BEFORE THE
OIL CONSERVATION COMMISSION
Santa Fe, New Mexico
March 13, 1958

IN THE MATTER OF: Case No. 1308

PARTIAL TRANSCRIPT OF PROCEEDINGS

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ORAL ARGUMENT

MR. PORTER: Do we have statements in Case 1308?

MR. SETH: We would like to make a summation, if the Commission please.

MR. PORTER: You may proceed, Mr. Seth.

MR. SETH: If the Commission please, the application of Shell for rehearing in this case, as we appreciate, has a somewhat limited scope. The application for rehearing does raise five or six basic points, which I believe are primarily questions of law, and mixed questions of law and fact.

The first of these points to be considered is the matter of vested rights, the application in the case that Shell, by virtue of its action taken under Statewide rules, acquired a vested right. The second point relates to estoppel. This is a proposition of when the person acts in reliance on the position taken by others and the person in whom reliance has been placed later changes his position, the Court will estop him from so doing to prevent injury to the party who has taken this action. The next point is the failure of the order to indicate any drainage areas. The next point relates to the impairment of the obligation

of contracts. The contract, of course, is the Carson Unit Agreement and the plans of development submitted under it. We feel that the change in position by the Commission impairs the obligations of contract which arose under the unit and the plans of development. And last, relates to the matter of the retroactive effect of the order here complained of.

Now, considering this matter of estoppel first. This is a fundamental point, I believe, in this rehearing. All of the points urged are independently urged, and we believe each one is sufficient ground to change the order; but as to estoppel, how is the doctrine of estoppel applicable here? As we have seen from the testimony this morning, Shell Oil Company, in reliance on the Statewide rule, proceeded with its drilling program. We're speaking about Statewide rules, all through this hearing, because that's all that we have. The original situation was obviously on a 40-acre basis; after the first hearing the Statewide rule was still in effect. The Commission had refused to change it, that was the only rule in existence. Shell, in reliance on these rules, as we have seen, proceeded with its drilling program. We have also seen that the Commission had knowledge that Shell was so proceeding with its drilling program and was drilling the wells which have been described in the hearing this morning. This notice was, of course, received through official channels by Form C-101, 128, and as we all know, at that time, at the time all of these wells were drilled, they could only be drilled on 40-acre tracts. That

was the rule of the Commission in force at the time. We have a typical situation, then, of someone acting in reliance on the Commission's rules. The Commission then changes the rules to the detriment of the person who has acted in reliance; and under the doctrine of estoppel, the Commission would be prevented now from so changing its mind to work a hardship on the operators who so acted in compliance.

As I said, it is a well-known doctrine and is applied frequently between individuals, but it is likewise applied against governmental agencies. The New Mexico courts have held that it does apply against a governmental agency. Now it has also been applied against governmental agencies, obviously, in other States, California, Colorado, and elsewhere. Its application against governmental agencies is a relatively recent development, but is well established. It is well-established in New Mexico.

I don't wish to burden the Commission with a long series of quotations, but I would like to read what one text writer has said about the application of this rule for governmental agencies. This appears in Book 1 A. L. R. (2d) at Page 346. The writer has this to say, this is a quotation.

"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."

That's the end of the quotation. We believe that sets out pretty much the basic rule that we have in this situation and should be applied to the facts in the situation that we observed ourselves here. As I said before, this has been considered in other states, in California in a number of cases, and also has been considered in Colorado. Now these situations where the courts have considered it, there are a variety of factual situations and a variety of agencies. They relate to dedication of streets, to sales tax, to matters of service and to authorities of various governmental bodies.

In this case in Colorado, the Supreme Court of Colorado had this to say, this is a quotation --

MR. WHITE: (Interrupting) Give us the citation.

MR. SETH: I will give it at the end of the quote. "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 the proper case. Estoppel was applied against the City of Denver in an eminent domain proceeding,"-- and they cite the case. "If estoppel applies

to the City and County of Denver, it surely applies to the Housing Authority."

That quotation is The Supreme Court of Colorado, appears in the case of Piz vs. Housing Authority, 289 Pacific (2d) 905. There again it's the factual situation, is a little different but the same principle applies. Estoppel applies against a governmental agency. We feel it applies in this case.

Shell was relying on the Statewide orders and is entitled to be protected against the consequences of the Commission changing its mind. We note that the Commission has apparently considered this matter before in its rules. Some of the early rules were adopted, recognition was made that wells that pre-existed those rules might not come in under the rules later adopted. They were expressly provided for. An example of this is Rule 104 (k). 104 is, of course, the basic well spacing rule. "Nothing herein contained shall affect in any manner any well completed prior to the effective date of this rule and no adjustments shall be made in the allowable production for any such wells by reason of these rules." There's an express saving clause for wells that were drilled before the adoption of that rule.

That's a typical provision in rules of all administrative bodies. It is a typical provision in Statutes. It is typical to install a grandfather clause. Everybody in that position before the Statute or rule was adopted was protected by it. There was no such rule or protection in 1069-B. Thus anyone can find

themselves in a situation that Shell finds themselves in in this case. Any Statewide rule, if the Commission's present position is correct, any Statewide rule can be later changed to the detriment of anybody, and they have no recourse, although what they might have done in the past year is entirely proper and legal and done under the requirements of this Commission.

We are not talking here just about this particular spacing situation. This matter goes to all the rules that you adopt, Statewide rules, and all the special rules, too.

Now on this matter of vested property rights, that proposition has not received the attention of the courts in very many cases. It is a relatively new proposition. Our position is that Shell acquired a vested property right by the location of these wells, by the drilling of wells under the requirements of the Commission at that time. These locations on 40-acre tracts were required by the Commission at the time. We acquired a vested property right. Now, as I mentioned before, this has not received very much attention in the courts. I would like to mention, however, one or two cases where it has been considered. First, just on the proposition of what is a vested property right, the State Supreme Court has considered this in New Mexico. This factual situation in this case, which is Rubalcava vs. Garst, 53 NM 295, this factual situation was where one of the parties had a claim against the estate of a deceased person. The claim was based on an oral agreement, that's all they had. At that time, at the

time that the oral agreement was made, such an agreement could be enforced against the estate of the decedent. After that, in 1947, the legislature passed an act that only written agreements would be so enforced, so where was this person who had the oral agreement that was in effect before the Statute was in force? The court said that this person had a vested property right created thereby and would be protected against the legislature's change in the law. That's what we have in this case here.

Now the court in this Garst case said this: "A 'vested right' is power to do certain actions or possess certain things lawfully, is substantially a property right, may be created by common law, statute, or contract, and after becoming absolute is protected from invasion of Legislature by constitutional provisions, and failure to exercise vested right before passage of subsequent statute seeking to divest does not affect or lessen such right."

The court later in the opinion stated this: "Every statute, which takes away or impairs vested rights acquired under existing laws or creates new obligation, imposes new duty, or attaches new disability respecting transactions or considerations already past must be deemed 'retrospective'".

That is the situation, I say again, here. The Commission changed its mind and attempted to apply the new rule retroactively to take away the vested property rights that Shell had. What is the vested right that Shell has in this case? Shell has a vested

property right to a full allowable for these wells that it acquired by drilling them. I don't know, no one here contends that they have a vested right to any particular allowable. That's absolutely an untenable position. We just have a vested right to a top allowable, that's all we have. We're entitled to have it protected. This matter has been considered in Texas at some considerable length. Perhaps the best-known case is Chenoweth vs. Railroad Commission, 184 SW 2d 711. This case concerned a case under their spacing rule 37, and I would like to quote just briefly from the opinion.

The Court held that an operator who had expended money in reliance on the rules of the Commission had a vested property right and was entitled to have it protected. The Court said, this is Civil Appeals of Texas: "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."

This case before the Civil Appeals of Texas is very close to the situation we have here. They protected the property rights acquired by the operator to drill pursuant to the Commission rules in this case. There are other cases in Texas, perhaps the next

best-known case is Humble Oil and Refining Co. v. Railroad Commission, 94 SW 2d 1197. This case is a very similar one to the Chenoweth case. I would like, if the Commission please, to read another quotation from this case. This is at page 1198.

"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."

I think those two cases are very persuasive on this matter that we are discussing here of vested property rights. As I mentioned, there are other cases, but I don't think it's necessary to discuss them at any great length. I think we are entitled to

the same protection in this case that we have here. We, as I said before, do not argue that we have a right to any particular proration. We have a right, however, to a full allowable well. We had that when it was drilled and it cannot be taken away from us. Now it's no answer to say that we still have that, it has not been taken away from us, because everybody has gotten twice as much as we have. That's something taken away from us, certainly. If you have your neighbor getting twice as much as we did, perhaps we don't have anything taken away from us, but we still are twice as far behind as before the action was taken. It's sort of like at a football game, we get six points and we make a touchdown, they get twelve. Nothing has been taken away, we still get six points, but I think the comparison is applicable.

Now on this drainage proposition, I'm not going to discuss that at any great length. The order does not make any finding about drainage area. I don't know whether it's implied in the order or not. I think before an 80-acre proration unit can be established, there has to be a finding on the fact that it can economically and efficiently drain that one well. In our application we mentioned Rule 505 which relates to the depth factor. That rule, by this order that we complain of, was amended, and we do not believe that that amendment was within the scope of the hearing, as it was originally contemplated. There has been a substantial change in Rule 505 as a result of the issuance of this rule, and the factor here applied is not in keeping with the factors

as they have been set out in Rule 505 over the years.

Now on the matter of obligation of contracts, as I mentioned before, this just concerns the Carson Unit Area; consequently it just concerns what we call three 40-acre wells. The contract, as I mentioned before, is the Carson Unit Agreement; that is a contract among the parties, a good many of the parties here in opposition to Shell, also the State and the Federal Government. It was a contract, it contemplated that plans of development be submitted from time to time. Those plans became a part of the original contract and we consequently have situation here where we have an approved plan of development, as the witness in the case, supplement number three, for a 53-well program, which was approved and which has been changed by this order.

Now this order, as I'll indicate later, probably has the force and effect of law; and consequently is a statutory change which is prohibited by constitution. You cannot have a statutory change that impairs the obligation of contract. That is a fundamental proposition of law.

In the same New Mexico case which we have considered before, which was the Garst case, the Court said, this is New Mexico Supreme Court, it quotes from 1 Cooley's Constitutional Limitations, 8th Ed, p 583, as follows:

"'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 the 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 operation 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.'"

We think it's quite apparent that 1069 impairs the obligation of the contracts which arose under the Carson Unit Agreement.

Now, on the final point, which relates to the retroactive effect of this Order 1069. This again is a fundamental proposition in this case and involves well-established doctrines of law. We, of course, do not believe that this order can have a retroactive effect, and we believe this because this Commission acts under delegated authority from the Legislature. You are exercising delegated legislative authority. The Legislature sets out the general framework in which the Commission shall operate. The Commission

is then given express authority and direction to adopt rules, regulations. These rules and regulations are an exercise of this delegated legislative power. You have the express right to make rules. These rules have the force and effect of law. There are penalties for violation of these rules. You are filling out by legislation the general framework that the State Legislature has set up. Other Commissions in the State do the same thing, of course, the Corporation Commission, with considerable Constitutional authority, but it again is exercising legislative authority. This is a very significant distinction that we must make all through this consideration. You are not exercising judicial authority. You are not adjudicating rights between individuals. You are not interpreting the Statutes. You are exercising legislative authority. This distinction is made in any discussion of administrative law, and the consequences are very fundamental. You cannot be exercising judicial functions and still be acting constitutionally.

That was clearly decided in a recent New Mexico case of a concrete products company against Governor Mechem here. That case, page 5250, clearly held that an administrative body could not be created in New Mexico with judicial power. That case has concerned, of course, a determination of whether or not the workmens' compensation law was constitutional. The Supreme Court held that it was not constitutional, by reason of the fact the Legislature had given this agency that was created by the Act

judicial authority. The Court held under our Constitution it cannot be given judicial authority, so obviously you are exercising legislative authority; so again you are acting respectively, you are under the same prohibition that the Legislature is as to retroactive Statutes. This goes back to the laws and all that goes with them. This again, of course, has received considerable attention by the courts.

The United States Supreme Court considered it in the case of Helvering vs. R. J. Reynolds Tobacco Company, 83 L. Ed. 536. That case involved the retroactive regulation by the Treasury Department affecting tax liability of the Reynolds Tobacco Company. The Supreme Court said that the regulation could not be applied retroactively; it changed the legal consequences of an act by a taxpayer before the regulation had been changed. That is again our position here. This order attempts retroactively to change the consequence of what Shell did under the previous regulation.

I would like to read a discussion, just a short paragraph on this Reynolds case because it's very, very significant. This discussion of the Reynolds case appears in Columbia Law Review, 40, P. 252. It is a summary of the opinion. The writer says:

"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. Reenactment 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."

Again here the Commission can have no greater power than the Legislature from which the authority is derived. The Legislature cannot enact retroactive statutes;such would be a violation of due process. Here again you are exercising legislative authority, and you again cannot apply them retroactively.

This is applied again in a variety of circumstances. The

one case that I referred to was a tax case. They have been applied to C.A.A. regulations. They have been applied to excise taxes. They have been applied to contributions to unemployment compensation funds. They have been applied to railroad rates; and under a variety of circumstances they have been applied also to boards admitting persons to practice, dentistry, all manner of situations. It is obvious that the question would arise under a variety of circumstances, but the principle of the thing goes through, is the same to all of them; and it applies just as well in this case as it did in the C.A.A. regulation case, that case or any other case.

As I said before, there is a fundamental distinction in the activities of administration boards between judicial and legislative. There are many cases on boards that have judicial functions; obviously that is a different situation entirely. There are many, many cases on interpretation of regulations; that obviously is a different situation. That is judicial, quasi-judicial, whatever you choose to call it. Here we have a Statewide rule, it has a general effect, prospective effect, and that is changed.

I'll not read from any further cases, other than this one case that is called the Arizona Grocery Company vs. A.T.S.F. Railroad. This was before the Supreme Court of the United States, 284 U.S. 370 76 Law Ed. 348. The Supreme Court said, Page 356, it said:

"The Commission's error arose from a failure to recognize" --

this is referring to the Interstate Commerce Commission. "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."

Now, on these several points, the matter of estoppel that we considered first, that is a fundamental proposition well recognized in law; the matter of protecting vested rights, pursuant to action taken by this Commission, is again a well recognized rule. The matter of impairment of contract and drainage area and the retroactive complication of the rule, they are all fundamental, and I think independently would justify a change in this proposed rule.

Now it is apparent that in the situation Shell here was certainly one of the few proponents of 40-acre spacing. They felt it was necessary for the proper development and still do. Now it's obviously a lot of people objecting to it. Most every action taken in business nowadays, somebody is going to object to

it. But in view of the questions that were put to the witness by the contestants here this morning, there is apparently some belief that they had to wait until there were no objections or that they should be guided by the objections from others. I don't think they seriously can contend that. Shell can go its own way, if it wants to. If it thinks it is right, doing the right thing, it can drill wells where it wants to, so long as it conforms to what the Commission says it can do or showed that is what it did. It doesn't have to wait until all the objections have died down. Now if it did, of course, in any situation, nobody can get any business done. It chose to rely on the orders of the Commission. After the initial hearing, of course, the Statewide, and after the initial order, the Statewide rule was still in effect. The Commission had refused to change it. The Shell, fully aware of the consequences of drilling during all these various periods, chose to proceed with its program of development considered the right thing to do, which it still considers the right thing to do. It was fully aware of the fact that anybody can come in to the Commission at any time and ask for any change that they want to ask for. This is no different from anybody making an argument that we should stop a certain development because somebody is going to or does introduce a bill in the Legislature. No one can stop us just because people are objecting or people are applying for some legislative relief, or that they are applying to the Commission for relief. Anybody can come in, as I said before, with

any sort of a proposal to the Commission, and the Commission sets it down and hears everybody and hears it, but that doesn't mean that everybody in the meantime has to pull up to a screaming halt to find out whether there is any merit to it or not.

Shell was fully aware of the fact that a rehearing might be granted, that it was granted, but it chose to rely on the Statewide rules and it chose to proceed with its announced course of action in the planned development. The orders are all final, that are issued by this Commission; there is no half-way ground. The original order before the application for rehearing was filed was a final order; every order is final. The Commission, of course, if a rehearing is granted, the Commission changes it mind, it can change an order. The order is final until an order entered after rehearing is entered by the Commission. So Shell has always been acting under final orders of this Commission and they have all been Statewide orders.

The order issued, as I mentioned before, after the first hearing that was on October 9, 1957, R-1069, that was the final order, but it didn't affect the Statewide order; so the Statewide order was clearly in effect after that order. The order granting the rehearing was issued, that didn't affect the Statewide order, it didn't affect any previous order of the Commission; and expressly recited that the previous order would remain in effect. Shell proceeded on that recitation again, and on the Statewide orders.

Likewise, all through this proceeding, as I mentioned

before, Shell has proceeded on the orders; it has been fully aware of all of the right of rehearing and that sort of thing, but it chose to proceed with its announced course of action.

If the Commission please, this has been discussed to some extent among counsel, but if the Commission would permit it, we would like to file a list, a memorandum on the cases that I have mentioned here and some other cases, and to relate those cases to the facts in this particular case, and to present a limited brief to the Commission on these various points, if that is agreeable; and we thought it would be advisable, perhaps, and expedite the matter if both parties were given a certain number of days to file memorandum briefs so that you have the full picture. Any period of time in that connection that the Commission feels reasonable is satisfactory with us.

Thank you.

MR. PORTER: We will take a very short recess.

(Recess.)

MR. PORTER: The meeting will come to order, please. We have further statements in this case. Mr. White.

MR. WHITE: If the Commission please, before I proceed, I would like to state that my argument will be on behalf of Magnolia, Humble, British-American, Skelly, Amerada, and Phillips, as a joint presentation on their behalf, and I wish to state that the attorneys for these companies have been very, very helpful in assisting in working up the argument; and at my conclusion, it is

very possible that they might want to add some statements.

I think at the start it might be well to mention that Mr. Seth mentioned the case of Governor Mechem's in 63 New Mexico, where it states that the Commission is strictly an administrative tribunal, but at the same time and in the same breath by the petition they're asking for judicial relief of an accountable nature. In their petition they went to great length in setting out certain allegations of good faith, I believe the first four paragraphs reiterate the good faith with which we were acting. However, little at this rehearing has been said about their good faith, except Mr. Robinson stated that he relied on Order 1069 throughout, and I might state he says that the Commission never advised him to the contrary and that they gave various notices and by your failure to do so, why, you mislead them. How can that be true, in view of the wording of Section 65-3-14, wherein it states that the Commission shall set up a uniform spacing plan or proration unit, and says: "...provided, that 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 produce from such tract, if 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."

Under this rule, the Commission could not deny them the

right to drill; and under this same statute, how can the Commission grant them what they're asking, a double allowable for their 40? So we submit that surely they didn't rely entirely on the order of 1069, and we submit even if they did, they have no vested right and we question the good faith of so relying.

It's been brought out that they were aware of the statutory right of appeal 30 days within notice of rehearing. They also knew that the case can be appealed to the Court for final determination. They knew that there was a possibility of the order being reconsidered and changed to an 80-acre spacing, and the probabilities of that fact were strengthened then and resulted in 1069-B and amended to allow 80 acres.

We submit that, why did Shell change their plans and go into a very rapid acceleration of the drilling of 40-acre wells when none had been drilled in the Bisti area prior to the filing of our application? Their correspondence that's in evidence shows that there was a question among the operators long before we filed our application as to whether it should be on a 40 or 80. They, it appears to us -- I won't say it appears to us, but it does suggest that either they acted under poor judgment or else they wanted to create the very situation which they now have presented to the Commission.

Now as to their rights as a result of the drilling. There's a case of Rieckhoff vs. Consolidated Montana Gas, 217 Pacific 2d, 1067. In this instance the gas company acquired the

rights of a lessor, and the gas company figured that the lessee had violated their covenants in their lease and brought a quiet title suit to cancel out the rights of the lessee. The District Court quieted title and cancelled out the rights of the lessee. He appealed it to the Supreme Court and the Supreme Court reversed the Lower Court. In the meantime the gas company had drilled a well on this land, so that the lessee filed an accounting suit, an injunction against the gas company; and the gas company, as does the petitioner here, claimed that they did it in good faith, they acted in accordance with the order of the District Court and therefore they should be treated with equity. The Court had this to say:

"The company says it was not a wilful trespasser for it entered under the District Court's decree, assuming to annul the lease and to quiet title in it. However, it knew the law gave to Rieckhoff 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 Rieckhoff" -- that is the lessee -- "had vigorously fought the suit and that he was likely to appeal from the judgment entered against him. In misjudging the law and Rieckhoff the gas company acted at its peril. It assumed the attendant risk of drilling the well on the lands leased to Rieckhoff and of having the trial court's judgment reversed on appeal, but it took the chance and lost."

There are other cases that I can cite, but I believe I'll cite just maybe one. That was the case of Liles vs Thompson, 85 Southwestern 2d 784, which is a Texas case. The Court here said:

"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."

We submit the same applies in this case, in view of all the testimony and of the correspondence that was directed to Shell for them to go ahead at their own risk, why, they did so. As to the first correspondence which we think has some relevancy as to the question of good faith and also as to the impairment of any contractual obligation in regard to the Carson Unit plan which has been brought out, no 80-acre wells were included in the first plan, second plan, nor the third plan. Shell went on and developed their own acreage on a 40, and then they tried to get the working interest in the Carson Unit to go along with them.

I think it's relevant to review just a little of the testimony. Shell Oil Company in a letter addressed to the United States Geological Survey under date of August 8th enclosed the third unit plan of 53 wells. In their application for rehearing,

the petitioners claim that they were obligated to drill this on a 40-acre unit, but in the very letter it says "We intend to develop the areas of undefined sand development on 80-acre well spacing while exploring for commercial limits of the Unit." Now how they can allege that they were obligated to drill on 40, we don't know; and in that regard, the Carson Unit has never been introduced in evidence. They requested this 53-well program and the operators would not go along with it.

On August 9, here is a wire sent to Skelly: "Request your approval to drill 80-acre locations including our most recent plan of development involving 53 wells within the Carson Unit." They objected, the operators objected, the lease interest or working interest objected to the drilling of 40-acre wells under this third plan, and then they adopted an interim plan so they were under no obligation to drill on a 40.

It is also noteworthy that Shell Oil Company, after they had received the approval from Skelly, El Paso, and Humble to carry out this interim plan on 80-acre spacing, they hadn't received this consent from Phillips, and in their letter of August 22nd, they set out this telegram asking their approval to drill on 80-acre location. Then these favorable replies were received from Skelly, El Paso, and Humble,"but to date we have received no response from Phillips. Meanwhile, as we are close to concluding the drilling of the last approved plan, and pending approval of our 53-well program, we found it necessary to submit an interim

plan to continue efficient and economical operations on the unit." Now if they can develop that unit during the pendency of a final decision in this case, as they say, in the efficient and economical operation, why couldn't they do the same on their adjoining properties? There's nothing in the testimony or in the transcript to show that they were required to drill in order to save any of their acreage, either. They stated in the petition that they had the unqualified approval of the United States Geological Survey. That also is open to interpretation. The United States Geological Survey witheld giving any approval until after the issuance of Order 1069, and in their letter of October 15, wherein they gave their approval, they said: "Apparently the objections to 40-acre spacing have now been resolved, and you request our further consideration of your plan." I believe it can be very logically argued that the United States Geological Survey consent was upon the false assumption that the 40-acre spacing program or argument had been resolved.

There are other letters of correspondence in here, where the various operators and working interests plead again and again with Shell to withhold their development. For example, in Mr. Selinger's letter of October 31, he says: "This is to advise that as of this morning we have received the following telegram from A. L. Porter,"wherein you granted the rehearing. He says, "This means that Order 1069 in Case 1308 has been held up due to the granting of a rehearing by the Oil Conservation Commission. On

the basis of approval by the United States Geological Survey on the assumption that 40-acre spacing objections have been resolved is no longer true, we respectfully request that you continue operation on the interim plan of 80 acres until such time as the New Mexico Oil Conservation Commission has issued a final order. You can well appreciate our desire to avoid hasty action, that should the Carson Unit be developed on 40 and should the New Mexico Oil Conservation Commission issue an 80-acre order, the wells therein would each secure a half-well allowable; and we therefore feel it behooves the interested parties to await the final outcome of the rehearing before the Oil Conservation Commission."

There is other correspondence to the same effect. It might be well to mention Shell's letter of December 6, 1957, wherein they set out their proposition of drilling eight 80-acre wells, and four 40, which was finally withheld as to the 40, and they say this: "As you know, we have developed our acreage outside the Carson Unit on 40-acre spacing in accordance with the New Mexico Oil Conservation Commission Order 1069, including their latest order of November 4, 1957, and we intend to drill our unit area on 40-acre spacing. Specifically, we intend to drill these various wells to which they objected in the immediate future." So it cannot be said that they went into their program without their eyes being fully opened and realizing what they were getting into. We question the good faith.

Now as to the vested right proposition that's set forth in Paragraph 7. They claim that by drilling these wells after the application of Sunray was filed, that they acquired certain vested rights. We contend that under the wholesale litigation involving these cases there is no question but what the Commission had the authority to act as it did, and that there is no vested right involved in this case.

In the case of Texas Trading Company, et al., vs. Stanolind, 161 S.W. 2d 1046, the Texas Trading Company appealed from an order of the Commission which cancelled the appellant's permit to drill an additional well within a drilling unit. The Plaintiff contended as a matter of law that it was entitled to drill the additional well because under the then spacing rules and regulations in existence at the time the area was segregated and at the time it acquired its lease, that it had the right to drill this 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 pro-ration 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."

Now Mr. Seth cited a case in Texas, I think it was 84 S.W. 2nd, that is a right to drill a well; under our law they have a right to drill a well; that does not mean that they get a double allowable because they drilled a well still according to their acreage.

They also cited the Railroad Commission vs. Rowan and Nichols Oil Company, 310 U.S. 573, and other cases. In the case of Patterson vs. Stanolind Oil and Gas Co., 77 P. 2d 83, Oklahoma case, certain royalty owners contested the constitutionality of the Oklahoma Well Spacing Act with regard to their interests in a well which was 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, which is very applicable to the case at hand.

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

"The decision of the United States Supreme Court in the

case of Ohio Oil Company vs. 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."

They further cited the case of Champlin Refining Company vs. Corporation Commission, 286 U.S. 210, 76 L. Ed. 1062, wherein the Court says:

"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."...."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."

Continuing, the Court said: "Such regulation of spacing and your proration according to the acreage is valid, 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." . . . "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."

I believe that sufficiently answers any question as to whether or not they have any vested rights in their having drilled on 40 acres.

As the Commission knows, there are no Supreme Court decisions in New Mexico defining the powers of the Commission. However, I think it's well to refer to the text of Summers Oil and Gas, wherein they define and explain the well spacing law for New Mexico as follows:

"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."

They go on and say that you have a right to amend your

rules from time to time, and expressly contained in your existing rules. 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."

I think clearly the Commission had the power to act as it did in the premises.

Now, the petitioner also claims that the order is a retrospective regulation and retroactive, in that it confiscates and violates their vested property rights. Now, Mr. Seth referred to a New Mexico case, I believe that was Rubalcava vs. Garst, 53 N.M., 295.

Our New Mexico Supreme Court said as to the definition of a "vested right", that it was 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,creates a new obligation, is retrospective in nature, but we submit, in what way or manner does the Order complained of take away or impair any right which the petitioner acquired under any prior rule or regulation of this Commission? Under the existing rule it's permissive rather than mandatory they can drill on a 40, they can drill on an 80. In what respect does this order create any new obligation in respect to the petitioner? 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 spacing program, as though the Order did not exist? Now, as before, is not the proration formula on an acreage basis and the same full allowable given to the 40 acres of which they complained as it would be given to any other 40 acres if you didn't have the rule? We submit, in what way are they harmed? How can they claim a vested property right, in view of the decision to which they refer and to which I refer, and can you say that the Order is retrospective when the rights exercised by the petitioner when they drilled were also subject to Rule 104-L of the Commission, which reads as follows:

"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."

When they exercised their right to drill, they were doing it subject to this rule. Further, they were doing it subject to Rule 501 (b), which reads:

"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."

That's what you did in this instance. Is not the petitioner, we submit, afforded the same opportunity to recover his just and equitable share of the oil in the pool now as he was before the

order? I believe in actual truth and in fact, the petitioner is really saying: "We have spent twice as much money in this pool as any other operator, although unnecessarily, but having done so we now want to receive twice as much oil as the other operators." I question whether or not the Commission can give such relief under the circumstances.

As to the next point they raised, as to the failure of the Commission to set forth the findings of fact that one well will economically and efficiently drain 80 acres, we submit that there is nothing in our conservation law that requires such a finding, and the general rule of law is that where a finding cannot work to the benefit of either party, it's not error to omit the finding. Supposing you had the finding that they requested, would it benefit you, would it benefit anybody? If the case is appealed to the District Court, the Court is going to look at the transcript and read the transcript to determine whether or not your order is reasonable. The fact that you had that statement of fact in there neither adds or subtracts from the order itself. Moreover, under our Ferguson-Steere case that was the case of Ferguson-Steere vs. State, 288 Pacific 2d, 440, the order of the Commission was challenged upon the ground that when they issued a certificate of convenience and necessity, the Commission failed to set forth the conclusion of ultimate fact that the public convenience and necessity required the issuance of the certificate. Our Supreme Court had this to say:

"We think the recent decisions hold an absence of specific findings does not render void an order granting a certificate such as that here involved. More especially is this true when there was no request made on the board or commission whose acts were challenged in making specific findings. If findings, more adequate findings by the administrative board or commission is desired, the duty rests on the party complaining of their absence to have made a request for them."

If the petition for rehearing should be considered as a request for further findings, the Commission, as they may see fit, may include the finding or not. I don't think it adds or subtracts from the order. Moreover, I think the general order that the Commission made encompasses any inferior findings.

Now as to Rule 505, we submit that it's apparent from the reading of Rule 505 that it was never intended nor does it now provide for 80-acre proportional factor in the depth range from zero to 5,000 feet, and 505 is a general rule and it does not give way to any specific rule or regulation for any specific pool or field.

As to the obligation of the contract, we submit that no contractual obligations were impaired under the Carson Unit Agreement, the first plan and the second plan as they have been completed didn't involve any 80-acre spacing. They are now operating under their third interim plan, wherein it is agreed that they are only going to develop on 80 acres; and the third

plan in regard to the drilling of the 53 wells has never been approved as yet by the working interests to my knowledge.

Now, does the Commission have the right to change their proration or spacing orders, in view of a unit agreement such as the Carson? There's abundant authority to the effect that making such an agreement is subject to alteration by the police powers of the State, and any existing rules and regulations. In fact, pages 9 and 10, I believe, of the Carson Unit Agreement specifically provide that the agreement as entered into is subject to the rules and regulations of the Commission being altered from time to time. However, be that as it may, in the case of Alston v. Southern Production Co., 21 So. 2d 383, the Court passed upon the power of the Conservation Department to increase the size of drilling units theretofore prescribed as 320 acres. Under the Department's ruling they increased the drilling units to 640 acres. The parties came in and claimed that that violated their contractual obligations, impaired the obligations of the contract; it was therefore unconstitutional. The Court in upholding the power of the Commission to act said this:

"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." -- the same as our law. "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 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."

Now as to this doctrine of estoppel, Mr. Seth referred to the Garst case in 53 N.M., but he didn't refer at all as to what the Court said in that case, which I believe has a bearing and should be mentioned. Under Paragraph 10 and 11 of their petition, they claim that you should be estopped from preventing them from receiving a double allowable. Now one of the elements of estoppel is the conduct; namely, the conduct of the Commission. At this

time I want to take that back, that was not, the elements of estoppel was not contained in the case cited by Mr. Seth, but cited in New Mexico case, Chambers vs. State, 17 N.M. 487. In defining the conduct necessary to bring about estoppel, our Court says it must consist of acts or language or conduct amounting to a representation or concealment of material facts. Now, are they claiming that the Commission in granting the order in the original instance was concealing a material fact that the Commission, if a rehearing were requested, was going to change it to an 80-acre program? Another element of estoppel is that the truth concerning the facts were known to one party and unknown to the other party. Now what true facts were known to the Commission at the time they entered either order? Can it be said that in order for estoppel to work in this instance, that you mislead the other party, Shell Oil Company, and that you withheld the truth concerning the true facts; namely, that you were in the final analysis, were going to issue an 80-acre program? I hardly think so.

Now Mr. Seth states in many New Mexico cases upholding estoppel against the State there are such cases, but they do not pertain to any case where estoppel can be asserted against the State, when it's in the exercise of its police power. I know in the case of Sganzini vs. Kirk where a County Treasurer mis-stated the true fact as to whether or not there's an outstanding tax certificate against his property, and the County Treasurer said, "No, there's no outstanding tax certificate," and the man lost

his land because in fact there was an outstanding tax certificate, our Supreme Court said, yes, and in that the treasurer is estopped to deny it, because he had a vested right to redeem his property within a certain length of time had he known the true facts. Now that doesn't come within the exercise of the police power. That's an administrative duty performed by a State agent, accountant, or official.

As to whether or not our Supreme Court permits estoppel to be applied against the State when it's in the exercise of its police power, I cite the case of First Thrift & Loan Assn. v. State ex rel, Robinson, 62 N.M. 61, and just reading the excerpt, our Supreme Court states that"a State cannot estop itself by grant or contract from the exercise of its police power."

The case of Erickson v. McLean, 62 N.M. 264, our Court said, "Public policy forbids the application of the doctrine of estoppel to a sovereign state where public waters are involved." I think the same would apply where oil is involved.

As to the cases cited by Mr. Seth as to the vested rights, that is true where there are vested rights, but we submit there are no vested rights involved in this case and that the Commission acted under authority, under the powers that they have, and we submit that the petitioner is not damaged in any way except through its own acts and doings which it voluntarily undertook and to which they are not entitled to relief.

Thank you.

MR. PORTER: Anyone else have a statement?

MR. SANCHEZ: Southern Union Gas Company joins in Sunray and Midcontinent's position that they take, and desire that the 80-acre spacing unit be retained.

MR. PORTER: Mr. Selinger.

MR. SELINGER: If the Commission please, and the staff, most of the points have been brought out, so I won't belabor the points. There are two corrections I wish to make in Mr. White's presentation: one is that under Shell's stipulation of exhibits this morning, the Carson Unit Agreement was made a part of the record; and secondly, that the 53 well, which is known as the third plan of development for the Carson Unit, did propose 40-acre wells, and I believe that Mr. White was attempting to explain to the Commission that none of the working interest in any of the participating areas approved any location within the Carson Unit under that third plan, except on an 80-acre basis. There is a statute, a section of the statute in the New Mexico law with respect to the matter which Mr. Seth very graciously indicated that Shell on its own interpretation drilled 40-acre wells to the number of 14, on reliance of existing order of the Commission, and drilled them at their own risk. The section provides, 65-3-5, wordage of Commission's Powers and Duties, was lifted wholly from the Oklahoma section which has exactly designated Commission's powers and duties. This is very brief, but it states: "The Commission shall have, and it is hereby given, jurisdiction and

authority over all matters relating to the conservation of oil and gas in this State, and of the enforcement of all the provisions of this Act and of any other law of this State relating to the conservation of oil or gas. It shall have jurisdiction and control of and over all persons or things necessary or proper to enforce effectively the provisions of this Act or of any other law of this State relating to the conservation of oil or gas."

Perhaps fortunately in some instances and unfortunately in other instances, as we are meeting today there's a great lack of what I call, of conservation oil and gas law in this State, but there are plenty of other states that have had a long varied history in conservation; and I might add without revealing my age that since '31, the year 1931, I have been actively engaged in practically,most of those litigations. What did the Supreme Court of the State of Oklahoma have to say specifically as to that section? The State of Oklahoma vs. Bond, 45 Pacific 2d, 712, it states:

"The foregoing is the section of the Act" -- which I have just read -- "which 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, the conditions surrounding production of oil from a common source of supply would change from time to time. To meet the exigencies of such changed condition, the Commission was empowered by this 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 of supply."

That's the interpretation that one State gives to the exact wordage of your Section 65-3-5. Apparently it must have been in the minds of the Legislature of this State to insert that Act for some purpose, and this is what one other State says the reason for the insertion of that particular provision is.

Now Mr. White has indicated the vast amount of correspondence within the Carson Unit. The reason for its importance at this particular hearing is that a portion of it lies in the heart of the field, of the trend going from southeast to northwest, and Shell was the unit operator. Despite all of the warnings of the other working interest, including myself in my letter of October the 31st, in which I specifically pointed out that should any hasty action be taken by Shell to develop the Carson Unit on 40 acres, they did so under the jeopardy of some allowable adjustment. Now this hearing does not concern location of wells, it has absolutely nothing to do with the matter that is presented in the petition for rehearing here. The matter is confined solely to one of allowable. Did the Commission act equitably in establishing the allowable differentiation between wells as they found them to exist at the time of the date of the issuance of the January 17th order? So this is confined solely to allowables.

It's the question of whether or not the Commission acted equitably in adjustment of allowables. Your statute, your rules are full of your authority to protect correlative rights. I think the Commission acted wisely in protecting correlative rights. I might admit that in my letter of October 31st I indicated that in that allowable differentiation between 40 and 80-acre, I referred to the allowable for 40-acre well as a half a well allowable. I think, and I stand corrected, I think the Commission action was wiser than my own interpretation, because your Order 1069-B provides, and you recognize the right of an operator to drill on any size tract under the statute; you recognize those operators that had drilled on tracts smaller than the 80-acre standard unit. You made provisions for them to have the exceptions. You made provisions for them to have their allowable according to the statutory authority given to you. You made provisions for the allowable, for the 80-acre well. I think you acted far more wisely than I even interpreted by the issuance of your Order 1069-B.

It is well known by the stipulation that all of the 14 wells that Shell complains here were spudded after the filing of the August 5th application of Sunray-Midcontinent, et al. Following my letter of October 31st, what was Shell's action in reply to pointing out the adjustment of allowable that might result from a correction of the order? Why, they went ahead and drilled eight additional wells of the fourteen, eight of the fourteen wells

additionally since that time. That was their answer.

Mr. White read you the letter of December 6th of Shell to Phillips and Skelly with respect to a development program in which they asked for eight 80-acre wells and four 40-acre wells. In the stipulation for the Sunray-Midcontinent exhibits, telegrams in which we requested Shell to withdraw their proposal for 40-acre wells and expressly gave them permission to drill the 80-acre wells; and those telegrams indicated that Shell did so, they withdrew their request for approval of the 40-acre wells. That is as of December 6th, and the part that Mr. White read you and which he indicated, the seven orders that are indicated in that paragraph that he read you are the three wells, the only three wells that are drilled on 40-acre in the Carson Unit not on participating area in which we would have a voice, but on Shell's own acreage in which they themselves would have the voice. We had nothing to say about it, but mind you, as late as December 6th, three, the only three 40-acre wells in the entire Carson Unit were drilled as a result of their statement saying that "We intend to drill our acreage in the unit outside the participating area on 40-acre spacing", and they specifically named the three wells that are on 40-acres inside the unit.

Now if you take, if you gentlemen accept Shell's interpretation of estoppel and vested rights and each order is a final order as it comes out from the mouths of the Commission and is issued, hark you what would result in administration from a

practical standpoint, you would have no authority at no time; once you initiate a spacing order under their theory, you would have no time to ever increase the size of the drilling unit because obviously wells were drilled on the existing order; and they could come in under their theory and say, "Well, you granted a 640-acre allowable, we drilled our wells on 160 acres, we are entitled to a 640-acre allowable."

How can the Commission proceed in its proper administration of the proration conservation matters if you accept Shell's argument about the matter of allowables in which they asked for 80-acre allowable given to 40-acre wells, based on existing orders, and no time can you ever change the allocation formula for any field, once you issue that, because it's those wells that were drilled under existing rules, were entitled under their theory to the top allowable forever. Now that is silly on its face, because we know that the Legislature intended this Commission to act from day to day as oil and gas conditions change from time to time. You would have no right, for example, in the Jalmat, to change the allocation formula, to introduce deliverability. I recognize your right to do that, as much as I dislike it, but I recognize your right to do it.

So that if Shell's theory is permitted to be adopted by this Commission, you no longer have the right to change either the spacing or the allocation formula, once you establish it in the field. I say that's going far beyond any law, any Court

decision that they may quote you. That might be applied to dentistry or to public service or to labor or anything else of that nature, because you see all the authorities that they have quoted this morning, you notice that they constantly said "under certain conditions". The administration of oil and gas is set aside from all other administrative regulations throughout the entire country. It has been set up by a special set of rules and regulations and Court decisions. As a matter of fact, in the administration of oil and gas in some states, the administrative bodies is the only exception to the United States Constitution after delegation of separation of powers, it was established way back in 17--,at the beginning of the birth of this nation, and just the Public Service Commission or a Railroad Commission or a Corporation Commission or an Oil Conservation Commission has a combination of rights which is separate and apart from the separation of powers in both the Constitutions of the respective States and the United States Constitution. So that why he may argue you don't have, this is not a judicial body, you do have to make decisions of a judicial nature. As a matter of fact, when someone comes in for an exception that is an exhibition of your judicial function under the statute here. So that we say that under the facts presented in which Mr. Seth admits that Shell went ahead on its 40-acre location at its own risk, that they cannot now say that they acted in good faith, they cannot say that they had vested rights, because the very fact of vested rights would prevent you from ever changing

any order of a particular field, no matter how it was warranted, and your delegation under your statutory authority permits you to change it from time to time.

Therefore, since this rehearing is confined to the matter of adjustment of allowable as between 40 and 80 acres, that all of the argument outside of that particular point is wholly irrelevant, such as spacing, or Rule 37 in Texas, which is nothing more than drilling, which is nothing more than in the absence of a unit as indicated in most other States, which Texas does not have, they have the theory of the Rule 37, that every tract, no matter how small, is entitled to a well. So that the only problem here is the adjustment of allowable between 40 and 80 acres, I submit that under the overwhelming legal authorities, your statutes, your own rules and regulations, and the very conduct of Shell in the entire proceedings indicates that you should deny their rehearing.

MR. KELL: I have a brief rebuttal. I think I can handle it in 10 or 15 minutes at the most.

MR. PORTER: Mr. Kell, there possibly will be other statements, just one moment. Will all of those who made appearances this morning have statements to make? I think we had best recess the hearing until 1:30.

(Recess.)

AFTERNOON SESSION

MR. PORTER: The hearing will come to order, please. At this time we will hear any further statements in Case 1308.

MR. KELLAHIN: If the Commission please, Jason Kellahin of Kellahin and Fox, appearing for Phillips Petroleum Company. I would like to make about a half a minute statement.

As I see it, the issue narrows down simply to the question prayed for in the prayer for relief in Shell's petition; it merely asks for the same allowable for 40-acre unit as that granted to an 80-acre unit. That's their prayer for relief. Now that's the argument that has been presented by Shell. I would like to point out that if the Commission would grant such relief as that, it would simply violate the statute which requires that acreage be given consideration in setting the allowable, and it would violate the statute for the protection of correlative rights.

I don't believe that anything further needs to be said. Thank you.

MR. PORTER: Mr. Ballou.

MR. BALLOU: A. F. Ballou, representing Sun Oil Company. Sun Oil Company is an operator in the Bisti Field. We feel that Mr. Kellahin's statement for Phillips Petroleum Company is accurate and we concur in the statements made by Mr. White and Mr. Selinger in opposition to Shell's request for relief.

MR. VERITY: If the Commission please, George Verity for Rex Moore. I would like to emphasize and underscore the portion of the argument that was made by the Skelly's attorney and point out to this Commission that this Commission is not just strictly a legislative body, but that they are judicial in nature as well,

as the cases he cited pointed out, and that Shell Oil Company in this hearing has had a judicial hearing and that they have a judicial appeal, a portion of which is taking place today; and therefore there are cases which are recited to the Commission which have to do with purely a legislative enactment which do not apply. They had full notice of the hearing, and when they drilled the wells in question and they knew that this order was exactly the one that might come out and they would be bound by the allowables that would come therefrom.

MR. PORTER: Mr. Bratton.

MR. BRATTON: If the Commission please, Howard Bratton, appearing for Monsanto Chemical Company. We would like to support the arguments which have been made by Mr. White, and we particularly concur in the analysis made by Mr. Kellahin. We believe that there are two facts which have been clearly demonstrated; one, that Shell has not demonstrated that it is entitled to any relief; and, two, that even if the Commission were so inclined, it could not under the statute grant the relief which Shell is asking.

MR. PORTER: Mr. Hinkle. Mr. Buell.

MR. BUELL: Guy Buell, for Pan American Corporation. Pan American recommends to the Commission that the application of Shell be denied in its entirety. We feel that the record of this case is crystal clear that the proper sized unit is an 80-acre unit. With respect to the allowable, it is our recommendation that 80-acre well receive double the allowable of a 40-acre well. We would

sincerely regret to see the Commission set a precedent of rewarding an operator who has drilled unnecessary wells by giving him the bonus allowable, which if Shell's request is granted, that's the effect of it.

MR. PORTER: Mr. Hinkle.

MR. HINKLE: Clarence Hinkle, representing Humble Oil and Refining Company. The Humble feels that the application of Shell should be denied. We concur in the position taken by Sunray, Skelly, and others, as stated here.

MR. PORTER: Mr. Sperling.

MR. SPERLING: J. E. Sperling, representing Magnolia Petroleum Company. Magnolia would like to add its concurrence to the position taken by Sunray, Phillips, and the others who have spoken in opposition to the relief sought by Shell.

MR. PORTER: Mr. Bushnell.

MR. BUSHNELL: H. D. Bushnell, attorney for Amerada. I would like to make a statement that I came here prepared to give what I believe the law ought to be in New Mexico, but after hearing Mr. Seth talk and give his argument, I have tossed that brief aside. Instead, I want to maybe sound so presumptious, as being a lawyer from out of state not certified to practice in this State, to take the liberty to disagree with the premise that Mr. Seth has used to support all of the issues he argued this morning. I do that because I feel that the State of New Mexico at this time is in a unique position of having no Judge-made law on the powers

of the Commission, and in construing the Act that empowers that Commission, those of us here today, lawyers from out of state, other states such as Oklahoma and Texas, are working under a handicap that you gentlemen, that you here who practice law operating under this State are not involved in. That predicament we find ourselves in stems from the fact that the Courts,not only in the States of Oklahoma and Texas, but also the United States Supreme Court, has often reasoned and reached its conclusions on the premise that Mr. Seth has used here, that you gentlemen are acting in a legislative capacity. As a result of that premise, they then reason that the particular issue should be applied to the function that the Commission is performing at that particular time. The authorities, the experts, the writers, many of them criticize this as not being any reasoning whatsoever. Instead, it is merely a justification for a conclusion already reached. I will show you some examples of the inconsistency of some of Mr. Seth's argument this morning. For example, he said, as I understand it, that you gentlemen are acting in a legislative capacity. To give support to one of his issues, he cites a case from Texas, which happens to be Rule 37.

In that particular case, it was a hearing on an exception to Rule 37 location. It so happens in the State of Texas the Court has used the same reasoning that Mr. Seth would like to have used here, that Court saying that when the Commission acts in that capacity, it acts in a judicial capacity but note that Mr.

Seth, who has already concluded that you are acting in a legislative capacity, cites a case from Texas where that Court has held that they are acting in a judicial capacity. You can see the confusion that can arise if you will take cases from various jurisdictions and take the rule out without considering one of the facts in the case, the statute that they are construing. If you do, and I speak this as figuratively speaking for every rule, and I think all the lawyers will agree with me, for every rule that could be cited on either case today, other lawyers could find you five rules to contradict it. You cannot take rules from just a group of cases and apply it to this one. There is one good fundamental reason why you can't. Historically, the problem has evolved as a result of the Courts attempting to apply judicial rules to administrative functions; as a result, this unique argument that you will classify the function and then apply the rule.

Another example of the inconsistency of such an argument is reflected in Mr. Seth's argument this morning. He says you are acting in a legislative capacity, but orders are final, but you must have a finding supported, in that order. They are inconsistent arguments, if you are acting legislatively instead of judicially; and I say this for the benefit of this Commission, for the benefit of the Courts of this State, the lawyers of this State, especially the counsel who are advising this Commission. I urge you to look to the purposes, the reasons, use logic in applying those reasons to the statute that now exists today, either

as it is expressed or as it is implied. Use your judge-made law that you have available in this State, and if you use any cases from out of State, look to the facts, look to the purposes, and by all means look at the Statute under which that Commission operates. For authorities I would refer you, and I will be glad to give you the page numbers, but I refer you to 48 Law Review, 49 Columbia, 7 Rutgers, 25 Texas Law Review, articles written on the function of administrative agencies, and their authority, either in what the Courts have developed as quasi-legislative, quasi-judicial. These comments that I make, I merely am paraphrasing the comments of these experts. It is not original with me.

Thank you.

MR. PORTER: Does anyone else have a statement before Shell's rebuttal?

MR. WHITE: The Texas Company is an operator in the Bisti and they concur in the position taken by Sunray-Midcontinent and urge upon the Commission to deny Shell's application.

MR. ERREBO: Burns Errebo, Sinclair Oil and Gas Company has authorized me to state in their behalf that they support the Sunray position and urge that the Shell application be denied.

MR. PORTER: Mr. Sullivan.

MR. SULLIVAN: Mr. White, at the commencement of his remarks this morning, represented that he was speaking on behalf of me and my client in this matter, the British-American Oil Producing Company. I wish to corroborate that and point out that

our position is opposed to the granting of the relief requested by Shell in its application for rehearing.

MR. PORTER: Mr. Kell.

MR. KELL: If the Commission please, I don't want to belabor the point, but I just want to correct a few statements that were made concerning the summation by the proponents of 80-acre spacing. First, with regard to finality of the orders of the Commission, it has been suggested that because these orders made from time to time be subject to change or amendment, that they aren't final. That simply isn't the case. Any order of the Commission can be amended subject to the constitutional revision and limitation. By the same line of argument you would argue that a legislative enactment is not.

Then on this good faith issue which relates to the three unit wells that have been drilled, there has been a lot of comments and suggestions to the effect that Shell wasn't acting in good faith because some of the operators didn't like the spacing pattern they proposed. Those objections which are quite common in unit operations, I have never known a group to be unanimous on that type yet. Those objections are dealing with the differences among the operators, as such it appeared to me that what is material in terms of reliance is the orders of this Commission, as well as the orders and approval of the United States Geological Survey. In other words, we were relying on the orders of the State agencies and the United States Geological Survey, which had the ultimate

authority to grant the permission, and particularly as far as the United States Geological Survey, because the bulk of the lands involved were Federal lands or allotted Indian lands within their jurisdiction and they approved the notice of intention to drill the 40-acre wells involved.

With regard to the applicability of some of the Texas spacing cases which Mr. Seth referred to, there has been some suggestion that since they're spacing matters and since this is a proration matter, they have no bearing. Well, that simply is not true. It overlooks the relationship between the spacing and proration which at least in New Mexico, so far as oil is concerned, is governed by the same standard; namely, the area that can be economically and efficiently drained by one well. I think that the Texas spacing cases are particularly applicable to this situation. Then there has been some further suggestion that Shell is in no wise injured or damaged by the order in question because they got a factor of one originally, and they still have the factor of one under 40-acre wells; but this overlooks the fact that it destroys the relative position with regard to the allowable granted wells. When these wells were drilled they were entitled to a full unit allowable. 80-acre wells received the same allowable. When the New Mexico Oil Conservation Commission set proration for the Carson Bisti Field in September and January, they set them on the basis of 40-acre wells, 40-acre allowable basis. Now that order as revised, Shell's 40-acre will be given half the allowable that

the 80-acre locations will receive. Now it's been suggested, although I have doubts as to how serious it was, I can't believe that anyone would suggest that if Shell's position is adopted the Commission can't change the spacing or proration rules. That simply isn't the case. All we suggested is that when you drill wells in accordance with existing rules, that when they are changed-- and no one denies the right of the Commission to change them -- that they make adequate provision to protect the parties who have drilled wells in accordance with existing rules, either by exception or such other means of protection that are equitable.

As for the United States Geological Survey's approval of this third supplemental plan of development, and as for whether or not there is any question as to the final approval, I will leave that to the correspondence that we will submit in connection with that plan. I think that will resolve any doubts as to the finality of the approval.

One other factor I would like to mention, and that's in connection with some of the authorities Mr. White cited with regard to a lessor operator proceeding while there was a pending judicial action. Those cases involved, well, it appeared to involve largely a lessee-lessor situation, and a situation where there was a legal proceedings pending; and under which there has been an attack upon the lease. In other words, all the basic rights the party had was subject to question. Well, that simply isn't the case. The Statewide 40-acre proration rules were never attacked.

There was just merely a request for an exception, and until such request was granted, the Statewide orders remained in full force and effect at all times. That was evidenced by Order 1069 and 1069-A. If the position of the proponent of 40-acre spacing is correct, the mere fact that someone files a request for exception, that you stop drilling or drill at your peril, it would be a simple matter for people to successfully file various applications and force you to drill at your peril.

I am not suggesting, of course, that wasn't done in this instance; it shows the situation that can develop if you follow that line of reasoning and if you take the position that any time an application for exception or qualification to a rule is made by some party, that the operator has to hold up drilling. You can see how that will deter the further drilling operations.

So for these reasons, I respectfully request that the application be granted.

MR. PORTER: Does anyone have anything further to offer in this case? There was some discussion of the matter of filing briefs. The Commission will expect one brief from each side, to be filed within fifteen days of this date.

The case will be taken under advisement.

* * * * * * * * * *

C E R T I F I C A T E

STATE OF NEW MEXICO)
) ss
COUNTY OF BERNALILLO)

I, ADA DEARNLEY, Notary Public in and for the County of Bernalillo, State of New Mexico, do hereby certify that the foregoing and attached Partial Transcript of Proceedings before the New Mexico Oil Conservation Commission was reported by me in stenotype and reduced to typewritten transcript under my personal supervision, and that the same is a true and correct record to the best of my knowledge, skill and ability.

WITNESS my Hand and Seal this 2nd day of June, 1958, in the City of Albuquerque, County of Bernalillo, State of New Mexico.

Ada Dearnley
NOTARY PUBLIC

My commission expires:

June 19, 1959.

BEFORE THE
OIL CONSERVATION COMMISSION
Santa Fe, New Mexico
March 14, 1958

IN THE MATTER OF: Case No. 1308

TRANSCRIPT OF PROCEEDINGS

DEARNLEY - MEIER & ASSOCIATES
INCORPORATED
GENERAL LAW REPORTERS
ALBUQUERQUE, NEW MEXICO
3-6691 5-9546

BEFORE THE
OIL CONSERVATION COMMISSION
Santa Fe, New Mexico
March 14, 1958

IN THE MATTER OF:

The rehearing requested by Shell Oil Company for reconsideration by the Commission of certain portions of Case 1308 - application of Sunray Mid-Continent Oil Company for the temporary establishment of a uniform 80-acre well spacing and Special Rules and Regulations in the Bisti-Lower Gallup Oil Pool. Case 1308

BEFORE:

Mr. A. L. Porter, Jr.
Mr. Murray Morgan
Governor Edwin L. Mechem

TRANSCRIPT OF PROCEEDINGS

MR. PORTER: The meeting will come to order, please. The matter to be considered this morning is the rehearing on Case 1308.

MR. COOLEY: Case 1308: In the matter of the rehearing requested by Shell Oil Company for reconsideration by the Commission of certain portions of Case 1308 - application of Sunray Mid-Continent Oil Company for the temporary establishment of a uniform 80-acre well spacing and Special Rules and Regulations in the Bisti-Lower Gallup Oil Pool.

MR. KELL: Appearances on behalf of Shell will be Oliver Seth and Leslie Kell. We only have one witness to offer evidence at this time. In order to expedite this hearing, the parties got

together and stipulated to a lot of facts not in controversy. I would like to briefly mention the stipulations.

First, that the Carson Unit Agreement under which Shell is unit operator was approved by the United States Geological Survey, the Commissioner of Public Lands, and the New Mexico Oil Conservation Commission.

Second, that Shell's map which will be designated as Rehearing Exhibit 1, contains a description of the location of the wells which was drilled by Shell in the Carson-Bisti area at the time referred to in the application for rehearing; that Shell's chart designated as Rehearing Exhibit 2 contains an accurate description of the wells drilled by Shell in the Carson-Bisti area during the period before Order R-1069, between Order R-1069 and R-1069-A, and between Order R-1069-A and 1069-B.

The parties have also stipulated that the date of Sunray's original application was August 5th, 1957, in this matter.

The parties have also stipulated that Shell's Exhibits 3-A through N, inclusive, consist of photo-print copies of notices of intention to drill filed with the United States Geological Survey and also the New Mexico Oil Conservation Commission, in connection with the fourteen 40-acre wells referred to in Shell's application for rehearing.

A further stipulation is that the correspondence contained in Shell's Rehearing Exhibits 4-A through F, inclusive, relate to approvals of the third supplemental plan of development under the

Carson unit by the United States Geological Survey, Commissioner of Public Lands, and the Oil Conservation Commission.

Further stipulated that there was a lack of unanimity among the working interest owners and Shell as unit operator under the Carson Unit as to whether forty or eighty acre spacing was proper, and was further evidenced by such parties in Shell's participation in Case 1308; it was stipulated that Skelly introduce as exhibits copies of correspondence between the other working interest owners and Shell, indicating the differences over spacing which arose in connection with this third supplemental plan of development; and that Shell will have ten days from the date of conclusion of the hearing to introduce additional correspondence which it has between it and the other working interest owners and between the United States Geological Survey or the State Oil Conservation Commission relating to this third supplemental plan.

It is further stipulated that 40-acre proration was in existence during December of 1957 and January of 1958; and finally, that the cost of the fourteen wells referred to in Shell's application for rehearing was the amount alleged in the petition, $565,600.00. The only witness we have --

MR. CAMPBELL: (Interrupting) Just a minute. I didn't hear that stipulation with regard to the date of the filing of the application by Sunray.

MR. KELL: I mentioned that, August 5th.

MR. CAMPBELL: Is that all you said?

MR. KELL: Yes.

MR. CAMPBELL: We also stipulated, did we not, that all the 40-acre locations referred to in this petition, all the wells were spudded subsequent to that date?

MR. KELL: That will be shown by the exhibit that we plan to introduce in evidence.

MR. CAMPBELL: I would like to have that included in that stipulation, if that is the fact.

MR. KELL: That is a fact, no question about it.

MR. SELINGER: In connection with the stipulation, the matter that Mr. Kell referred to, the correspondence that Skelly was going to introduce, unfortunately we have only one copy of the attachments; however, we have summarized them and indicated them to be Sunray Mid-Continental, et al, second rehearing exhibits, March 13, and designated as Rehearing Exhibits from 1 to 20.

In addition to that, at the bottom of the summary sheet the following request is made for Shell to submit letter dated July 24, 1957, from Shell to the United States Geological Survey; also letter dated July 23, 1957, from the Oil Conservation Commission to Shell; and the letter dated August 23, 1957, from the United States Geological Survey to Shell. Also attached to this summary is the statement that Shell can also furnish copies of all instruments in their files of any correspondence regarding the third plan of development, and that is in connection with their stipulation.

MR. KELL: Our only witness will be Mr. R. R. Robison.

MR. WHITE: I think it might be proper to enter the other appearances at this time. Burns H. Errebo, Tulsa, Oklahoma; Jack M. Campbell of Roswell, New Mexico; and Charles White of Santa Fe, New Mexico, appearing on behalf of Sunray and others.

MR. SELINGER: George W. Selinger for Skelly Oil Company.

MR. SULLIVAN: R. W. Sullivan for British American Oil Producing Company, Denver, Colorado.

MR. BUSHNELL: H. D. Bushnell, appearing for Amerada Petroleum Corporation.

MR. VERITY: George L. Verity for Rex Moore.

MR. SANCHEZ: Manuel Sanchez for Southern Union Gas Company.

MR. KELLAHIN: Jason Kellahin for Phillips Petroleum Company.

MR. BUELL: For Pan American Petroleum Corporation, Guy Buell.

MR. BALLOU: For Sun Oil Company, A. R. Ballou.

MR. WADE: For the Texas Company, H. N. Wade.

MR. SPERLING: J. E. Sperling, Magnolia.

MR. HINKLE: Clarence Hinkle, Howard Bratton, Humble Oil and Refining Company.

MR. COOLEY: Will that be all the appearances in the case?

MR. PORTER: Mr. Cooley, will you swear the witness?

(Witness sworn.)

R. R. ROBISON

called as a witness, having been first duly sworn, on oath, testified as follows:

DIRECT EXAMINATION

By MR. KELL:

Q Would you state your name, employer, and the capacity in which you are employed?

A My name is R. R. Robison, Production Manager of Shell's Farmington Division, located in Farmington.

Q In your capacity as Production Manager, are you familiar with the drilling activities which Shell has conducted in the Carson-Bisti Area?

A I am.

Q Now in connection with exhibits, Shell's Rehearing Exhibits 1 and 2, would you refer to them and briefly explain what they purport to show?

A I think it might be a little more clear if we look at Exhibit 2 first. Exhibit 2 shows graphically the wells that have been drilled by Shell in the Bisti Field during the last eleven months or so, beginning April of 1957, and up to the end of February. The upper row shows the wells drilled with one string of tools, which was the first string of tools employed by Shell in the Bisti Field; and the second or lower row of wells indicated by number and by the solid blocks are those drilled with the second string of tools beginning the latter part of May, 1957.

MR. PORTER: Will you speak up a little, Mr. Robison?

A I'll begin with the second row, I think that is clear. The wells are numbered and the spud date is the initial date there

of the well, like 2515, the first well in the second row was spudded on May the 25th, and the rig was released on June the 4th, and so on.

That second string of tools was released near the end of January of 1958. The wells indicated in the blue --

MR. PORTER: Mr. Robison, just a minute. I believe a little better seating arrangement could improve this.

A The wells indicated in the solid blue color, you will note, are referred to as 80-acre wells and are so indicated in accordance with the present dedication of acreage; namely, one well on an 80-acre parcel, or no more than two wells in a quarter section. The wells indicated in red are those wells representing the third or fourth wells in a quarter section, or to which two wells are located in an 80-acre tract. The 80-acre wells, excuse me, the 40-acre wells indicated in red are shown to represent a total of fourteen wells, meaning that there are fourteen 80-acre tracts on which there are two wells. The wells indicated in red are the second to be drilled in the several 80-acre tracts.

The dates are shown on the chart, that is, the wells drilled are shown and the three dates, rather, pertinent dates are shown on the bottom here as October 9, 1957, which was the date of the Commission's order, original Order No. R-1069; November 4th is shown as the date of the second Order R-1069-A; and similarly, January 17th, the date of issuance of Order R-1069-B.

Prior to October 9, 1957, you will note that there are two

40-acre wells having been spudded and drilled; between October 9th and November 4th two wells had been drilled and two spudded for a total of four; and between November 4th and January 17th, eight wells were spudded, for the total of fourteen.

Then if you will refer to Exhibit No. 1, the locationsof the various wells are shown. The two wells drilled prior to October 9th are shown in Sections 15 and 10 of 25-12, over here in the lefthand portion of the map, locations being 31-15 and 44-10, circled in green or blue, it looks pretty close there. Then the four wells in between the dates of October 9th and November 4th are shown circled in blue; namely, 13-10, 33-10, and 22-9, and 42-9. The eight wells drilled after November and prior to January 17, 1958, are circled in red. You will note that three of the wells, only three of the wells were drilled, the 40-acre wells were drilled within the Carson Unit, the Carson Unit being indicated by the 24 section tract with the dashed lines representing the boundary.

Q Now these numbers that appear, for clarification, the numbers that appear on the chart 2 and correspond with the same numbers that appear on the map Exhibit No. 1, the well designation numbers?

A That's right.

Q According to the chart here, there were actually two wells that were drilled between the date of filing of Sunray's application on August 5th and the date of the Order R-1069, is that correct, two wells were drilled in that period?

A Correct.

Q Isn't it also true that of the two wells, one of the wells could have been dedicated 80-acres in accordance with the plan proposed by Sunray in its application?

A I believe that was correct, although there was some, I don't have the exact, I would have to look up here the order in which we drilled those wells, but 31-15 was at that time the seventh well on that section, so in my opinion that could have been classed as an 80, depending on how the acreage was dedicated.

Q As we stipulated, there was disagreement among the working interest owners in connection with the third supplemental plan of development under the Carson Unit. There was quite a bit of correspondence pertaining to this disagreement, was there not?

A That is correct.

Q Isn't it true that as a result of this disagreement among the parties that Shell proceeded to drill some of the 80-acre locations first?

A Within the Carson Unit?

Q Yes.

A Yes.

Q If I am correct, are three of the fourteen wells in question located within the Carson Unit itself?

A That's right.

Q Are you generally familiar with these various orders, 1069, A and B of the Commission?

A I think so.

Q Did 1069 expressly provide for continuation of the statewide proration rules, 40-acre?

A Yes.

Q Did 1069-A also contain a similar provision?

A Yes, and even just as forceful as 1069.

Q How about 1069-B?

A 1069-B as I interpret --

Q (Interrupting) Excuse me, 1069-A, did it contain a provision to the effect that the 40-acre statewide rule would remain in effect pending further order of the Commission?

A Spelled out carefully, that 1069 shall remain in full force and effect, and 1069-A, which granted the rehearing.

Q In connection, going back again to the unit wells,in connection with the unit wells, as you indicated, some of the 80's were drilled before the 40's due to the disagreement among the working interest owners, insofar as the United States Geological Survey was concerned, after the letter of October 15th which is Shell's Exhibit 4, did you have any request or suggestion from them that you not continue drilling 40's?

A No, sir, none whatsoever. In fact, we have complied with the regulations completely to my knowledge, in that we filed the notices of intention to drill, copies of which, after approval by the United States Geological Survey, are forwarded to the Commission's office in Aztec.

Q Well, now, insofar as the Oil Conservation Commission and the Commissioner of Public Lands are concerned, did you at any time between the time Sunray filed its application on August 5th and the date of Order 1069-B on January 17, 1958, have any request from any of the state agencies that you not drill any 40-acre wells?

MR. SELINGER: We object to the question. It is not within the province of this Commission to indicate to an operator when he shall drill a well on what basis. That is entirely within the business process of the applicant.

Q Did you receive any objection --

MR. SELINGER: (Interrupting) Let the Commission rule.

MR. SELINGER: Alright, if he withdraws his question.

Q Did you receive any request from the Commission not to drill these wells?

A None whatsoever.

Q As to all of these wells drilled subsequent to October 9th which is all but two, these wells were at all times drilled without objection from any state or Federal Governmental agencies?

A That is correct.

Q In drilling these 40-acre locations, did you do so in reliance upon the orders and upon the lack of objection received from any of these agencies?

A That is also correct.

MR. KELL: I think that's all the questions I have.

CROSS EXAMINATION

By MR. CAMPBELL:

Q You are not telling the Commission here, Mr. Robison, that Shell was unaware that a considerable number of the operators in this pool were pursuing a course of seeking an order for 80-acre units in the Bisti Field during all this period? You are not telling the Commission that you were unaware of that?

A No, I'm not.

Q None of these wells, the fourteen wells shown on your Exhibit No. 2, were drilled prior to the time that the applications of Sunray for 80-acre units in this field were filed, were they?

A That is correct.

Q At the time of the hearing in this case on September 20th, 1957, I asked you some questions with regard to Shell's plans at that time in relation to your testimony that Shell had these rigs which they needed to keep operating on some sort of a continuous program. At page 282 of the transcript of testimony on September 20, 1957, I asked you the question: "Have you estimated the number of wells you would be drilling if the 80-acre density were maintained during the next year?" You answered: "Yes, I have." Then I asked the question: "How many would that be?" Your answer to that: "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 through the balance of the year, the same as the 40, but next year there would be eleven wells." Question:

"But you could maintain a continuous program for the balance of this year, at least, with the present operations that you contemplate?" Answer: "That's right."

Your Exhibit No. 2 indicates that on October 15th, less than one month after the hearing of September 20th, you commenced a series of 40-acre locations which are part of the complaint in this rehearing application. What changed the position of Shell during that period, between September 20th at the time you gave that testimony and the time that you started these 40-acre locations?

A I don't know that I follow you exactly on that transcript.

Q You stated at that time that Shell was, would be able to drill 80-acre locations for the balance of the year without any interruption of their drilling program, but you chose to drill 40-acre locations commencing less than thirty days after that testimony, isn't that correct?

A After Order R-1069?

Q Yes, but after this testimony that you gave that you could continue on 80-acre units.

A Yes, it was after that date.

Q Were you aware of the fact or advised of the fact that other operators had opportunity for rehearings in these cases?

A Yes.

Q Were you advised of that immediately after Order 1069 was issued?

A That you were going to request a rehearing?

Q That we were entitled to seek a rehearing.

A Yes.

By MR. WHITE:

Q Mr. Robison, at the hearing, on page 285 of the transcript of the prior hearing, Mr. Cooley asked you: "You stated that Shell has not commenced any 40-acre wells since filing this application. Would you be in a position to state whether they anticipate commencing any until there is a final decision in this case?" You replied: "I think that is right, that we will defer, we would like to and probably will defer drilling until there's a decision in this case."

In view of your testimony that you knew that we were entitled to a rehearing and that the order issued October 9th was not a final order, what brought about your change of position to cause you to proceed and drill on 40's?

A Order R-1069 and my, as I interpret it, was a complete denial of everything that the proponents of 80-acre spacing had asked for. We were in favor of 40 acres, still are, and on the strength of that order, proceeded to drill in accordance with statewide rules.

Q Knowing --

A (Interrupting) Order R-1069-A was even more emphatic in that the last paragraph of that order, I believe the last paragraph says that Order R-1069 in the meantime shall remain in full force and effect.

Q And in view of the fact that we had filed our application for rehearing, you continued to drill on 40's?

A Right.

Q Knowing that there possibly could be a change in the Commission's view?

A Could be, but on the strength of drilling them in accordance with the then existing rules, we certainly couldn't foresee a retroactive feature of any subsequent order.

Q Under the Carson Unit plan No. 1, there were no 40-acre units drilled, is that correct?

A Under what?

Q Under your Carson Unit plan No. 1.

MR. SELINGER: The first plan of development.

A I believe that is correct. I say that, because as far as I know the only ones drilled were the three wells shown on Exhibit 1, which were part of the third supplemental plan of development, the fifty-three well program.

Q Would you give us the days that those three wells were drilled in the Carson Unit, that is, the 40's? This is the spudding dates.

A 11-14 in the northeast corner of Section 14 was --

MR. SELINGER: (Interrupting) That is the northeast of northwest.

A Early January, 1958.

MR. SELINGER: Northeast --

A Northwest of the northwest.

MR. SELINGER: Northwest of the northwest.

A That was early January, 1958.

MR. SELINGER: That was a completion date?

A Spudded, it looks like, on January 1st, or December 31st, right there at the end of the year, and the rig released on the 7th of January, 1958. 33-14 was just a few days behind it, having been spudded, it looks like, on the 2nd of January, 1958, the drill rig released on January 9th, 1958. 44-14 was spudded on the 25th of December, 1957, and completed January, or rig released January 1, 1958.

Q (By Mr. White) At any time did the working interests in the Carson Unit agree to the drilling of any 40-acre wells?

A They did not.

Q And you did that as an operator?

A Those wells were not included in the participating area under the Carson Unit Agreement. We therefore had a right to drill those wells.

MR. WHITE: That's all I have.

By MR. SELINGER:

Q Mr. Robison, you were asked with respect to your reliance on the Commission order in drilling 40-acre locations, do you recall that, on direct examination?

A I recall something about it.

Q That Mr. Kell asked you that you relied on the orders of

the Commission in drilling your 40-acre locations?

A Say that again.

Q Do you recall on direct examination from Mr. Kell stating that in your opinion --

A (Interrupting) Today?

Q Just now, just a little while ago, that you relied on the order of the Commission in drilling these fourteen 40-acre locations?

A Oh, yes.

Q I believe you stated that you also are familiar with all of the orders of the Commission, that is, the orders 1069, 1069-A, 1069-B, and 1069-C?

A I don't recall offhand what 1069-C is.

Q That's granting your rehearing this morning.

A Okay, yes.

Q You are familiar with all those orders?

A Yes.

Q Tell this Commission what order of the Commission prevents you from drilling 40-acre locations?

A I consider that there are no objections to drilling 40-acre locations..

Q And there's no prohibition by this Commission for you to drill 40-acre location at this time, is there?

A That is right.

Q The only complaint Shell has is not the 40-acre locations but the allowable feature, is that correct?

A That is our strongest objection to the proration order.

Q That's your only objection, is that not correct?

A I believe that is the essential one, the essential complaint filed in our application.

MR. SELINGER: That's all. Thank you.

MR. KELL: I have some redirect.

MR. COOLEY: I have one question.

By MR. COOLEY:

Q Was the production department, which is responsible for the drilling of these wells, aware that any party that might be aggrieved by Order R-1069 might within twenty days apply for rehearing?

A Yes, they're aware of that.

Q Were they advised of the fact that Sunray Mid-Continent Oil Company did make such an application?

A We were aware of that.

Q Were you aware that in the event an application for rehearing is filed, that an order of the Commission is not final? It does not become final unless there is a failure to apply for rehearing within the prescribed period, the case remains open and subject to reconsideration?

A Yes, we understand that.

Q Isn't this somewhat inconsistent with your statement that it was Shell's policy not to commence any other 40-acre locations until such time as the final order was entered in this case?

A No, but the first two orders, R-1069 authorized, first they denied everything that applicants had asked for, and I believe spelled out that 40-acre spacing was fitting and proper and should be continued.

Q You realized that this order was not final?

A That's right.

Q Due to the fact there was an application for rehearing?

A We proceeded because we considered that if there was a final order that it could not be made retroactive.

Q You proceeded even though there was no final order applying on the questions, or finding that the Commission would stay on 40-acre spacing?

A I don't know if we would call it a guess or not. After Order R-1069 or R-1069-A seemed to be so conclusive, there could only be room for doubt.

Q You do understand, your department understood that in the event that a rehearing is granted that any order could be entered as a result of that rehearing, that 80-acre spacing could have been granted, as it was, that it was a possibility?

A In the hands of the jury, you never know what will happen.

Q You realized that it was still pending?

A Yes, the case was still pending.

MR. SELINGER: I have one more question before redirect, if I may.

By MR. SELINGER:

Q Do you know whether or not you or anyone in the Shell organization was advised specifically on the matter of allowables of 40-acre and 80-acre wells prior to January 17, 1958?

A Advised of 40-acre allowables and 80-acre allowables?

Q The matter of which you are complaining before this Commission today as to the allowables between 40-acre wells and 80-acre wells. Was anyone in the Shell organization advised of that fact by anybody?

A To my knowledge, no.

MR. SELINGER: Thank you. No.

REDIRECT EXAMINATION

By MR. KELL:

Q Getting back to the allowables question that Mr. Selinger has raised on cross, at the time that these 40-acre wells were drilled, they received the full unit allowable, did they not?

A Correct.

Q The allowable was on a 40-acre basis. Now, under R-1069-B where you have two, two 40's, where you drilled two 40-acres in close proximity, they will be in effect receiving just half the allowable, is that not correct?

MR. SELINGER: We object to that question. That is interpreting the present existing Order 1069-B. I don't think this witness is qualified to interpret that. We will let Mr. Seth and Mr. Kell interpret that, but the matter of the 40-acre allowable as it existed prior to January the 17th and as it exists as of today is the same, all the 40-acre allowable wells get the same.

The effect of your order is to increase the allowable for only the 80-acre wells, but in no way is the 40-acre allowable wells affected.

MR. SETH: Are you objecting or arguing the case?

MR. COOLEY: The order speaks for itself. It needs no interpretation. If they wish to,argue it on legal argument.

MR. PORTER: Well, the order will speak for itself as far as the allowable case is concerned.

MR. KELL: I guess that's all I have, then.

MR. PORTER: Does anyone else have a question of the witness? He may be excused.

(Witness excused.)

MR. KELL: At this time we would like to offer in evidence Shell's Exhibits 1 through 4, inclusive, and we would also like to --

MR. WHITE: (Interrupting) What's 3 and 4?

MR. SELINGER: They haven't been introduced yet.

MR. KELL: 3 was the notice of intention to drill filed in connection with these wells, and 4 consisted of correspondence pertaining to third supplemental development.

MR. PORTER: And have been explained by the witness? They will be admitted.

MR. COOLEY: How did you specify these were to be marked?

MR. PORTER: Shell's Rehearing Exhibits 1 through 4.

MR. SELINGER: You had better make it Second Rehearing.

MR. COOLEY: You had better say Second.

MR. KELL: All right. I think we would also like to ask that the prior transcripts and the exhibits in the previous aspect of this case be incorporated in the record.

MR. COOLEY: They're already a part of this case. This is the same case. Mr. Kell, how many different wells of two forms does Exhibit 3 comprise?

MR. KELL: A through N, one for each of the fourteen wells.

MR. COOLEY: A through N as in Nancy?

MR. KELL: Yes, one for each of the fourteen wells. That's all the testimony that we have to offer in this application for rehearing at this time.

MR. CAMPBELL: We have no further testimony. We understand that the exhibits offered by Mr. Selinger on behalf of Sunray and et al have been received?

MR. COOLEY: They have not been offered.

MR. SELINGER: They were made part of the stipulation, but to clarify it we now wish to offer Sunray Mid-Continent et al Exhibits 1 through 20, also noting the paragraph on the bottom which permits Shell to introduce whatever correspondence is necessary with respect to the third plan of development to the Carson Unit.

MR. PORTER: Any objection to the introduction of these exhibits?

MR. COOLEY: That is Exhibits 1 through 20?

MR. SELINGER: They are indicated on the summary sheet,

Exhibits RX 1 through 20.

MR. PORTER: Does anyone have testimony to present in the case? Do we have statements?

(Oral argument by counsel.)

MR. PORTER: Does anyone have anything further to offer in this case? There was some discussion of the matter of filing briefs. The Commission will expect one brief from each side to be filed within fifteen days of this date. The case will be taken under advisement.

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C E R T I F I C A T E

STATE OF NEW MEXICO)
) ss
COUNTY OF BERNALILLO)

I, ADA DEARNLEY, Notary Public in and for the County of Bernalillo, State of New Mexico, do hereby certify that the foregoing and attached Transcript of Proceedings before the New Mexico Oil Conservation Commission was reported by me in stenotype and reduced to typewritten transcript under my personal supervision, and that the same is a true and correct record to the best of my knowledge, skill and ability.

WITNESS my Hand and Seal this 31st day of March, 1958, in the City of Albuquerque, County of Bernalillo, State of New Mexico.

Ada Dearnley
NOTARY PUBLIC

My commission expires:

June 19, 1959.