TEXAS PACIFIC COAL & OIL COMPANY

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 filled 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 40 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 that 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 admissibility. 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:
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> . . . . . .
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> "(10) To fix the spacing of wells;
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> . . . . . .

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 department, 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 of 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 of 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 expedited 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 fwr 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 the 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 theprinciples 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 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 in 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. 344, 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 a 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, 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 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 thing, and cannot be interfered with by the court, except in case of fraud or grave abuse, resulting in manifest wrong or injustice. 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 So.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 the 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 was 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 inconsistent 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) of 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 his 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 consitutional 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.
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> "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 and 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.
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> "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....
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> ".... 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."
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> (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 68-1383)

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 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., 38 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 quote 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; 128 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 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 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. 50; 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 the 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, is Section 61-505, 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 set 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 235, an appeal was taken under the section relating to cancellation of a liquor license, Section 61-305 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. 1917B, 1231.

"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 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 48 N.M.306; 129 P. 2d 340 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 a 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; Flocek 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 61-805.

In the recent case of Yarbrough v. Montoya, 214 P. 2d 780, 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 Flocek 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. 353, 128 P. 2d 353."

It is true that the statutes for appeal from orders of the Commissioner of Public Lands, Section 6-867 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.

COPY

ATWOOD, MALONE & CAMPBELL
LAWYERS

JEFF D. ATWOOD
ROSS L. MALONE, JR.
JACK M. CAMPBELL

J. P. WHITE BUILDING
ROSWELL, NEW MEXICO

April 14, 1950

Hon. George T. Harris
Judge of the Fifth Judicial District
Court House
Roswell, New Mexico

Re: Cause No. 8485 - Lea County

Dear Judge Harris:

This case, which is now pending in the District Court of Lea County, is an appeal from an order of the Oil Conservation Commission of New Mexico denying the application of Amerada Petroleum Corporation for 80-acre well spacing in the Bagley area of Lea County. It is the first appeal in the history of New Mexico from an order of the Oil Conservation Commission.

The appeal was taken by Amerada Petroleum Corporation and the defendants in the appeal are Texas Pacific Coal and Oil Company and the members of the Oil Conservation Commission of New Mexico. Our firm represents Texas Pacific Coal and Oil Company.

We believe that a pretrial conference will be of material assistance in connection with the further handling of the case, inasmuch as this is the first proceeding of its kind to be handled in the courts of New Mexico. In addition, it should be possible to simplify the proof and clarify the issues which will be presented in court. It is, therefore, requested that this case be set down for pretrial conference at the earliest date convenient to the court for the purpose of considering the following matters, in addition to any others that counsel for opposing parties may suggest.

1. The nature and scope of the review by this court of the order appealed from, including the question of what evidence may be presented when the appeal is heard.

2. The issues and legal questions which are presented by the petition for review and the responsive pleadings filed by the defendants.

3. The matters in issue which are admitted by both sides and as to which proof can be eliminated.

4. The matter of the transcript from the Oil Conservation Commission and its status in the appeal.

We are confident that there will be additional matters which other counsel will want to suggest for determination at the pretrial conference.

It occurs to us that it might be desirable to hold this conference in Roswell. The firm of Hervey, Dow & Hinkle is one of those representing Amerada Petroleum Corporation. In addition, Messrs. Seth and Montgomery of Santa Fe are representing Amerada. Don G. McCormick and George Graham are attorneys for the Oil Conservation Commission in the matter. In addition, company attorneys from both Tulsa and Fort Worth will be present to participate in the pretrial and the trial. It would probably be more convenient for all concerned to hold the conference in Roswell, as well as making available better accommodations for out of state attorneys who will be present.

Respectfully yours,

ATWOOD, MALONE & CAMPBELL

By: Jack M. Campbell

JMC:bk

cc: Hervey, Dow & Hinkle

Seth & Montgomery

Don G. McCormick

George A. Graham ✓

Amerada Petroleum Corporation

[illegible]s Pacific Coal and Oil Company

JEFF D. ATWOOD
ROSS L. MALONE, JR.
JACK M. CAMPBELL

ATWOOD, MALONE & CAMPBELL.

LAWYERS

J. P. WHITE BUILDING
ROSWELL, NEW MEXICO

May 23, 1950

Mr. George Graham,
Commissioner Public Lands
Santa Fe, New Mexico

Dear George:

As you know, the pretrial conference on the Amerada appeal is set for May 29 at 9 o'clock A.M. in the District Court of Roswell. We presume you will be here and that you will have with you the complete transcript of proceedings before the commission.

Very truly yours,

ATWOOD, MALONE & CAMPBELL

By Jack M. Campbell

JMC:hl

cc: Mr. R. R. Spurrier,
Director of Oil Conservation Commission
Santa Fe, New Mexico

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

IN THE MATTER OF THE PETITION OF AMERADA PETROLEUM CORPORATION FOR REVIEW AND APPEAL OF PROCEEDING BEFORE THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO IN CASE NO. 191) Case No. 8485

NOTICE OF PRETRIAL CONFERENCE

TO: Hervey, Dow & Hinkle
Roswell, New Mexico

Seth & Montgomery
Santa Fe, New Mexico

Harry D. Page
Tulsa, Oklahoma

Booth Kellough
Tulsa, Oklahoma

Attorneys for petitioner, Amerada Petroleum Corporation, and

Joe L. Martinez, Attorney General
Santa Fe, New Mexico

Phillip Dunleavy, Assistant Attorney General
Santa Fe, New Mexico

Don G. McCormick, Special Assistant Attorney General
Carlsbad, New Mexico

George L. Graham, Special Assistant Attorney General
Santa Fe, New Mexico

Attorneys for Oil Conservation Commission of New Mexico, and

Atwood, Malone & Campbell
Roswell, New Mexico

Eugene T. Adair
Fort Worth, Texas

Attorneys for Texas Pacific Coal & Oil Company.

Please take notice that at the request of Texas Pacific Coal & Oil Company I have appointed the hour of 9:00 o'clock a.m. on the 29th day of May, 1950, for a pretrial conference in the above entitled cause in my chambers at the Court House, Roswell, New Mexico, pursuant to the provisions of Rule 16 of the Rules of the District Courts of the State of New Mexico.

The purpose of said pretrial conference is for the consideration of the following matters:

1. The nature and scope of the review by this court of the order appealed from, including the question of what evidence may be presented when the appeal is heard.

2. The issues and legal questions which are presented by the petition for review and the responsive pleadings filed by the defendants.

3. The matters in issue which are admitted by both sides and as to which proof can be eliminated.

4. The matter of the transcript from the hearing of the Oil Conservation Commission and its status in the appeal.

5. Such other matters as may aid in the disposition of the action.

You are requested by the Court to appear at such time and place for said pretrial conference.

DONE at Roswell, New Mexico this 5th day of May, 1950.

S/ Geo. L. Harris
District Judge

IN THE DISTRICT COURT OF LEA COUNTY, NEW MEXICO

IN THE MATTER OF THE PETITION OF AMERADA PETROLEUM CORPORATION FOR REVIEW AND APPEAL OF PROCEEDING BEFORE THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO IN CASE NO. 191

CASE NO. 8485

THE STATE OF NEW MEXICO
TO: THOMAS J. MABRY, Chairman,
GUY SHEPARD, Member, and
R. R. SPURRIER, Secretary,
of the Oil Conservation Commission
of the State of New Mexico;
TEXAS PACIFIC COAL AND OIL COMPANY,
a foreign corporation,

GREETINGS:

NOTICE

You are hereby commanded to appear, in your official capacity designated above, before the District Court of the Fifth Judicial District of the State of New Mexico, Division No. 2, sitting within and for the County of Lea at Lovington, New Mexico, that being the county and place in which the petition for review herein is filed, within thirty (30) days after service of this notice, then and there to answer the petition for review of the Amerada Petroleum Corporation, Petitioner in the above cause.

You are notified that unless you so appear and answer, the petitioner, Amerada Petroleum Corporation, will appeal to the court for the relief demanded in its petition for review, which is marked "Exhibit A", attached hereto and made a part hereof to the same extent as if set out in this notice.

WITNESS the Honorable G. T. Harris, District Judge of the said Fifth Judicial District Court, Division No. 2, of the State of New Mexico, and the seal of the District Court of Lea County, New Mexico, Division No. 2, this 13th day of MARCH, 1950

(SEAL)

W. M. Beauchamp

W. M. Beauchamp, Clerk of the said District Court.

By _____
Deputy