violates any constitutional right of the complaining party."

The concurring opinion of Justice Griffith considers the question of the power of the Court and of the type of evidence which may be presented, concluding as follows:

> "The result is the conclusion that the legislature could not confer upon either of the said judicial courts the original authority in either respect above mentioned, and since it could not do so directly, it could not do so by the indirect device of a trial de novo on appeal; and thus there is the further result that all the authority which could be conferred on the courts would be of a review to determine whether the Oil and Gas Board in its order acted within the authority conferred on it by statute, and if so, then whether in making its order it did so upon facts substantially sufficient to sustain its action.
>
> "The essential nature of such a review is such that it must be of what the Board had before it at the time it made its order. It would be an incongruity as remarkable to permit another different record to be made up on appeal to the circuit court as it would be to allow another and a different record to be presented to this Court on an appeal to it. The question is, and must be, what did the Oil and Gas Board have before it, and all this the majority opinion has well and sufficiently pointed out.

"But what the Oil and Gas Board had before it is best and most dependably shown by a certified transcript made by a competent person in precise duplication of what was there heard and what there transpired. It is an incongruity in merely another phase which omits such a transcript, and thereafter would call witnesses to prove what was heard by and what transpired before the Board, as is allowed to be done by the reversal in this case..."

It appears to us that these cases, particularly the last one, which involved an appeal from a board similar to our Oil Conservation Commission, clearly reflect that the most recent decisions leave to the administrative bodies the discretion which has been given them by the Legislature, and that the courts confine themselves solely to the question of whether there is substantial evidence in the record before the Commission on which the Commission's decision can be based, or, in other words, whether the administrative body acted arbitrarily. It further appears that since this substantial evidence rule is the basis for the extent of review, the transcript of evidence before the Commission is the only evidence which can logically be considered.

New Mexico Law Concerning Appeals and Reviews Of Orders Of Administrative Bodies

We come now to the New Mexico law concerning appeals from reviews or orders from administrative bodies, which we consider to bear out our position as to the power of this court to review a decison of the Oil Conservation Commission. As has heretofore been stated, the pertinent provision of the Constitution of New Mexico is contained in Section 1, Article III and is as follows:

"The powers of the government of this state are divided into three distinct deparments, the legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted."

Until rather recent years, the cases in New Mexico concerning the powers of the courts to review decisions of administrative bodies have been confined primarily to appeals from the action of the State Corporation Commission. The Constitution of New Mexico is unique in that it contains the provision for the powers of the Corporation Commission and further provides for removal of matters covered by the constitutional provision to the Supreme Court of New Mexico, and:

"In the event of such removal by the company, corporation or common carrier, or other party to such hearing the Supreme Court may, upon application in its discretion, or of its own motion, require or authorize additional evidence to be taken in such cause; but in the event of removal by the commission, upon failure of the company, corporation, or common carrier, no additional evidence shall be allowed.....

".....the said court shall have the power and it shall be its duty to decide such cases on their merits, and carry into effect its judgments, orders, and decrees made in such cases, by fine forfeiture, mandamus, injunction and contempt or other appropriate proceedings."

(Article II Section 7 Constitution of New Mexico)

As the functions and duties of the Corporation Commission have grown, it has become necessary to enact a statute supplementing the Constitution, which provides in effect that a motor carrier being dissatisfied with an order of the Commission, which order is not removable directly to the S upreme Court under the constitutional provisions, may:

"Commence an action in the district court for Santa Fe County against the Commission as defendant, to vacate and set aside such order or determination, on the ground that it is unlawful or unreasonable. In any such proceeding the court may grant relief by injunction, mandamus or other extraordinary remedy....."

The Statute further provides that:

"The same shall be tried and determined as other civil actions without a jury."

(New Mexico Statutes 1941 Annotated 68-1363)

It should be borne in mind that some of the cases cited are under the constitutional provision, and some are under the statutory provision.

The first case in New Mexico appears to be Seward v. D. & R. G. 17 N. M. 557, which was a proceeding under the constitutional provision, moving directly from the Commission to the Supreme Court. In this case the matter was removed by the Commission when the carrier refused to comply with the order, and the court refused to allow additional evidence under the Constitutional provision. The Attorney General took the position that the Supreme Court had a right to form its independent judgment in the matter and was not confined to a consideration of the reasonableness and lawfulness of the order of the Commission. He based his position upon the language in the statute quoted above, that the court shall have "the power and it shall be its duty to decide such cases upon their merits." The Supreme Court had this to say:

"Now if the contention is sound then the provision just quoted invests this court with legislative power to fix rates. There is no doubt but that the people of the state, by constitutional provision could confer such power upon the judges of the Supreme Court. If they saw fit they might combine all the power of government in one department, but such action would not be in accord with the settled policy of the states of the Union, where it has been the studied purpose to, so far as possible, keep separate the three great departments, and we should not so construe the provision as conferring legislative power upon this body, unless compelled to do so by clear and unmistabable language."

The court held that the only thing to be decided upon the appeal by the Commission was the reasonableness and lawfulness of the order, and they concluded that if the court finds the order reasonable and lawful, it enters a judgment to that effect, but if it finds it unlawful and unreasonable, it refuses to enforce it and the State Corporation Commission may proceed to form a new order under its rule.

This proposition was further discussed in Seaberg v. Raton Public Service Co. 36 N. M. 59; 8 P. 2d 100, in which the petitioner had removed a matter before the Corporation Commission directly to the Supreme Court, and the Corporation Commission filed a motion to dismiss. The facts of the case are not particularly pertinent to the present question, but some of the language of the court indicates the position which it was quick to take in these matters. We quoted from the case as follows:

"The proceeding of removal is not for the review of judicial action by the commission. It is to test the reasonableness and lawfulness of its orders. The function of the commission is legislative; that of the court, judicial. The commission is not given power to enforce any order; it being merely a rate-making or rule-making body, doing what, if there were no commission, the Legislature alone could do. The court, on the other hand, can make no rate or rule, since it lacks the legislative power."

Perhaps the most complete discussion of the matter arose in the case of Harris v. State Corporation Commission 46 N. M. 352 P. 2d. 323, which was an appeal under the statute to the district court of Santa Fe County. The carrier had been granted a certificate and another carrier, adversely affected, appealed to the district court. The appeal to the district court was taken by way of a complaint filed by the protestant. At the trial, the plaintiff, instead of introducing the record of the hearing before the Commission, introduced new evidence by way of testimony of seven witnesses.

Upon conclusion of the evidence the court made many findings contrary to those of the Commission and concluded, as a matter of law, that the action of the Commission was unlawful and unreasonable. The first question discussed was the scope of judicial review provided for in the statute. The court goes into a rather exhaustive review of the New Mexico authorities and discusses several Law Review articles concerning the subject. Some of its concluding remarks are as follows:

> "When our Legislature enacted Ch. 154, L. 1933, it declared its purpose and policy to confer upon the Commission the power and authority to make it its duty to supervise and regulate the transportation of persons and propety by motor vehicle for hire upon the public highways of this state and to relieve the undue burdens on the highways, and to protect the safety, and welfare of the travelling and shipping public and to preserve, foster and regulate transportation and permit the co-ordination of transportation facilities...
>
> "Counsel for Appellee contends that in the removal of a cause pending before the Commission under Sec. 51, etc. of the Act, the trial before the District Court is a trial de novo. This view is repelled distinctly by what we said in the Seward Case.....
>
> "Even where statutes of other states have said that upon judicial review of administrative or legislative acts the trial shall be de novo, some courts have held such provision unconstitutional, others hold that the de novo provision is limited to the ascertainment by the court of whether the jurisdictional facts exist and whether there had been due process, and whether the Commission had kept within its lawful authority.
>
> "That question of constitutional right and power raised by administrative action must be tried de novo so that the court may reach its own independent judgment on the facts and the law without being bound by the rule of administrative finality of the facts and that additional evidence may be introduced so that these questions of constitutional right and power need not be decided on the administrative record alone, may be conceded."
>
> "We hold that the District Court erred in receiving and considering testimony other than that which had been produced at the hearing before the Commission."

The most recent case on this subject is New Mexico Transportation Co., Inc. v. State Corporation Commission, 51 N. M. 59; 178 P. 2d 580, in which the Commission affirmed the position taken in Harris v. State Corporation Commission, supra, and refused to disturb an order of the State Corporation Commission. The Court said:

> "Following the rules there announced, we are unable to say from an examination of the record that the order of the Commission granting these certificates was either unlawful or unreasonable. It is not sufficient that we might have reached a different conclusion."

This matter has also been discussed in general in cases arising out of the enforcement of the liquor laws of New Mexico by the Bureau of Revenue. Our statutes authorize the Commissioner of Revenue to establish a Division of Liquor Control and to appoint a chief of this division to administer the powers and duties of it.

(New Mexico Statutes 1941 Annotated, 61-501 to 61-525)

Among powers given to the Division of Liquor Control is the power to issue, revoke, cancel or suspend licenses.

There are different appeal provisions from orders referring to the issuance of licenses and those referring to cancellation or revocation of licenses. The provisions relative to appeal of orders concerning issuance of licenses are found in Section 61-516 of New Mexico Statutes 1941 Annotated. This section originally provided as follows:

> "Any person, firm or corporation aggrieved by any decision made by the chief of division as to the issuance or refusal to issue any such additional license may appeal therefrom to the district court of Santa Fe County, by filing a petition therefor in said court within thirty (30) days from the date of the decision of the chief of division, and a hearing on the matter may be had in the district court. Provided, however, that the decision of the chief of division shall continue in full force and effect, pending a reversal or modification thereof by the district court. "

In 1945 the provision was amended by adding the words "which hearing shall be de novo."

The section of the statute dealing with revocation and suspension of licenses, and appeals from such orders, in Section 61-605, New Mexico Statutes 1941 Annotated, which provides, among other things, that:

> "The matter on appeal shall be heard by the judge of said court without a jury, and such court shall hear such appeal at the earliest possible time granting the matter of the appeal a preference on the docket. The judge, for good cause shown may receive evidence in such proceedings in addition to that appearing in the record of hearing and shall act aside and void any order or finding which is not sustained by, or has been overcome by, substantial, competent, relevant and credible evidence."

This section of the statute has not been amended to provide for a de novo hearing.

In the case of Floeck v. Bureau of Revenue, 44 N. M. 194; 100 P. 2d 225, an appeal was taken under the section relating to cancellation of a liquor license, Section 61-605 New Mexico Statutes 1941 Annotated. Some question was raised as to the Constitutionality of the liquor control act, but the court did not pass upon that question. It did, however, have this to say:

"Assuming the constitutionality of Sec. 1303, it did not undertake to vest in the district court the administrative function of determining whether or not the permit should be granted. It gave the court authority only to determine whether upon the facts and law, the action of the Commissioner in cancelling the license was based upon an error of law or was unsupported by substantial evidence or clearly arbitrary or capricious. (Ma-King Products Co. v. Blair, 271 U. S. 479, 46 S. Ct. 544, 70 L. Ed. 1046); otherwise it would be a delegation of administrative authority to the district court in violation of the Constitution. Bradley v. Texas Liquor Control Board, Tex. Civ. App., 108 S. W. 2d 300; State v. Great Northern Ry. Co. 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1907B, 1201.

"The New Mexico Liquor Control Act is an exercise of the police power of the state, for the welfare, health, peace, temperance and safety of its people. It prescribes the terms and and conditions upon which licenses shall be issued and the grounds and procedure for their cancellation; all of which are made purely administrative."

Apparently the question was not raised in this case as to the introduction of new evidence.

However, in the case of Chiordi v. Jernigan 46 N. M. 396; 129 P. 2d 640 this same statute was under consideration. After revocation of his license, a licensee appealed to the district court of Santa Fe County. In discussing the authority or jurisdiction of the district court, the Supreme Court had this to say:

"No provision is made on appeal for trial de novo, and jury trials are specifically excluded. It is provided that the judge for good cause shown may receive additional evidence. It is obvious that he must review the evidence taken in the hearing before the Chief of Division. As the trial is not de novo the Chief of Division's decision on the facts must be reviewed as he heard it, and and it could not be if additional evidence was authorized upon the question of whether appellee was the party in interest. It is our conclusion that the new evidence which may be admitted must be confined to questions of whether the Chief of Division acted fraudulently, capriciously or arbitrarily in rendering his decision. Ma-King Products Co. v. Blair, supra; Floeck v. Bureau of Revenue, supra; Texas Liquor Control Board v. Floyd, supra.

"The proceedings before the Chief of Division, while quasi judicial, were esentially administrative. The questions before the district court and here, are questions of law. They are, whether he acted fraudulently, arbitrarily or capriciously in making his order, and, whether such order was supported by substantial evidence, and generally,

whether the Chief of Division acted within the scope of the authority conferred by the liquor control act."

It should be noted that some of the conclusions appear here to be based upon the fact that there is no provision for a trial de novo under this section of the statute.

It may have been this language which prompted the Legislature of 1945 to insert in Section 61-516 New Mexico Statutes 1941 Annotated, which is the section dealing with appeals refusing to issue licenses, the de novo provision. As has been noted above, however, this provision was not inserted in Section 61-605.

In the recent case of Yarbrough v. Montoya, 214 P. 2d 769, the Supreme Court of New Mexico was called upon to pass upon the effect of the insertion of the de novo provision in Section 61-516, New Mexico Statutes 1941 Annotated. As will be recalled this de novo provision was inserted after the Floeck and Chiordi cases were decided. The Court again called attention to the fact that the Chief of the Liquor Division is given wide administrative judgment and discretion with respect to new licenses, and that the statute does not provide for formal hearing, and there is no requirement that he may only consider evidence that would be admissible in a court hearing. There is likewise no limitation upon evidence before the Oil Conservation Commission. The Court, in concluding that the de novo provision does not change the fundamental proposition of limitation of judicial review, had this to say:

> "We are further committed to the doctrine that the courts may not overrule the acts of administrative officers on matters committed to this discretion unless their actions are unlawful, unreasonable, arbitrary, capricious, or not supported by evidence."

The Court said further:

> "The applicant says this rule no longer obtains since the provision for a hearing de novo was written into the liquor law in 1945. A sufficient answer to this contention is found in Floeck case, supra, where in speaking of the powers of the District Court on appeal under the 1937 liquor act, we said: 'Assuming the constitutionality of Sec. 1303, it did not undertake to vest in the district court the administrative function of determining whether or not the permit should be granted. It gave the court authority only to determine whether upon the facts and law,

the action of the Commissioner in cancelling the license was based upon an error of law or was unsupported by substantial evidence or clearly arbitrary or capricious (Ma-King Products Co. v. Blair, 271, U. S. 479, 46 S. Ct. 544, 70 L. Ed. 1046); otherwise it would be a delegation of administrative authority to the district court in violation of the Constitution.'

"See also the case of Harris v. State Corporation Commission, 46 N. M. 352, 129 P. 2d 323."

It is true that the statutes for appeal from orders of the Commissioner of Public Lands, Section 8-867 New Mexico Statutes, 1941 Annotated, provide for trials de novo, but we find no cases in which the question of extent of review was raised.

CONCLUSIONS

Based upon the decisions and authorities cited, it is the position of Texas Pacific Coal and Oil Company that the nature and scope of the review by this Court of orders of the Oil Conservation Commission, including the question of what evidence may be presented, is limited as follows:

1. In view of the apparent attempt to delegate non-judicial functions to this Court, the review provisions of the statute are unconstitutional unless limited by the Court to the affirming or vacating of the order of the Commission.

2. This Court is limited upon review to a determination of whether the action of the Commission was unsupported by substantial evidence or was clearly arbitrary or capricious.

3. In making this determination this Court cannot pass upon the Commission's action unless it limits itself to the transcript of evidence before the Commission.

Respectfully submitted,

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MEMORANDUM BRIEF

THE NATURE AND SCOPE OF THE REVIEW BY THE DISTRICT COURT OF AN ORDER OF THE OIL CONSERVATION COMMISSION INCLUDING THE QUESTION OF WHAT EVIDENCE MAY BE PRESENTED UPON APPEAL.

This case represents the first appeal ever taken in the State of New Mexico from an order of the Oil Conservation Commission. It is taken under the provisions of the oil and gas conservation law of this State which was enacted in 1935 and which was re-enacted by the 1949 Legislature with certain amendments. Included in the amendments was one which changed the appeal and review sections under which this appeal is taken.

At the outset it would seem proper to state specifically the position of the Texas Pacific Coal and Oil Company in this case and its attitude concerning the power of the District Court to review matters decided by the Commission, including the nature of the evidence which may properly be heard by this Court.

The original application herein was filed by Amerada Petroleum Corporation and in its application it requested that it be granted an exception from the state-wide rules concerning the spacing of oil and gas wells. The general spacing program in New Mexico has for a number of years been upon a forty acre basis, and deviations from that spacing pattern have been granted from time to time upon application for an exception to the rule. It is of some significance to note that heretofore exceptions have been requested for spacing patterns for less than forty acres, but this appears to be the first instance in this State in which application has been made for an exception requesting a spacing pattern for more than forty acres. It should be noted in passing that Amerada is not being forced by Commission or anyone else to drill on forty acre locations. Texas Pacific Coal and Oil Company is the owner of certain leases in the field here involved, and it entered the hearing before the Commission protesting the granting of the exception to the state-wide rule.

The Commission, after hearing the evidence, denied the application for the exception, by its order No. R-2, in which it found in effect that the evidence submitted by the applicant was insufficient to prove what the Commission considered to be necessary matters of proof for the granting of an exception to the state-wide rule. The applicant then filed its petition for rehearing setting out the respects in which it considered the Commission in error, as required by the statute, and upon the denial of the motion for rehearing it takes this appeal to the Court, in which appeal, under the statute, it is limited to the same questions which were presented to the Commission in its application for rehearing. There is no constitutional question presented in the petition for Review.

The first matter which Texas Pacific Coal and Oil Company would like to call to the attention of the Court, with the request that it be determined at this time, is the nature and extent of the review of the Commission's order which may be obtained before this Court. We consider this proposition fundamental, both from a substantive and a procedural point of view. It is a proposition which we raise at the outset, in order to avoid the possibility of delay in the disposition of this matter by the introduction of evidence and the inevitable objection to its admissiability. It is our position that the so-called "de novo" provisions in the New Mexico appeal statute violate the Constitution of the State of New Mexico, and that this Court, if review is to be granted, is limited upon review to the transcript of evidence before the Conservation Commission and only such other evidence as may bear upon the power of the Commission to act. It is our further position that this Court can only inquire into whether or not the decision of the Commission is supported by substantial evidence, or is arbitrary or capricious, or beyond the power of the Commission to make, or violates some constitutional right of the appellant.

Applicable Constitutional and Statutory Provisions

In order that the Court may bear in mind through this argument the basis of the position of the Texas Pacific Coal and Oil Company, we wish to call to the attention of the Court the constitutional and statutory provisions to which we will make reference and which we consider pertinent to this matter.

As has heretofore been state, the Oil Conservation Commission was created and its power defined by the re-enactment of the 1935 Statute by the 1949 Legislature, which Statute now appears at Chapter 69 of the 1949 Accumulative Pocket Supplement of the New Mexico Statutes 1941 Annotated. Section 69-210 of that Act defines that general powers of the Commission as follows:

> "The commission is hereby empowered, and it is its duty, to prevent the waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the commission is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof."

Section 69-211 enumerates certain specific powers of the Commission, including the one which is pertinent to this case by stating:

> "Apart from any authority, express or implied, elsewhere given to or existing in the commission by virtue of this act or the statute of this state, the commission is hereby authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated herein, viz:
>
> .....
>
> "(10) To fix the spacing of wells;
>
> .....

It should be apparent that the Legislature has delegated to the Oil Conservation Commission wide powers to deal with matters involving the production of oil and gas in this State, and that such powers are legislative powers which could be exercised by the Legislature itself or through committees, except for the fact that the Legislature obviously considered it more practical

to delegate these powers to an administrative body composed of the Governor of the State, the Commissioner of Public Lands and the State Geologist, as a member and Director. In connection with this legislative power invested in the Oil Conservation Commission, the provision of the Constitution of New Mexico relating to separation of powers must be considered. This provision is found in Section 1, Article III of the Constitution of the State, and is as follows:

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted."

Certainly this is an unequivocal separation of power.

Finally, in considering this matter, it is necessary to realize that when the conservation act was amended by the 1949 Legislature, the provision for judicial review was completely revised in an effort to provide a "de novo" hearing before the Court. This statute, under which the present appeal is taken is found in Section 69-223 of the amended law, and it provides as follows:

> "(b) Any party to such rehearing proceeding, dissatisfied with the disposition of the application for rehearing, may appeal therefrom to the district court of the county wherein is located any property of such party affected by the decision, by filing a petition for the review of the action of the Commission within twenty (20) days after the entry of the order following rehearing or after the refusal or rehearing as the case may be. Such petition shall state briefly the nature of the proceedings before the Commission and shall set forth the order or decision of the commission complained of and the grounds of invalidity thereof upon which the applicant will rely; provided, however, that the questions reviewed on appeal shall be only questions presented to the Commission by the application for rehearing. Notice of such appeal shall be served upon the adverse party or parties and the commission in the manner provided for the service of summons in civil proceedings. The trial upon appeal shall be de novo, without a jury, and the transcript or proceedings before the commission, including the evidence taken in hearings by the commission, shall be received in evidence by the court in whole or in part upon offer by either party, subject to legal objections to evidence, in the same manner as if such evidence was originally offered in the district court. The commission

> action complained of shall be prima facie valid and the burden shall be upon the party or parties seeking review to establish the invalidity of such action of the commission. The court shall determine the issues of fact and of law and shall, upon a preponderance of the evidence introduced before the court, which may include evidence in addition to the transcript of proceedings before the Commission, and the law applicable thereto, enter its order either affirming, modifying, or vacating the order of the commission. In the event the court shall modify or vacate the order or decision of the commission, it shall enter such order in lieu thereof as it may determine to be proper. Appeals may be taken from the judgment or decision of the district court to the supreme court in the same manner as provided for appeals from any other final judgment entered by a district court in this state. The trial of such application for relief from action of the commission and the hearing of any appeal to the supreme court from the action of the district court shall be expediated to the fullest possible extent."

Thus, it will be seen that in this argument we must consider first, that the general powers of the Commission are derived from the Legislature and that the power to fix the spacing of wells has been specifically delegated to it. Second, that the Constitution of New Mexico contains a specific and unambiguous provision providing for separation of powers of government. Third, that the review statute, under which this appeal is taken, undertakes to authorize the court to conduct a "de novo" hearing, and to enter an order in lieu of the Commission's order, after hearing new and additional evidence which was not before the Commission.

General Applicable Principles of Administrative Law

Before proceeding with a discussion of the cases concerning the question here involved, we consider it proper to briefly mention some general principles of administrative law which are discussed in these cases and which we consider to be pertinent to the matter here under discussion.

As is stated in 42 American Jurisprudence, Public Administrative Law, Section 35:

> "The necessity for vesting administrative authorities with power to make rules and regulations because of the impracticability of the lawmakers providing general regulations for various and varying details of management, has been recognized by the court, and the power of the Legislature to vest such authority in administrative officers has been upheld as against various particular objections."

Questions such as are present in the instant case arise not so much from the authority of the Legislature to confer power upon the administrative board, but rather upon the nature of the power exercised by the board and extent to which judicial review may be had. This proposition involves the question of whether the power exercised by the administrative body is legislative or judicial. The distinction between these types of powers is sometimes difficult to make, but in general it is, as stated in 42 American Jurisprudence, Public Administrative Law, Section 36, as follows:

> "Legislative power is the power to make, alter, or repeal laws or rules for the future, to make a rule of conduct applicable to an individual, who but for such action would be free from it is to legislate. The judicial function is confined to injunctions, etc., preventing wrongs for the future, and judgments giving redress for those of the past."

The broad general powers delegated to the Oil Conservation Commission by the statutes which have been quoted, coupled with specific power to regulate the spacing of wells indicates to us that this is a wide discretionary authority, a legislative authority granted by the lawmakers to the Oil Conservation Commission. It obviously affects the actions of persons in the oil and gas industry in the future and has no reference to the protection of private rights as of the present or for the redress against wrongs which have been done in the past. In other words it appears to us that this is clearly a legislative rather than a judicial function. This brings us to the meat of the proposition insofar as the general applicable principles of administrative law are concerned. As is stated in 42 American Jurisprudence, Public Administrative Law, Section 190:

> "It is a well settled general principle that non-judicial functions cannot be exercised by or imposed upon courts, and statutes which attempt to make a court play a part in the administrative process by conferring upon it administrative or legislative, as distinguished from judicial, functions may contravene the principles of separation of powers among the different branches of our government."

And in Section 191, American Jurisprudence, follows this line of reasoning by stating:

> "The statute which provides or permits a court to revise the discretion of a commission in a legislative matter by considering the evidence and full record of the case, and entering the order it deems the commission ought to have made, is invalid as an attempt to confer legislative powers upon the courts."

Decisions of the Courts of other States

There are several decisions of the courts of the western states concerning the power of the court to review the action of an administrative official or an administrative board. Before passing to the New Mexico cases, we would like to review briefly some of the language in these cases in other States which touch upon the subjects here involved.

The first case to which we wish to call the court's attention is the case of Manning V. Perry, 62 P. 2d 693 (Ariz.). This case involved an action between two parties who sought to obtain from the State Land Department a lease upon certain State land. After investigation and hearing, the Commissioner approved the application of one of the parties and the other party appealed. In the State of Arizona the Land Department consists of the Governor, the Secretary of State, Attorney General, State Treasurer, and State Auditor. After hearing this Land Department approved the decision of the Commissioner, and the party who had lost the application appealed to the court under the Constitution and statutes of Arizona. The case was tried in the superior court of one of the counties of Arizona without the aid of a jury and de novo as the statute seemed to contemplate that it should. The case was taken to the Supreme Court of Arizona upon appeal, the appelant contending that under the law of facts he was entitled to have his lease renewed. Concerning the question of the extent of the "trial de novo" as provided in the statute, the Arizona Supreme Court had this to say:

> "While the superior court on appeal from the Land Department tries the case de novo, it should not be forgotten that the court is not the agency appointed by law to lease state lands. The Legislature has vested that power in the Land Department. If it investigates and determines which of the two or more applicants appears to have the best right to a lease, its decision should be accepted by the court, unless

> it be without support of the evidence, or is contrary to the evidence, or is the result of fraud or misapplication of the law."

The Arizona court discussed with approval the decisions from the State of Wyoming which have held a similar vein:

> "In speaking of the functions of the court on an appeal from the Land Department it is said, in Miller v. Hurley, 37 Wyo. 334, 262 P. 238, 'the discretion of the Land Department in leasing the public lands should be controlling' except in a case of the illegal exercise thereof, or in the case of fraud or grave abuse of such discretion.' It was further said in that case: 'In the first place, nowhere in the Constitution or statutes is the district court or judge thereof, granted power to lease state lands. Both the Constitution and the statutes repose that power in the land board. In exercising such power, the land board exercises a wide discretion. (Citing Wyoming cases) If, by the simple expedient of an appeal from the decision of the land board, that discretion can be taken from the board and vested in the district court, as contended by appellant, then the discretion of the land board amounts to nothing on a contested case. It is an empty thing, [redacted]'."

The Arizona court continues:

> "And, we may add, a practice which permits the court to substitute its discretion for that of the Land Department would give us as many leasing bodies as there are superior courts in the state, or fourteen in number, instead of one as provided for by the Legislature--an intolerable situation."

This same view is followed in Denver & R. G. W. R. Co. v. Public Service Commission 100 P. 2d 552 (Utah). In that case the applicant for a motor carrier permit and the protestant both applied for rehearings after the Public Service Commission of Utah had granted an application with certain limitations. The matter was appealed to the District Court under the statutes of Utah. The court called attention to the fact that prior to the enactment of the 1935 statute the court's review of the action of the commission was limited to questions of law and the commission's findings of fact were final and not subject to review. However, in 1935 the Legislature changed the statute and provided that the District Court" shall proceed after a trial de novo." The Arizona court in considering the extent of the authority of the District Court had this to say:

> "The expression 'trial de novo' has been used with two different meanings (3 Am. Jur. p. 356, sec. 815): (1) A complete retrial upon new evidence; (2) a trial upon the record made before the lower tribunal. Locally we find an example of the first in Section 104-77-4, R. S. U. 1933, covering appeals from the justice court to the district court--the case is tried in the district court as if it originated there. An example of the second meaning we find locally in our treatment of equity appeals wherein we say that the parties are entitled to a trial de novo upon the record."

In considering the effect of the amended Utah statute, as applied to these two different meanings, the court said:

> "To review an action is to study or examine it again. Thus, 'trial de novo' as used here must have a meaning consistent with the continued existence of that which is to be again examined or studied. If, in these cases, the first meaning were applied to the use of the term 'trial de novo' then one could not consistently speak of it as a review, as the Commission's action would no longer exist to be re-examined or restudied. There would be no reason for making the Commission a defendant to defend something that had been automatically wiped out by instituting the district court action.
>
> "What the Legislature has done by Section 9 is to increase the scope of the court's review of the record of the Commission's action to include questions of fact as well as questions of law. A submission to the court of the application, together with testimony other than the record of the testimony before the Commission was not contemplated. The Legislature had in mind the second meaning when it used the word 'trial de novo' here."

In the Wyoming case of Banzhaf v. Swan Co. 148 P. 2d 225, the Wyoming Supreme Court had before it an appeal from the District Court of a Wyoming county, which had reversed the decision of the State Board of Land Commissioners on the question of to whom a state lease upon certain lands should be issued. Conflicting applications were filed in the office of the Commissioner of Public Lands. The Commissioner of Public Lands awarded the lease to Banzhaf, and upon appeal to the Board of Land Commissioners under the statute that award was set aside and a lease issued to Swan Company. Upon appeal to the District Court, the District Court reversed the Board of Land Commissioners, and the appeal here is taken by Banzhaf from the order of the District Court.

Under the Wyoming Constitution certain state officials constitute the Board of Land Commissioners and have the power to lease state lands. The statute concerning the leasing of state lands provides that any party aggrieved by the decision of the board may have an appeal to the District Court, and upon the appeal the contest proceeding "shall stand to be heard and for trial de novo, by said court."

In Miller v. Hurley, 262 p. 238, the court said as follows:

> "In the former decisions of this court above set forth, it has been held that the discretion of the land board is a substantial things, and cannot be interfered with by the court, except in case of fraud or grave abuse, resulting in manifest wrong or injustice. Yet if appelant's contention were upheld, it would be necessary to hold that the discretion of the land board, conferred on it by the constitution and statutes of this state, and heretofore recognized by the decisions of this court, is completely wiped out by an appeal. We cannot concur in such contentions, but hold that that discretion should be controlling, except in the case of an illegal exercise thereof, or in case of fraud or grave abuse of such discretion."

The case which we consider to have almost the same factual situation as the case here involved is the recent case of California Co. v. State Oil & Gas Board, 27 Sc. 2d. 542 (Miss.) This was an appeal to the Supreme Court of Mississippi from a final judgment of the Circuit Court of Adams County, Mississippi, which had dismissed an appeal taken by the California Company from an order of the State Oil & Gas Board. The order had granted to T. F. Hodge, the appellee, an exception to general rule concerning the spacing of oil wells~~which was the same type of order as is here involved~~. The Circuit Court had dismissed the appeal on constitutional grounds and no opportunity was offered the California Company to offer proof as to whether the Oil & Gas Board should have passed such an order. The Mississippi Statute at Section 6136, Code 1942, provides that anyone "being a party to such petition may appeal from the decision of the board within ten days from the date of the rendition of the decision to the circuit court of Hinds county, or of the county in which the petitioner is engaged in business or drilling opeeations. . . . and the matter shall be tried de novo by the circuit court and the circuit court shall have full authority to approva or disapprove the action of the board."

The question raised here was that the requirement that the matter be tried de novo unconstitutional and void because it undertook to confer nonjudicial functions upon the circuit court. It should be noted here that the Mississippi statute does not go as far as the New Mexico statute, since it gives the court authority to approve or disapprove while our statute gives the court authority to modify, or in fact to enter any order in lieu of the Commission's order which the court deems to be proper. The Mississippi court called attention to the fact that the provision of the Mississippi statute for a de novo trial was inconsistant with the provision authorizing the court to approve or disapprove the action of the board. No such inconsistency appears to exist under the New Mexico statute. The Mississippi court found it possible under their statute "to hold the de novo provision unconstitutional but to sustain the power of the court to 'approve or disapprove' the action of the board." In so doing the court had this to say:

> "The decision of the foregoing questions is found to involve the question (1) or whether or not a trial de novo in the Circuit Court in the instant case would permit the Circuit Court to substitute its own findings and judgment for that of the State Oil and Gas Board on a purely legislative or administrative matter, and, (2) if so, whether or not the right of appeal should nevertheless be preserved by striking down the provision for a trial de novo and retaining the power of the Circuit Court to merely approve or disapprove the action of the State Oil and Gas Board, upon the theory that to permit said Court on a trial de novo to substitute its own ideas as to the proper spacing of oil wells for those of this administrative or legislative body is unconstitutional, while the mere right to approve or disapprove its action is a valid exercise of judicial power on a hearing as to whether or not the decision of said Board in that regard is supported by substantial evidence, is arbitrary or capricious, beyond the power of the Board to make, or violates some constitutional right of the complaining party.
>
> "We are unable to say that except for the provision granting a trial de novo the Legislature would not have given the right of appeal at all from any action of the Oil and Gas Board. It has made provision for appeals in many instances from the decisions of administrative boards created by statute in this State without requiring that the testimony taken before such boards be reduced to writing for such purpose. But it is unnecessary that we shall here digress to illustrate.
>
> "The Legislature itself had the right in the first instance to prescribe the general rule and regulation as to the spacing of oil and gas wells and to provide for exceptions thereto under given circumstances, and it had the right to delegate this legislative power to a special administrative agency, composed of the State Oil and Gas Supervisor, who is to be a competent

> petroleum engineer or geologist with at least five years experience in the development and production of oil and gas, and therefore presumed to have expert knowledge as to the proper rules and regulations for the spacing of oil and gas wells, and also the Governor, Attorney General, and State Land Commissioner, as it has done by Section 5 of Chapter 117, Laws of 1932, now Section 6136, Code 1942. And it is to be conceded that in adopting such general rule and regulation, the Oil and Gas Board was acting in a legislative capacity; and we are of the opinion that in granting the exception involved in the instant case to the said general rule and regulation the said Board was likewise acting in at least a quasi legislative capacity. In order that any hearing shall be judicial in character, it must proceed upon past or present facts as such, which are of such nature that a judicial trial tribunal may find that they do or do not exist, while in making these conservation rules and the exceptions thereto the larger question is one of state policy. So that what is to be made of the facts depends upon their bearing upon a legislative policy for which persons of special training and special responsibility have been selected.

There appeared to be little doubt in the minds of the Mississippi court, and there is little doubt in ours, that if the Legislature had seen fit it could have adopted this general spacing rule and regulation and could also have heard testimony as to whether exceptions should be provided for, and the fact that it may have conducted such a hearing would not have rendered its action judicial. The Mississippi court concluded that:

> 'And since the Legislature had the power to delegate this function to a Board composed of the officials hereinbefore mentioned, we are of the opinion that the action of said Board in adopting both the general rules and regulations, as provided for by the statute, and the exceptions thereto after a hearing, was as heretofore stated likewise legislative; that, therefore, the Circuit Court would be without constitutional power on appeal to substitute its own opinion as to what are proper oil conservation measures for that of the State Oil and Gas Board, on a legislative or administrative question. Since the separation of executive, legislative and judicial powers,. . . . . forbid."

In view of the presumption of validity of statutes, the Mississippi court held that the authority of the court to approve or disapprove the action of the board may be upheld by

> "limiting its authority in that behalf to the right to conduct a hearing to the extent only of determining whether or not the decision of the administrative agency is supported by substantial evidence, is arbitrary or capricious, beyond the power of the Board to make, or violates some constitutional right of the complaining party....."

The court further held that in determining these questions the circuit court would be acting judicially and to that end it might hear evidence to the extent of determining what state of facts the administrative body acted on. But the court specifically limited the evidence which might be introduced by saying:

> "But to allow an appellant to present to the Circuit Court a different state of case or one based on additional facts would merely tend to becloud the issue as to whether or not the administrative body had based its decision on substantial evidence, had acted arbitrarily or capriciously, beyond its power, or violated some constitutional right of the party affected thereby. In other words, to permit a trial de novo in the Circuit Court on a legislative or administrative decision of the State Oil and Gas Board, within the common acceptance of the term 'tried de novo' would permit a party to withhold entirely any showing of these facts, as he contends them to be, from the original board composed of experts and of those charged with the responsibility of a great public policy of the State, and wait until on appeal when he will make his full disclosure for the first time before none-experts in that field to determine as to the proper spacing of oil and gas wells. In such case the Court would be departing from its proper judicial function into the realm of things about which it has no such knowledge as would form the basis for intelligent action."

After disposing of the decisions of the Texas Courts, as not applicable to the Mississippi statute because based upon a statute providing for an independent action rather than an appeal, the opinion as a part of its conclusion recites:

> "Therefore, the only sound, practicable or workable rule that can be announced by the Court is to hold that when the appeal is from either a general rule and regulation or from an exception granted thereto, the Court to which the appeal is taken shall only inquire into whether or not the same is reasonable and proper according to the facts disclosed before the Board, that is to say, whether or not its decision is supported by substantial evidence or is arbitrary or capricious, or beyond the power of the Board to make, or whether it violates any constitutional right of the complaining party."

The concurring opinion of Justice Griffity considers the question of the power of the Court and of the type of evidence which may be presented concluding as follows:

> "The result is the conclusion that the legislature could not confer upon either of the said judicial courts the original authority in either respect above mentioned, and since it could not do so directly, it could not do so by the indirect device of a trial de novo on appeal; and thus there is the further result that all the authority which could be conferred on the courts would be of a review to determine whether the Oil and Gas Board in its order acted within the authority conferred on it by statute, and if so, then whether in making its order it did so upon facts substantially sufficient to sustain its action.
>
> "The essential nature of such a review is such that it must be of what the Board had before it at the time it made its order. It would be an incongruity as remarkable to permit another different record to be made up on appeal to the circuit court as it would be to allow another and a different record to be presented to this Court on an appeal to it. The question is, and must be, what did the Oil and Gas Board have before it, and all this the majority opinion has well and sufficiently pointed out.
>
> "But what the Oil and Gas Board had before it is best and most dependably shown by a certified transcript made by a competent person in precise duplication of what was there heard and what there transpired. It is an incongruity in merely another phase which omits such a transcript, and thereafter would call witnesses to prove what was heard by and what transpired before the Board, as is allowed to be done by the reversal in this case..."

It appears to us that these cases, particularly the last one, which involved an appeal from a board similar to our Oil Conservation Commission, clearly reflect that the most recent decisions leave to the administrative bodies the discretion which has been given them by the Legislature, and that the courts confine themselves solely to the question of whether there is substantial evidence in the record before the Commission on which the Commission's decision can be based, or, in other words, whether the administrative body acted arbitrarily. It further appears that since this substantial evidence rule is the basis for the extent of review, the transcript

of evidence before the Commission is the only evidence which can logically be considered.

New Mexico Law Concerning Appeals and Reviews Of Orders of Administrative Bodies

We come now to the New Mexico law concerning appeals from reviews or orders from administrative bodies, which we consider to bear out our position as to the power of this court to review a decision of the Oil Conservation Commission. As has heretofore been stated, the pertinent provision of the Constitution of New Mexico is contained in Section 1, Article III and is as follows:

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted."

Until rather recent years, the cases in New Mexico concerning the powers of the courts to review decisions of administrative bodies have been confined primarily to appeals from the action of the State Corporation Commission. The Constitution of New Mexico is unique in that it contains the provision for the powers of the Corporation Commission and further provides for removal of matters covered by the constitutional provision to the Supreme Court of New Mexico, and:

> "In the event of such removal by the company, corporation or common carrier, or other party to such hearing the Supreme Court may, upon application in its discretion, or of its own motion, require or authorize additional evidence to be taken in such cause; but in the event of removal by the commission, upon failure of the company, corporation, or common carrier, no additional evidence shall be allowed.....
>
> "..... the said court shall have the power and it shall be its duty to decide such cases on their merits, and carry into effect its judgments, orders, and decrees made in such cases, by fine forfeiture, mandamus, injunction and contempt or other appropriate proceedings."

(Article II Section 7 Constitution of New Mexico)

As the functions and duties of the Corporation Commission have grown, it has become necessary to enact a statute supplementing the Constitution, which provides in effect that a motor carrier being dissatisfied with an order of the Commission, which order is not removable directly to the Supreme Court under the constitutional provisions, may:

> "Commence an action in the district court for Santa Fe County against the Commission as defendant, to vacate and set aside such order or determination, on the ground that it is unlawful or unreasonable. In any such proceeding the court may grant relief by injunction, mandamus or other extraordinary remedy....."

The Statute further provides that:

> "The same shall be tried and determined as other civil actions without a jury."

(New Mexico Statutes 1941 Annotated 68-1363)

It should be borne in mind that some of the cases cited are under the constitutional provision, and some are under the statutory provision.

The first case in New Mexico appears to be Seward v. D. & R. G. 17 N.M. 557, which was a proceeding under the constitutional provision, moving directly from the Commission to the Supreme Court. In this case the matter was removed by the Commission when the carrier refused to comply with the order, and the court refused to allow additional evidence under the Constitutional provision. The Attorney General took the position that the Supreme Court had a right to form its independent judgment in the matter and was not confined to a consideration of the reasonableness and lawfulness of the order of the Commission. He based his position upon the language in the statute quoted above, that the court shall have "the power and it shall be its duty to decide such cases upon their merits." The Supreme Court had this to say:

> "Now if the contention is sound then the provision just quoted invests this court with legislative power to fix rates. There is no doubt but that the people of the state, by constitutional provision could confer such power upon the judges of the Supreme Court. If they saw fit they might combine all the power of government in one department, but such action would not be in accord with the settled policy of the states of the Union, where it has been the studied purpose to, so far as possible, keep separate the three great departments, and we should not so construe the provisions as conferring legislative power upon this body, unless compelled to do so by clear and unmistakable language."

The court held that the only thing to be decided upon the appeal by the Commission was the reasonableness and lawfulness of the order, and they concluded that if the court finds the order reasonable and lawful, it enters a judgment to that effect, but if it finds it unlawful and unreasonable, it refuses to enforce it and the State Corporation Commission may proceed to form a new order under its rule.

This proposition was further discussed in Seaberg v. Raton Public Service Co. 36 N M. 59; 8 P. 2d 100, in which the petitioner had removed a matter before the Corporation Commission directly to the Supreme Court, and the Corporation Commission filed a motion to dismiss. The facts of the case are not particularly pertinent to the present question, but some of the language of the court indicates the position which it was quick to take in these matters. We quoted from the case as follows:

> "The proceeding of removal is not for the review of judicial action by the commission. It is to test the reasonableness and lawfulness of its orders. The function of the Commission is legislative; that of the court, judicial. The Commission is not given power to enforce any order; it being merely a rate-making or rule-making body, doing what, if there were no commission, the Legislature alone could do. The court, on the other hand, can make no rate or rule, since it lacks the legislative power."

Perhaps the most complete discussion of the matter arose in the case of Harris v. State Corporation Commission 46 N.M. 352 P. 2d. 323, which was an appeal under the statute to the district court of Santa Fe county. The carrier had been granted a certificate and another carrier, adversely affected, appealed to the district court. The appeal to the district court was taken by way of a complaint filed by the protestant. At the trial, the plaintiff, instead of introducing the record of the hearing before the Com-

mission, introduced new evidence by way of testimony of seven witnesses. Upon conclusion of the evidence the court made many findings contrary to those of the Commission and concluded, as a matter of law, that the action of the Commission was unlawful and unreasonable. The first question discussed was the scope of judicial review provided for in the statute. The court goes into a rather exhaustive review of the New Mexico authorities and discusses several Law Review articles concerning the subject. Some of its concluding remarks are as follows:

> " When our Legislature enacted Ch. 154, L. 1933, it declared its purpose and policy to confer upon the Commission the power and authority to make it its duty to supervise and regulate the transportation of persons and property by motor vehicle for hire upon the public highways of this state and to relieve the undue burdens on the highways, and to protect the safety, and welfare of the travelling and shipping public and to preserve, foster and regulate transportation facilities...
>
> "Counsel for Appellee contends that in the removal of a cause pending before the Commission under Sec. 51, etc. of the Act, the trial before the District Court is a trial de novo. This view is repelled distinctly by what we said in the Seward Case.....
>
> "Even where statutes of other states have said that upon judicial review of administrative or legislative acts the trial shall be de novo, some courts have held such provision unconstitutional, others hold that the de novo provision is limited to the ascertainment by the court of whether the jurisdictional facts exist and whether there had been due process, and whether the Commission had kept within its lawful authority.
>
> "That question of constitutional right and power raised by administrative action must be tried de novo so that the court may reach its own independent judgment on the facts and the law without being bound by the rule of administrative finality of the facts and that additional evidence may be introduced so that these questions of constitutional right and power need not be decided on the administrative record alone, may be conceded."
>
> "We hold that the District Court erred in receiving and considering testimony other than that which had been produced at the hearing before the Commission."

The most recent case on this subject is New Mexico Transportation Co., Inc. v. State Corporation Commission, 51 N. M. 59; 178 P. 2d 580, in which the Commission affirmed the position taken in Harris v. State Corporation Commission, supra, and refused to disturb an order of the State Corporation Commission. The Court said:

> "Following the rules there announced, we are unable to say from an examination of the record that the order of the Commission granting these certificates was either unlawful or unreasonable. It is not sufficient that we might have reached a different conclusion."

This matter has also been discussed in general in cases arising out of the enforcement of the liquor laws of New Mexico by the Bureau of Revenue. Out statutes authorize the Commissioner of Revenue to establish a Division of Liquor Control and to appoint a chief of this division to administer the powers and duties of it.

(New Mexico Statutes 1941 Annotated, 61-501 to 61-525)

Among powers given to the Division of Liquor Control is the power to issue, revoke, cancel or suspend licenses.

There are different appeal provisions from orders referring to the issuance of licenses and those referring to cancellation or revocation of licenses. The provisions relative to appeal of orders concerning issuance of licenses are found in Section 61-516 of New Mexico Statutes 1941 Annotated. This section originally provided as follows:

> "Any person, firm or corporation aggrieved by any decision made by the chief of division as to the issuance or refusal to issue any such additional license may appeal therefrom to the district court of Santa Fe County, by filing a petition therefor in said court within thirty (30) days from the date of the decision of the chief of division, and a hearing on the matter may be had in the district court. Provided, however, that the decision of the chief of division shall continue in full force and effect, pending a reversal or modification thereof by the district court."

In 1945 the provision was amended by adding the words "which hearing shall be de novo."

The section of the statute dealing with revocation and suspension of licenses, and appeals from such orders, in Section 61-605, New Mexico Statutes 1941 Annotated, which provides, among other things, that:

> "The matter on appeal shall be heard by the judge of said court without a jury, and such court shall hear such appeal at the earliest possible time granting the matter of the appeal a preference on the docket. The judge, for good cause shown may receive evidence in such proceedings in addition to that appearing in the record of hearing and shall act aside and void any order or finding which is not sustained by, or has been overcome by, substantial, competent, relevant and credible evidence."

This section of the statute has not been amended to provide for a de novo hearing.

In the case of Floeck v. Bureau of Revenue, 44 N. M. 194; 100 P 2d 225, an appeal was taken under the section relating to cancellation of a liquor license, Section 61-605 New Mexico Statutes 1941 Annotated. Some question was raised as to the Constitutionality of the liquor control act, but the court did not pass upon that question. It did, however, have this to say:

> "Assuming the constitutionality of Sec. 1303, it did not undertake to vest in the district court the administrative function of determining whether or not the permit should be granted. It gave the court authority only to determine whether upon the facts and law, the action of the Commissioner in cancelling the license was based upon an error of law or was unsupported by substantial evidence or clearly arbitrary or capricious. (Ma-King Products Co. v. Blair, 271 U. S. 479, 46 S. Ct. 544, 70 L. Ed. 1046); otherwise it would be a delegation of administrative authority to the district court in violation of the Constitution. Bradley v. Texas Liquor Control Board, Tex. Civ. App., 108 S.W. 2d 300; State v. Great Northern Ry. Co. 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1907B, 1201.
>
> "The New Mexico Liquor Control Act is an exercise of the police power of the state, for the welfare, health, pease, temperance and safety of its people. It prescribes the terms and conditions upon which licenses shall be issued and the gounds and procedure for their cancellation; all of which are made purely administrative."

Apparently the question was not raised in this case as to the introduction of new evidence.

However, in the case of Chiordi v. Jernigan 46 N. M. 396; 129 P. 2d 640 this same statute was under consideration. After revocation of his license, a licensee appealed to the district court of Santa Fe County. In discussing the authority or jurisdiction of the district court, the Supreme Court had this to say:

> "No provision is made on appeal for trial de novo, and jury trials are specifically excluded. It is provided that the judge for good cause shown may receive additional evidence. It is obvious that he must review the evidence taken in the hearing before the Chief of Division. As the trial is not de novo the Chief of Division's decision on the facts must be reviewed as he heard it, and it could not be if additional evidence was authorized upon the question of whether appellee was the party in interest. It is our conclusion that the new evidence which may be admitted must be confined to questions of whether the Chief of Division acted fraudulently, capriciously or arbitrarily in rendering his decision. Ma-King Products Co. v. Blair, supra; Floeck v. Bureau of Revenue, supra; Texas Liquor Control Board v. Floyd, supra.
>
> "The proceedings before the Chief of Division, while quasi judicial, were essentially administrative. The questions before the district court and here, are questions of law. They are, whether he acted fraudulently, arbitrarily or capriciously in making his order, and, whether such order was supported by substantial evidence, and generally, whether the Chief of Division acted within the scope of the authority conferred by the liquor control act."

It should be noted that some of the conclusions appear here to be based upon the fact that there is no provision for a trial de novo under this section of the statute.

It may have been this language which prompted the Legislature of 1945 to insert in Section 61-516 New Mexico Statutes 1941 Annotated, which is the section dealing with appeals refusing to issue licenses, the de novo provision. As has been noted above, however, this provision was not inserted in Section 61-605.

In the recent case of Yarbrough v. Montoya, 214 P. 2d 769, the Supreme Court of New Mexico was called upon to pass upon the effect of the insertion of the de novo provision in Section 61- 516, New Mexico Statutes 1941 Annotated. As will be recalled this de novo provision was inserted after the Floeck and Chiordi cases were decided. The Court again called

attention to the fact that the Chief of the Liquor Division is given wide administrative judgment and discretion with respect to new licenses, and that the statute does not provide for formal hearing, and there is no requirement that he may only consider evidence that would be admissible in a court hearing. There is likewise no limitation upon evidence before the Oil Conservation Commission. The Court, in concluding that the de novo provision does not change the fundamental proposition of limitation of judicial review, had this to say:

> "We are further committed to the doctrine that the courts may not overrule the acts of administrative officers on matters committed to this discretion unless their actions are unlawful, unreasonable, arbitrary, capricious, or not supported by evidence."

The Court said further:

> "The applicant says this rule no longer obtains since the provision for a hearing de novo was written into the liquor law in 1945. A sufficient answer to this contention is found in Floeck case, supra, where in speaking of the powers of the District Court on appeal under the 1937 liquor act, we said: 'Assuming the constitutionality of Sec. 1303, it did not undertake to vest in the district court the administrative function of determining whether or not the permit should be granted. It gave the court authority only to determine whether upon the facts and law, the action of the Commissioner in cancelling the license was based upon an error of law or was unsupported by substantial evidence or clearly arbitrary or capricious (Ma-King Products Co. v. Blair, 271, U. S. 479, 46 S. Ct. 544, 70 L. Ed. (1046); otherwise it would be a delegation of administrative authority to the district court in violation of the Constitution.'
>
> "See also the case of Harris v. State Corporation Commission, 46 N. M. 352, 129 P. 2d 323."

It is true that the statutes for appeal from orders of the Commissioner of Public Lands, Section 8-867 New Mexico Statutes, 1941 Annotated, provide for trials de novo, but we find no cases in which the question of extent of review was raised.

CONCLUSIONS

Based upon the decisions and authorities cited, it is the position of Texas Pacific Coal and Oil Company that the nature and scope of the review by this Court of orders of the Oil Conservation Commission, including the question of what evidence may be presented, is limited as follows:

1. In view of the apparent attempt to delegate non-judicial functions to this Court, the review provisions of the statute are unconstitutional unless limited by the Court to the affirming or vacating of the order of the Commission.

2. This court is limited upon review to a determination of whether the action of the Commission was unsupported by substantial evidence or was clearly arbitrary or capricious.

3. In making this determination this Court cannot pass upon the Commission's action unless it limits itself to the transcript of evidence before the Commission.

Respectfully submitted,

ATWOOD, MALONE & CAMPBELL

By_____

EUGENE T. ADAIR

Attorneys for Protestant,
Texas Pacific Coal & Oil Company.

IN THE DISTRICT COURT OF LEA COUNTY
STATE OF NEW MEXICO

PHILLIPS PETROLEUM COMPANY, Plaintiff,	)	
vs.	)	No. 11, 422
OIL CONSERVATION COMMISSION OF NEW MEXICO, ET AL. Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES

1. Skelly Oil Company, Shell Oil Company and Magnolia Petroleum Company are all "adverse parties" within the meaning of sec. 69-223 (b), NMSA, and are therefore at least necessary parties defendant in this suit.

2 Words and Phrases 549 et seq.
Rule 19 (b) NMRCP
6 Cycl. of Fed. Procedure 478-479, 481
Shields v. Barrow, 15 L. Ed 158, 17 Howard (58 U.S.) 130

6 Cycl. of Fed. Procedure 482
Washington v. U. S. 87 F 2d 421

2. The Oil Conservation Commission has been granted wide powers by the legislature to deal with matters involving the production of oil and gas in this state. Such powers are legislative in nature, and the Commission has also been granted a broad discretion in the exercise of these powers.

Sec. 69 - 210, NMSA
Sec. 69 - 211, NMSA

3. There is an unequivocal provision for the separation of powers in New Mexico.

Sec. 1, Art. III, New Mexico Constitution

4. (a) Non-judicial functions cannot be exercised or imposed upon courts.

42 Am. Jur. 563-564
Jaffe v. State Dept. of Health 135 Conn. 339
64 A 2d 330, 6 ALR 2d 654

Harris v. State Corp. Com., 46 NM 352, 129 P 2nd 323

Manning v. Perry 62 P2d 693 (Ariz.)

(b) The District Court, in this proceeding, cannot amend or modify the Oil Commission's order, such action being repugnant to the fundamental law providing for separation of powers.

Transcontinental Bus System v. State Corp. Commission 241 P 2d 829; 56 NM 158
Davis on Administrative Law, Sec. 256

(c) Courts may not overrule the acts of administrative officials unless their acts are unlawful, capricious, or not supported by the evidence.

Yarborough v. Montoya 54 NM 91, 214 P 2d 769

Floeck v. Bu. Rev. 44 NM 194, 100 P 2d 225

Harris v. State Corp. Comm. 129 P 2d 323, 46 NM 352

5. With the foregoing basis and fundamental law in mind, the New Mexico Supreme Court has narrowly construed even those statutes which have provided for a "trial" or "hearing" de novo.

Floeck v. Bu. Rev., supra

Yarborough v. Montoya, supra

In addition although "de novo" has been given different meanings, the provision for a "review" is inconsistent with the concept of a trial "de novo" in its broader meaning.

Denver R. G. v. Public Service Commission. 100 P 2d 552 (Utah).

6. Even if it should be ruled that additional evidence may be introduced in this Court, such further evidence shall be limited to that which may clarify the record, or that which was not available to the Commission below.

42 Am. Jur. 663

Colteryham Dairy v. Milk Control Comm.

332 Pa. 15, 1 A 2d 775, 122 ALR 1049

7. In any event, the "review" in this case is limited to those questions presented to the Commission by Plaintiff in its application for rehearing.

Sec. 69-223 (b), NMSA.

NOTE: The foregoing is not intended to be a brief of this whole, and rather complicated subject. If the court desires an extended brief on some or all of the points raised herein, counsel for the Commission will be happy to supply the same to the Court in a few days time.

MELVIN T. YOST

W. F. KITTS

Attorneys for Oil Conservation Comm.

The question of primary interest to the Oil Conservation Commission in this case is the proper scope of review for its decisions. Sec. 65-3-22 of the N.M.S.A. (1953 Comp.) provides that:

"The trial upon appeal shall be "de novo" without a jury, and a transcript of proceedings before the Commission, including evidence taken in hearings by the Commission, shall be received in evidence by the court in whole or in part upon offer by either party subject to legal objections to evidence, in the same manner as if such evidence was originally offered in the District Court."

My argument will be limited to a discussion of the various interpretations of the term "de novo".

This subject has been a fruitful source of litigation for many years and as a result there has developed at least two distinct meanings for the term "de novo"; the first of which is exemplified in Article 6, Sec. 27 of New Mexico Constitution which provides that in appeals to the District Court from the Probate Court and Justices of the Peace, trial shall be had de novo.

The New Mexico Supreme Court, Case of State v. Coats 18 NM 314, 137 Pac. 597 (1913) held that the District Court is required to enter its own independent judgment in such cases and further than any discretion conferred upon the Justice of the Peace is necessarily transferred to the District Court by the Appeal.

The same term-trial de novo, appears again in the laws of New Mexico, but in an altogether different sense, in the statutes providing for judical review of administrative decision an example of which is the statute involved in the case at bar. In contrasting the two distinct uses of the term de novo it should be noted that in the appeals from Justices of the Peac e that the function of the inferior court is purely judicial in that it passes judgment on past acts and redresses wrongs between private individuals while in the case of the administrative body the action is prospective and general in its application and thus legislative in character.

In the former case the original decesion is made by an untrained and often illprepared layman while in the latter case the decision is the result of the deliberation and judgment of a highly trained technical staff. This distinction is well defined in the case of Denver & R G W R v. Public Service Commission 100 Pac 2nd 552----------.

Upon examining our appeal statute it might be urged that the foregoing interpretations of the term de novo are inconsistent with the clause in the same statute permitting the court to receive evidence " in addition to the transcript of proceedings before the Commission. "

Whibe such an interpretation is of course possible it is certainly not necessary. The Cupreme Court of Penn. in the case of Colteryahn Dairy v. the Milk Control Board , 332 Pa 115, 1 A 2 775. interpreted a similar provision as allowing additional evidence only for the purpose of clarifying the record or showing the actual effect of the order complained of. The court went ahead to say that it was not the intention of the legislature that the dealers or producers should withhold evidence at the administrative hearing and then on appeal submit that evidence to the court, thus presenting an entirely new case and forcing the court to exercise legislative power.

State v. Coats et al.
18 NM 314 137 Pac. 597 (1913)

One Bledsoe was the prosecuting witness in a case before a Justice of the Peace. The defendent was acquitted and the Justice of the Peace finding that the case had been maliciously instituted taxed the cost to the complaining witness which he was authorized to do in his discrition. The case was appealed to the District Court and there dismissed due to the fact that the state failed to introduce any evidence whatsoever as to the guilt of the defendant. The state appealed the dismissal on the ground that the imposition of costs upon the prosecuiting witness resting solely within the discretion of the Justice of the Peace, no appeal could be had to review such discretion. In rejecting this contintion the court said: " This would be true if the app. ct. simply reviewed the judgment of the Justice of the Peace and reversed or affirmed the same; but under statute the case in the District Court must be tried de novo and the District Court is necesssrily required to enter its independent judgment. This being true the discretion conferred upon the Justice of the Peace is necessarily transferred to the District Court by the appeal.

Bisti case

SKELLY OIL COMPANY

PRODUCTION DEPARTMENT
C. L. BLACKSHER, MANAGER

TULSA 2, OKLAHOMA

February 17, 1958

New Mexico Oil Conservation Commission
P. O. Box 871
Santa Fe, New Mexico

Attention: Mr. Jack Cooley

Gentlemen:

Hereto attached are a number of citations from Oklahoma, Louisiana, Kansas and Texas regarding the Commission's authority to do what they did in the Bisti matter of adjusting 40-acre location through the allowable route in protecting correlative rights.

Yours very truly,

George W. Selinger

GWS:dc

OKLAHOMA

Champlin vs. Corporation Commission 51 Federal 2nd 823 - 286 U.S. 210

"We are of the opinion that the limiting of the taking to the Market Demands is a reasonable regulation for the prevantion of waste and the protection of co-equal rights of the owners of land over such pool. Where the public's interest is involved, perferment of that interest over the property interest of the individual is one of the distinguishing characteristics of every exercise of the policepower which affects property". Quoting Miller vs. Schoene 276 U.S. 272.

Sterling vs. Walker - 25 Pac. 2nd 312.

"Fair dealing and common justice as well as the statutory provisions demanded that if the state is to exercise its power to limit the production of oil from a c s of s it must likewise prevent the different producers from taking an unratable portion of the oil therefrom.

"We cannot completely ignore nor lightly brush aside the manifest necessity of vesting in boards and commissions sufficient power to secure a practical and efficient administration of the law and the accomplishment of the purposes and functions of government. Complex and ever changing conditions, such as confront us in connection with administration of an Oil and Gas Conservation act, renders impossible the practical enforcement of laws which are so rigid in their requirement that they cannot bend to meet the varying conditions which may arise. One of the most practical methods which has been devised for the accomplishment of such ends is the vesting by the legislature in a commission charged with the administration of the law, the power to promulgate rules and regulations. Practical considerations have no doubt played an important part in causing the commissions to sustain the validity of legislation combining the powers of government in one board or Commission. Such powers, vested are administrative in their character and there is no practical or legal reason to vest them in the judiciary. While hasty and ill considered action should not be taken by the Commission yet the rights of the various operators should be spedily determined and unreasonable delay should be avoided. The rapid changing conditions of the oil fields demand a proper and prompt administration of the law.

Oils Mc vs. C.C. 25 Pac 2nd 703.

Method of Proration in Oklahoma City field was changed from time proration plan to percentage plan.

While we sustain Pl to the extent that we decide that he was entitled to have production of his well based upon an open flow hole, we cannot agree with his further contention that he is entitled to dictate to the Commission the manner in which the amount of the open flow production should be determined. Pl insists that

the amount of production should be determined by a method of mathmatical calculation based upon the production of the well at the time it was brought in on production. The method in which the pat production of the well should be determined is a matter pecularly within the province of the Corporation Commission, subject only to the limitations prescribed by law. And it is within their province and duty in so deciding to take into consideration all of the elements and factors necessary to arrive at a just conclusion.

Wilcox vs. Walker - 32 Pac. 2nd 1044

Quoting Wichita vs. Public Utilities 260 U.S. 48

"That is the general section of the act comprehensively describing the duty of the Commission vesting it with power to fix and order substuting new rates for existing rates.

It is to be noted that this Commission determine the market demand for a certain definite future period and then determine a new and another market demand for another definite future period.

State of Oklahoma vs. Bond et al. 45 Pac 2nd 712.

Sec. N.M. Statutes 65-3-5 Powers of Commission which is similar to Oklahoma Statute referred to in this case).

The foregoing section of the act empowers the Commission to make, change, or modify its orders applicable to each common source of supply. It was inserted in the Act for a purpose. The legislature realized no doubt that conditions surrounding the production of oil from a common source of supply would change from time to time. To meet the exigencies of such changed conditions the Commission was empowered by the quoted section of the Act to exercise a discretion judicial in nature, and to make, and modify its orders to accomplish the purposes of the Act, that is, the prevention of waste and the permission to each producer to take his ratable part of the oil from the common source.

Under the Act the Corporation Commission is empowered to limit the amount of oil to be taken in a stated period so as to prevent waste and to provide for a ratable taking of the oil as between the producers but it has no power to compel a producer to produce the amount of oil he is permitted or allowed to produce from the common sourc e of supply during such period.

Wilcox vs Bond 48 Pac 2nd 820.

It is now well settled that the State has an interest paramount to owners in the potential production of oil from the underground reservoirs and that within reasonable limits it is the duty of the

State to preserve to the owners of oil producing lands, where production is bad from a common source of supply the natural forces and elements necessary for the ultimate production of the maximum amount of oil by the owners producing from said common source of supply. With this recognition of the paramont right of the State to restrict production of oil to prevent waste, a consequent duty to prevent inequitable taking from a common source of supply necessarily arose. In exercising this function the State necessarily was compelled to consider and safeguard the correlative rights and obligations of the operators in a common pool. By the passage of the Act the State fixed constantly in mind such correlative rights and obligations.

Republic Natural Gas vs. State of Oklahoma 180 Pac 2nd 1009
Adjust Correlative rights

LOUISIANA

Hunter vs. McHugh 11 So. 2nd 495.

There is a co-equal right in common owners to take from the common source of supply and the legislature power may be exercised to protect all collective owners. The fact that there may have been no waste or wasteful use of gas in the ordinary sense in which the word waste or the term wasteful use is used is no reason why the Commissioner should not have taken steps for the prevention of waste and to avoid the drilling of unnecessary wells in that field. The purpose of establishing drilling units is not merely to stop the wasting of gas, which is already going on. The purpose is said to be to prevent waste and to avoid the drilling of unnecessary wells. It goes without saying that the drilling of more wells than are necessary to drain a gas field efficiently and economically causes waste; it is a waste of valuable material, skill and labor; a waste of gas for fuel in the drilling of unnecessary wells; and a waste of gas in allowing the necessary wells to clean themselves out before being placed on production. See Placid vs. North Central Texas 19 So. 2nd 616.

Alston vs. Southern Production Company 21 So. 2nd 283

Validity of orders increasing the size of drilling units.

The effect of the ruling was to supersede pooling agreements made between owners of the land and lessors under authority of a previous order.

Sec. Dillion vs. Halcomb 110F 2nd 610.

KANSAS

State Corporation Commission of Kansas vs. Wall 113 F. 2nd 877

Property right of owner and lesser of land in and to the gas beneath the surface is not an absolute one. Those substances, because of their pecularity in the natural state partake more in the nature of common property title to which becomes absolute only when they are captioned and reduced to possession. Because they are natural resources the public has a definite interest in their preservation from waste and the state has the power to regulate the production of oil and gas for the purpose of preventing waste and to protect the correlative rights of owners producing oil or gas from a common source of supply.

Bay Petroleum Corporation vs. Corporation Commission of Kansas 36F Supp. 66.

We think the State may in its efforts to certain these objections (prevention of waste and protection of correlative rights) consider the oil industry of state as a whole, restrict allowed production to a predetermined market, prorate the allowed production among the several pools in the manner authorized by the statute and forbid production in a given pool in excess of the amounts allowed.

Bennett vs. Corporation Commission 142 Pac. 2nd 810.

Recognizes the policy of conservation and ruled that it was illegal to produce oil under conditions which injured the correlative rights of others in a pool. A duty is imposed on the Commission to regulate production in a manner which prevented inequitable or unfair taking.

TEXAS

Railroad Commission vs. Konona - 174 S.W. 2nd 605.
Concerning validity of a water oil ratio order. Limiting amount of water any oil well could producer the order had the effect of limiting the production of oil from oil wells even though they were claimed as marginal.

See Brown vs. Humble 83 S.W. 2nd 935,944
87 S.W 2nd 1069
Gulf vs. Atlantic 131 S.W. 2nd 73
Railroad Commission vs. Gulf 132 S.W. 2nd 254
Marrs vs. Railroad Commission 177 S.W. 2nd 941
Railroad Commission vs. Humble 132 S.W. 2nd 824

Railroad Commission vs. Continental Oil Company 157 S.W. 2nd 695
Reasonable market demand for a field and state as a whole.

Corzelius vs. Harrell 186 S.W. 2nd 961
Power of State to regulate production solely for purpose of adjusting correlative rights.

To Jack Cooley from Speedy

GMP/GPE 5/20/58

Shell Oil Company appeal
from order of New Mexico Oil
Conservation Commission
No. 6553 Dist.Court, San Juan
County, New Mexico

SCOPE of REVIEW

The New Mexico Statutes 1953 65-3-22 provides for the appeal from the Oil Conservation Commission to the District Court. A question has arisen with respect to the trial "de novo" aspects of this statute as well as the portion of it which grants to the District Court the right to enter such order in lieu of the Commission's order as the court may determine to be proper. No construction of either the constitutionality or the procedure to be followed under this statute has ever been made by the Supreme Court of New Mexico.

A somewhat similar statute (75-6-1) dealing with water rights has to do with an appeal from the decision of the State Engineer to the District Court. The statute involved provides that such proceeding shall be "de novo" and in other respects is similar to 65-3-22.

In Spencer v. Bliss, State Engineer (N.M. 1955) 60 N.M.16, 287 P.2d 221, the Supreme Court of New Mexico was considering among other things 75-6-1. With respect to the "de novo" feature of the statute the court quotes at length from Farmers Development Co. v. Rayado Land & Irrigation Co., 18 N. M. 1, 133 P. 104. The Farmers case was a case being therein relied on by the plaintiff. In the Spencer case the court said, at page 227 of 287 P. 2d:

> "Counsel for the plaintiff pin their greatest faith in what this court said in Farmers Development Company v. Rayado Land & Irrigation Co., 18 N. M. 1, 133 P.104, 106. Among other things, we said:
>
> > "'The act in question, as shown by the above excerpts, clearly shows that in each instance, where a hearing is provided for, or required, the same shall be de novo, or an original hearing, where the engineer, board of water commissioners or the court hears such competent proof as may be offered by the parties interested in the proceeding, and forms his or its own independent judgment relative to the issues involved. The board of water commissioners does not, nor is it called upon,

to review the discretion of the engineer. Upon appeal to it, it determines for itself the question as to whether the application should be approved or rejected. It is not bound, controlled, or necessarily influenced, in any way, by the action of the engineer. It hears, or may hear, additional evidence, and upon the record, and such evidence as is properly before it, it decides the question presented. Likewise in the district court, the hearing is de novo. The court may consider such evidence as has been introduced before the board and engineer, and transcribed and filed with it; but it also hears additional evidence, and is not called upon to determine whether the engineer or the board of water commissioners erred in the action taken and order entered, but must form its own conclusion and enter such judgment as the proof warrants and the law requires. It does not review the discretion of the engineer or the board, but determines, as in this case it was required by the issue presented, whether appellee's application to appropriate water should be granted. The court, in order to form a conclusion upon the issues, was necessarily required to determine, for itself, whether there was unappropriated water available, whether the approval of the application would be contrary to the public interest, and all other questions which the engineer was required, in the first instance to determine. In such case the question recurs anew as to whether the application shall be granted. This being true, the second assignment of error must fail because it is not well taken.' (Emphasis ours.)

"Counsel for the State Engineer putting chief reliance on our decisions in Harris v. State Corporation Commission, 46 N.M.352, 129 P.2d 323; Floeck v. Bureau of Revenue, 44 N.M.194, 100 P.2d 225, and Yarbrough v. Montova, 54 N.M.91, 214 P.2d 769, contend the finding or decision of the State Engineer is not to be disregarded or set aside unless unlawful or unreasonable, that is, 'capricious' or 'arbitrary.'

"There is much to support them in their claim to such a holding in what is to be read from language of Mr. Justice McGhee in Yarbrough v. Montoya, supra. There, too, we were dealing with a statute authorizing an appeal to the district court from the decision of the Chief of the Division of Liquor Control upon which the hearing or trial was to be de novo, as in the case at bar. Apparently, the decision in the Rayado Land & Irrigation case went unnoticed when we were considering Yarbrough v. Montoya. To say the least, it was not cited. And there was even a hint in the latter case that to hold otherwise than we did on the question at issue would subject the statute involved to serious question of its constitutionality.

"However, without appraising Yarbrough v. Montoya, supra, as a modification of our decision in the Rayado case, as it may well be deemed, we can see room within the full scope of the holding in the latter case, in the language 'or necessarily influenced' italicized above, for the district court to give weight to a merited finding of the State Engineer. Just as we can find support in Manning v. Perry, infra, for a

modification of Rayado case and still preserve the de novo trial provided for.

"A case much like the present and relied upon strongly by the defendant, is Manning v. Perry, 48 Ariz. 425, 62 P.2d 693, 695, mentioned next above. It contains language in which we can find little to critize, if we should be called upon to speak decisively on the question discussed, as we are not in view of the conclusion reached. In that case the Supreme Court of Arizona, without denying the appeal to the district court character as a trial de novo, would decline to overturn the decision of the State Engineer, unless it 'be without support of the evidence, or is contrary to the evidence, or is the result of fraud or misapplication of the law.'

"The administration of the public waters of the state, especially the underground waters is a task requiring expert scientific knowledge of hydrology of the highest order. The administration of surface waters alone, where the trained and experienced engineer may see and observe what he does, or should do, and what the agency he administers is doing, is beset by difficulties enough. But when the administration is turned to underground waters the engineer's troubles are multiplied a hundredfold.

"We are satisfied we need not here decide just what effect the decision of the State Engineer should be given in the de novo trial provided for the hearing of an appeal. Especially, is this true in view of our conclusion that the plaintiff has failed to satisfy his burden of proving existing rights will not be impaired by the granting of his application. We think we have demonstrated however, it will be an unfortunate day and event when it is established in New Mexico, that the district courts must take over and substitute their judgment for that of the skilled and trained hydrologists of the State Engineer's office in the administration of so complicated a subject as the underground waters of this state."

Some of the reasoning of the court in the Spencer case indicates that although Shell's appeal under 65-3-22 is "de novo", nevertheless the Oil Conservation Commission's order should not be overturned unless it is unlawful, unreasonable, capricious or arbitrary.

The Spencer case (and the cases cited therein) it seems to me would dictate that in our answer to be filed on or before June 9, we raise the point that the District Court is powerless to overturn the order of the Commission unless said order is arbitrary. The theory behind this idea is that the Constitution of New Mexico contemplates a separation

of powers between the executive, legislative and judicial branches of the government, and therefore the Constitution does not contemplate or sanction the granting of legislative (so-called administrative) powers to the judicial branch of the government.

But does the New Mexico Constitution actually prohibit the substitution of the discretion of a district court for that of a so-called administrative body?

Article III, Sec. 1 of the Constitution of New Mexico provides:

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this Constitution otherwise expressly directed or permitted.

Article VI, Sec. 13 of the Constitution of New Mexico provides:

> "The district court shall have original jurisdiction in all matters and causes not excepted in this Constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and all other writs, remedial or otherwise in the exercise of their jurisdiction; provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction. The district courts shall also have the power of naturalization in accordance with the laws of the United States. Until otherwise provided by law, at least two terms of the district court shall be held annually in each county, at the county seat."

In Article VI, Sec. 13, the words "and such jurisdiction of special cases and proceedings as may be conferred by law" might possibly be held to clothe the legislature with power to invest a district court with jurisdiction to substitute its discretion for that of an administrative body — in our instance the Oil Conservation Commission of New Mexico.

However, such a construction would give the language of Article VI, Sec. 13, a meaning which completely ignores the provisions of Article III, Sec. 1. In my opinion, the words of Article VI, Sec. 13 "and such jurisdiction of special cases and proceedings as may be conferred by law" refers to jurisdiction which is essentially juridical. The above quoted phrase is general; whereas the inhibition contained in Article III, Sec. 1 is specific.

In Yarbrough v. Montoya, (N.M. 1950) 214 P. 2d 769, the Supreme Court of New Mexico was construing an act of the legislature of that state which dealt with the issuance of licenses to sell intoxicating liquors.

That statute provided for an appeal de novo, as follows:

> "Any person, firm or corporation aggrieved by any decision made by the chief of division as to the issuance or refusal to issue any such additional license may appeal therefrom to the district court of Santa Fe County, by filling a petition therefor in said court within thirty (30) days from the date of the decision of the chief of division, and a hearing on the matter may be held in the district court which hearing shall be de novo. Provided, however, that the decision of the chief of division shall continue in full force and effect, pending a reversal or modification thereof by the district court for good cause shown.
>
> "Any appeal from the decision of the district court to the Supreme Court shall be permitted as in other cases of appeals from the district court to the Supreme Court."

With respect to the power and authority of a court to substitute its discretion for that of an administrative body, the court said at pages 771 and 772 of 214 P.2d:

> "We are further committed to the doctrine that the courts may not overrule the acts of administrative officers on matters committed to their discretion unless their actions are unlawful, unreasonable, arbitrary, capricious, or not supported by evidence. Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225, 228.
>
> "The applicant says this rule no longer obtains since the provision for a hearing de novo was written into the liquor law in 1945. A sufficient answer to this contention is found in Floeck case, supra, where in speaking of the powers of the District Court on appeal under

the 1937 liquor act, we said:

> "'Assuming the constitutionality of Sec. 1303, it did not undertake to vest in the district court the administrative function of determining whether or not the permit should be granted. It gave the court authority only to determine whether upon the facts and law, the action of the Commissioner in cancelling the license was based upon an error of law or was unsupported by substantial evidence or clearly arbitrary or capricious (Ma-King Products Co. v. Blair, 271 U.S. 479, 46 S.Ct. 544, 70 L.Ed. 1046); otherwise it would be a delegation of administrative authority to the district court in violation of the Constitution.'"

The Supreme Court of New Mexico then went on to say, at page 773 of 214 P.2d, that:

> "That the District Court of Santa Fe County in a hearing on an appeal from the decision of such administrative officer may only reverse it where it is established by the evidence that the action of such official was unreasonable, arbitrary or capricious."

In State v. Huber (W.V. 1946) 40 S.E. 2d 11, 168 A.L.R. 808, the court had under consideration a statute which granted to a Beer Commission power to revoke beer licenses and also granted concurrent jurisdiction to a court to revoke such licenses.

The Constitution of West Virginia contains provisions similar in many respects to those of the State of New Mexico. Article V of the West Virginia Constitution provides:

> "The Legislative, Executive and Judicial Departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature."

Article VIII, Sec. 12 of the West Virginia Constitution provides in part regarding the jurisdiction of Circuit Courts, that:

> "They shall also have such other jurisdiction, whether supervisory, original, appellate, or concurrent, as is or may be prescribed by law."

It was argued in the Huber case that the above quoted language from Article VIII, Sec. 12, was intended to give to the legislature unlimited power to extend the jurisdiction of the Circuit Courts. But the Supreme Court of Appeals rejected this argument saying, at pages 821-822 of 168 A.L.R., that:

> "But if we sustain the present law, conferring jurisdiction on courts of record to entertain proceedings to revoke licenses to sell nonintoxicating beer, it will, in principle, amount to total destruction of the theory of separation of power, intended to be forever secured by Article V of our Constitution. We deem it our duty to attempt to enforce the true meaning, intent and purpose of Article V, rather than to encourage departure therefrom."

And, on page 825 of 168 A.L.R., the Court said:

> "If there is an abuse of power; or if the power conferred by the Legislature be exceeded; or there is arbitrary or fraudulent exercise thereof; or any provision of the Constitution or the statute laws of the State is violated, a judicial question arises upon which the courts may pass judgment. But unless these administrative agencies are at fault in the respects noted above, their power to perform their functions, delegated to them by the Legislature, cannot be controlled by the courts; and, this being true, courts will not assume to exercise administrative power, even though the Legislature may mistakenly authorize them to do so."

The West Virginia court then went on to hold that the statute involved was unconstitutional and invalid, insofar as it conferred concurrent jurisdiction on the Circuit Court to revoke beer licenses. The reasoning in the Huber case is clear and concise and it applies with considerable force to the point involved in the Shell Appeal.

Article III of the Constitution of the United States vests the federal courts with jurisdiction with respect to "cases" and "controversies". It has been held that these so-called constitutional courts may not be invested by Congress with powers or duties of an administrative, rather than a jurisdictional character. (42 Am. Jur. p. 563: Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co. 289 U.S. 266, 77 L. Ed. 1166).

In the **Nelson** case it was held in substance that, while Congress can confer on the courts of the District of Columbia power to hear, review and determine an appeal from the Radio Commission, it (Congress) cannot invest the United States Supreme Court with such power for any purpose. The reason why Congress can so invest the courts of the District of Columbia with such authority is because of the plenary power which Congress holds and exercises over the District.

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REPLY TO
MEMORANDUM BRIEF
OF PETITIONER

Turning now to the memorandum brief of Petitioner, Amerada Petroleum Corporation, we find that on page 23 of the brief they accept the general rule to be as follows:

> "We recognize that as a general rule it has been held that in a judicial review of administrative orders the court can decide only questions of law and that all questions the fact are binding upon the court if there is any competent evidence to sustain them."

Petitioners, however, take the position that this particular case is an exception to this rule as will be hereinafter discussed.

It will be noted that in the first portion of their argument concerning the extent of the power of the District Court to review orders of the Oil Conservation Commission, the petitioner's attempt to distinguish between the New Mexico cases relating to appeals from the Liquir Control Division of the Bureau of Revenue and appeals from the Oil Conservation Commission and they state that protestant Texas Pacific Coal & Oil Company in its argument has relied chiefly upon the liquor cases. At the outset we wish to again call to the attention of the court the fact that the liquor cases referred to in the memorandum brief of protestant are the more recent cases but that a long line of similar cases arising out of the authority of the State Corporation Commission are referred to in protestant's brief. It is our position that the cases arising out of appeals from the Corporation Commission, both under the constitutional provisions and under the statutory provisions make the position of our Supreme Court clear upon this proposition. Later in this brief we will point out to the court the similarities that exist

in the standards by which the Corporation Commission is to be guided and those by which the Oil Conservation Commission is to be guided. We see no essential difference between the powers of these administrative bodies. They all act upon legislative authority delegated under the police power of the State.

In attempting to distinguish the present case from the Liquor Control Division cases, the petitioner has attempted to show that the powers exercised by the Oil Conservation Commission are quasi-judicial powers as distinguished from the administrative or ministerial powers exercised by the Liquor Control Division.

We point out at the outset that if the Oil Conservation Commission is in fact exercising judicial or quasi-judicial powers than it has been granted such powers by legislative act in violation of the constitutional provisions in the State of New Mexico relating to separation of powers. It would thus appear that the petitioner is putting in question the constitutionality of the Oil Conservation Commission Act by raising the proposition that in this particular instance at least the Oil Conservation Commission is exercising judicial powers. In this regard we note in 42 A.J., Public Administrative Laws, Sec. 60 a quotation as follows:

> "In speaking of a power which pertains more to the administrative than to the judicial, yet partakes of the judicial, the court reports referred to it as 'quasi-judicial', or 'judicial in nature'. Also the term 'quasi-judicial' may be used to designate a judicial function, but to indicate that it is exercised by a person other than a judge. However, the fact remains that in this connection the function of any particular act must be either administrative or judicial and there can in reality be no middle or half way ground between them. The use of such terms are but convenient ways of approving the exercise of a judicial power by an administrative officer."

Furthermore, it will be noted that on Page 6 of the Petitioner's brief in quoting a portion of the case of Chiordi vs. Jernigan, supra, the following is shown:

> "The proceedings before the chief of division, while quasi-judicial, were essentially administrative."

It would thus appear that even though the Supreme Court felt that some of the functions of the head of the Liquor Control Division were quasi-judicial that nevertheless even under a de novo provision of that statute the District Court would be limited upon review to a determination of whether the head of the division acted unreasonably, arbitrarily or capriciously.

Petitioner apparently takes the position that one of the factors determining whether the action of an administrative body is judicial or administrative is the mode of the proceedings before that body. Petitioner goes at some lengths into the method of conduct of the hearing before the Oil Conservation Commission as distinguished from the method of conduct of hearing before the head of the Liquor Control Division. It is our position that the method of conducting the hearings has little, if any, bearing upon the nature of the act finally performed by the administrative body. As noted in the 42 American Jurisprudence Public Administrative Law Sec. 41:

> "Investigations and hearings preliminary to an act do not characterize the act as judicial rather than legislative. The ascertainment of facts or the reaching of conclusions upon evidence taken in the course of a hearing may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead."

It appears to us that the court should be more inclined to refuse to rehear matters which have been fully heard before administrative bodies in a case such as this case - where a full and ample hearing was given to the Petitioner before the administrative body - than in those cases where a single administrative official acts without any formal hearing.

We call to the attention of the court the provisions for hearing granted in cases before the State Corporation Commission as reflected in Sections 74-702 and 68-1308 New Mexico Statutes 1941 Annotated. It will be noted that in the cases arising on appeals from the State Corporation Commission the Supreme Court has not felt that simply because there were some formalities in the proceedings before the administrative body that for that reason the action taken by that body was judicial in its nature. On the contrary the court has in all those cases found that the action of the State Corporation Commission was an administrative action and that the court would be violating the constitutional provision against separation of powers were it to again rehear the matters.

In view of the cases previously cited in our memorandum brief and in further view of the admission by Petitioner that the general rule supports our position, we pass now to the final point raised by Petitioner in its memorandum brief.

Having conceded that the general rule is substantially as suggested by the Protestant, Petitioner then seeks some method of bringing the facts of this case within an exception to the general rule. Protestant does not deny that there is a well known exception to the rule, it being that on questions of constitutional right or upon questions of jurisdiction, the court may hear evidence de novo and may exercise its judgment independent of that of

the administrative body. We must, however, vigorously disagree with Petitioner that there is any question of constitutional right or jurisdiction involved here.

At the outset, we respectfully call to the attention of the court the fact that in the petition for rehearing and in the petition upon appeal, the Petitioner has not raised a jurisdictional question and the statute Petitioner supports provides that no matters may be raised upon appeal that were not in the petition for rehearing. It is true that Petitioner has included an assignment of error that the Commission acted contrary to law. It will be pointed out by Protestant in another point to be raised in the pre-trial conference that under the New Mexico decisions, such an assignment is too general in its nature to be considered by the court.

Coming now to the effort of Petitioner to bring its case within the exception to the well established general rule, we now state what the contention of the Petitioner seems to us to be. It contends that the statute limits the power of the Commission in that it may not require an operator to drill more wells than are reasonably necessary to secure his proportionate part of production. Since Petitioner contends that the determination of whether a well will drain 80 acres is the ultimate fact to be determined here, it classifies such fact to be a jurisdictional fact since, if the Commission decides against it in its application for an exception, and the Commission is wrong, it will in effect be requiring it to drill more wells than are reasonably necessary and thereby will exceed its authority. It would then be up to this court to decide de novo whether the Commission is requiring Petitioner to drill more wells than are reasonably necessary.

We will analyze the cases cited by Petitioner, but before doing so it might be worthwhile to note that Petitioner apparently considers the street of jurisdiction to be a one-way street for it takes the position that if the Commission decides against it, the facts are jurisdictional, but if it decides for the Petitioner after the Petitioner has invoked the jurisdiction of the Commission, then the facts were satisfactorily decided and were not jurisdictional.

The cases cited by Petitioner in which the courts held that jurisdictional facts might be heard de novo before the Court are cases involving the primary jurisdiction of the administrative body over the person or the subject matter involved. They were determinations to be made before it could be said that the Commission had the right to hear the matter, as distinguished from the situation here where the Petitioner itself invoked the jurisdiction of the Commission seeking relief and did not raise any jurisdictional question there. An analysis of these cases makes this point apparent.

The principal case cited by Petitioner, and the case most frequently cited concerning the determining of jurisdictional facts upon appeal, is the case of Crowell vs. Benson, 285 US 22, 52 S Ct 285, 76 L. Ed. 598. In that case the Commission had made a determination after hearing evidence and apparently upon a point of contention before it that the relationship of master and servant existed and that the injury occurred upon the navigable of the United States. The statute required that these elements be present before the Commission had any power to pass upon amount of compensation which might be due to an employee under the Longshoremen's and Harbor Workers' Act. The court there said, over the vigorous dissent of Justice Brandeis, that these were jurisdictional facts

court simply held that this being a question for preliminary determination before the Commission could act, it was a jurisdictional matter upon which the Commission could hear evidence de novo. The same circumstances do not exist here, for the primary jurisdiction of the Commission is not questioned by Petitioner who has sought relief from it.

The case of State ex rel Hardie vs. Coleman, 155 So. 129, 92 A.L.R. 988, is a case in which the question of the abuse of executive power was in question and the constitutional rights of an individual were involved. The Court there reached the conclusion that it could not independently determine the sufficiency of evidence to support charges preferred by the executive orders of suspension. The only thing the court there found that it could inquire into was the sufficiency of the facts alleged in the order of suspension and if the order alleged facts which would give the executive jurisdiction, then his determination of the sufficiency of the evidence to support the allegations was not open for independent determination by the Court.

It would therefore appear that the cases cited by the Petitioner are not similar to the case at issue here. It is one thing to say, for instance, that a finding of the State Corporation Commission of New Mexico that a rail line is a common carrier and not a private line is a jurisdictional fact. It is quite another thing to say that when the State Corporation Commission finds that public convenience and necessity does not require additional service - when the facts may be to the contrary - it is deprived of jurisdiction and such a finding is a jurisdictional fact subject to a de novo hearing before the court upon appeal. This appears to us to be the essential difference between the cases cited by Petitioner and the situation involved in the present appeal, as

will be indicated at the conclusion of this memorandum brief. To hold the facts here to be jurisdictional facts would result in almost all findings of administrative bodies being subject to complete review and independent action by the court, for in all cases standards and guides are furnished for the administrative body. This is not the general rule and most certainly not the rule in New Mexico as has been heretofore pointed out by references to the decisions of New Mexico Courts.

The distinction to which we refer is pointed out in Vom Bauer, Federal Administrative Law, Section 521, where it is said:

> "All administrative questions are judicial in the broad sense that a factual condition found to exist must accord with the legal meaning of the particular legislative policy, standard, or rule of conduct describing that factual condition. In other words, if 'unreasonable' rates or 'unjust discrimination' are prohibited, rates found to be 'unreasonable' or 'unjustly discriminatory' must be so within the legal meaning of the words. Certain rates are 'unreasonable' or 'unjustly discriminatory', or the contrary as a matter of law.
>
> "However, once the legal meaning of a legislative standard describing an administrative question is ascertained, the facts which fit the words as a matter of law become known. Whether those facts exist in a particular case is within the administrative province, and the questions of fact are administrative questions."

This position has been adopted by the Supreme Court of New Mexico as indicated in the case of Lorenzino vs. James, 18 N.M. 240. In that case the question arose as to whether a writ of mandamus was available to compel the Board of County Commissioners to revoke a liquor license where liquor was being sold outside of the locality for which the license was granted. The contention was made that in determining whether the license should be cancelled, the Board of County Commissioners acted judicially and, therefore, mandamus would not lie. The statute provided that a license might be revoked where the Commissioners, after a hearing, should be satisfied that the licensee was selling

liquor outside of the locality for which the license was granted. The Court said:

> "It is true the Board was required to determine whether the facts existed, which required the cancellation of the license, but in so satisfying itself that the state of facts existed, which required the cancellation of the license, it acted only in a ministerial capacity.
>
> "A duty to be performed is none the less ministerial because the person who is required to perform it may have to satisfy himself of the existence of the state of facts under which he is given his right or warrant to perform the required duty."

In a later case of State vs. Kelly, 27 N.M. 412, the court was called upon to consider the nature of the action of a Board of Loan Commissioners, consisting of the Attorney General, the State Auditor and the State Treasurer. This Board had been set up for the purpose of auditing, passing upon and allowing claims against the State under an Act of the Legislature. These were debts which had been incurred in territorial days and the State was attempting to determine which were binding upon it after statehood. A person appearing before the Board was indicted, tried and convicted for obtaining money under false pretenses and he raised the proposition that the offense, if any, should have been perjury, since the Board was acting in a judicial rather than administrative capacity. The court points out that in determining whether it was the intention of the legislature to invest this Board with judicial powers, the presumption must be that such was not the legislature's intention because the Constitution prohibits such action. The court in State vs. Kelly cites with approval the Lorenzino case, to the effect that although the Board must determine whether certain facts exist, that in so satisfying itself it acts in a ministerial and not in a judicial capacity.

It could be said in the Lorenzino case that since the license could not be cancelled if the licensee was not in fact selling liquor outside of the prescribed locality, that this was a limitation upon the authority of the Board and that that determination, therefore, became a jurisdictional question and that the jurisdictional fact could be considered anew by the Court. As will be pointed out later, this could be applied to any standard set up in legislative acts for the guidance of an administrative agency.

In the case of State Dental Examiners vs. Savelle 90 Colo. 177, 8 Pac. 2d 693, 82 A.L.R. 1176, the State Dental Board had revoked the license of a dentist under a statute authorizing the Board to so act where there was a gross violation of professional duty. The District Court upon appeal cancelled the order of the Board, holding that the charges were insufficient and that in acting upon the complaint the Board was without jurisdiction and abused its discretion. The dentist whose license had been revoked contended that the Board lacked jurisdiction. The Supreme Court had this to say:

> "Counsel for the dentist do not contend that it was any lack of jurisdiction over their persons, by reason of insufficient notice, or otherwise. This reduced the question to the subject matter, which engaged the attention of the Board, namely, the alleged gross violation of professional duty on the part of the accused dentist.
>
> "5. Infallibility of judgment is not the test of jurisdiction '. . . . jurisdiction of the subject matter is the power lawfully conferred to deal with the general subject involved in the action. The statute is the sole source of the authority of the Dental Board and it cannot transcend it, but in dealing with a case such as alleged in the complaint the matter was germain to (the statute), and it was in the power of the Board to act. Our conclusion is that whether its judgment was right or wrong, its jurisdiction was complete over the person of the accused, as well as the subject matter."

We conclude, therefore, that once the Commission acquired jurisdiction over the parties and the subject matter - which was the spacing of wells - that this jurisdiction continued while a determination of the facts was made. That the Commission in effect decided adversely to Petitioner does not make the facts jurisdictional. It might be noted at this point that the Commission here did not require the Petitioner to drill wells upon 40-acre locations, but simply found that the evidence furnished by Petitioner was not sufficient to justify a specific exception to the statewide rule. In other words, the Petitioner cannot be said to be required by the Commission to drill wells on each forty acres.

Let us analyze the argument of Petitioner from the point of view of the effect such a rule would have upon administrative action. We might first consider the State Corporation Commission, in which cases the Supreme Court has so definitely held, in accordance with the general rule, that matters of fact will not be tried de novo before the courts. The Motor Carriers' Act at Section 68-1308 provides that any common carrier must obtain a certificate of public convenience and necessity before it may operate in this state. It further provides for notice and hearing and then further provides:

> "If the Commission finds from the evidence that the public convenience and necessity require the proposed service or any part thereof, it may issue the certificate as prayed for . . . .; otherwise, such certificate shall be denied. Before granting a certificate . . . ., the Commission shall take into consideration existing transportation facilities in the territory for which a certificate is sought, and in case it finds from the evidence that the service furnished by existing transportation facilities is reasonably adequate, the Commission shall not grant such a certificate."

Suppose now that an application is made for a certificate and an existing transportation company comes in and protests

on the ground that the facilities now furnished are adequate, and assume further that the Commission, after hearing the evidence, agrees with the applicant and grants the certificate. If contention of the Petitioner here is correct, the Protestant could say that the essential question of fact is whether transportation facilities are reasonably adequate and that if they are then under the statute, applicant cannot be granted a certificate. Therefore, upon Petitioner's theory this would become a jurisdictional fact and one which the court may hear de novo.

This same conclusion, under the Petitioner's theory, would be reached in matters before the Oil Conservation Commission in all cases where a determination must be made as to prevention of waste or protection of correlative rights, which are likewise standards set up in the statute. For instance, assume that the application here was for spacing of less than forty acres on the ground that the applicant was so situated that oil was being drained from under his property and his correlative rights were adversely affected. If the Commission denied the application on the ground that he had failed to furnish sufficient evidence, after hearing, or that his correlative rights were not adversely affected, the applicant could then go before the court and say that the statute required the Commission to protect the correlative rights of producers and that, therefore, the question of whether his oil was being drained was the ultimate fact and that the court could hear the matter de novo.

In short, it would seem to us that a theory of this type would impose upon the courts the burden of determining technical questions brought before Boards and Commissions under most, if not all, administrative statutes.

This proposition was discussed in the dissenting opinion in the case of Crowell vs. Benson, supra, where Justice Brandies observed:

> "No good reason is suggested why all the evidence which Benson presented to the district court in this cause could not have been presented before the deputy commissioner; nor why he should have been permitted to try his case provisionally before the administrative tribunal and then to retry it in the district court upon additional evidence theretofore withheld. To permit him to do so violates the salutary principle that administrative remedies must first be exhausted before resorting to the court, imposes unnecessary and burdensome expense upon the other party and cripples the effective administration of the Act. Under the prevailing practice, by which the judicial review has been confined to questions of law, the proceedings before the deputy commissioners have proved for the most part non-controversial; and relatively few cases have reached the courts. To permit a contest de novo in the district court of an issue tried, or triable, before the deputy commissioner will, I fear, gravely hamper the effective administration of the Act. The prestige of the deputy commissioner will necessarily be lessened by the opportunity of relitigating facts in the courts. The number of controverted cases may be largely increased. Persistence in controversy will be encouraged. And since the advantage of prolonged litigation lies with the party able to bear heavy expenses the purpose of the Act will be in part defeated."

This tendency was likewise noted in 42 A.J. Public Administrative Law, Page 222, where it is stated:

> "In fact, the cases decided by the Supreme Court subsequent to Crowell vs. Benson show a disinclination on the part of the Court to classify as jurisdictional facts other than those expressly stated in Crowell vs. Benson." . . . . . .
>
> "It is doubtful how much vitality the rule subjecting constitutional or jurisdictional facts to the independent judgment of a reviewing court has in the law of today. In almost every United States Supreme Court case announcing these rules there has been a strong dissent."

By calling attention to these limitations we do not intend to imply that the instant case falls within this category. We call these matters to the attention of the court solely because the Petitioner has apparently relied upon this line of cases in an attempt to avoid the general rule.

We feel that a careful analysis of this argument and a comparison with the cases cited to support it and the instant case will make it apparent that the facts here are not jurisdictional facts contemplated by this exception.

The matter is well summarized in the Justice Holmes in Fauntleroy v. Lum, 210 US 230, 52 Law Edition 1039, 28 S Ct 641, where it was said:

> "No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits . . . . . One goes to the power, the other only to the duty of the court. Under the common law it is the duty of the court not to enter a judgment upon a parol promise made without consideration; but it has the power to do it, and if it does, the judgment is unimpeachable unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction of the court, depend upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of the substantive law . . . . . or is meant to limit its power is a question of construction and common sense."

Respectfully submitted,

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