IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

AMANDA E. SIMS and GEORGE W. SIMS,

Petitioners and Appellants,

vs.

No. 7207

HONORABLE EDWIN L. MECHEM, CHAIRMAN, E. S. (JOHNNY) WALKER, MEMBER, A. L. PORTER, JR., MEMBER, SECRETARY OF THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO; OLSEN OILS, INC., and TEXAS PACIFIC COAL AND OIL COMPANY, SUCCESSORS TO OLSEN OILS, INC.,

Respondents and Appellees.

APPEAL FROM DISTRICT COURT, LEA COUNTY,

Neal, Judge

APPELLEES' ANSWER BRIEF

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SUBJECT INDEX

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OBJECTIONS TO STATEMENT OF THE CASE

Appellees object to Appellants' Statement of the Case insofar as said statement asserts that the Notice of Hearing in Case No. 1567 did not advise Appellants that the previous Order No. R-677 would be affected by the proceeding and at the hearing in Case No. 1567 for the reason that said Notice as published and served upon Appellants by mail shows on its face that the previous Order No. R-677 would be affected at such hearing (Applt's Br. in Ch.13).

Appellees further object to the statement that:

> 'The Oil Company presented no evidence that waste was being committed or that the granting of the order asked for would stop the commission of waste or prevent waste from being committed.'

for the reason that the witness Watson, a Geological Engineer, and recognized expert before the Oil Conservation Commission (Tr. 91), testified that standard quarter sections would most efficiently drain the 320 acre tract (Tr. 96).

Appellees object to the statement in Appellants' Statement of the Case that:

> 'Such order did not contain a finding that waste was being committed or that the entry of the order would prevent such waste.' (Applt's Br. in Ch. 3)

for the reason that the order of the Commission in Paragraph 7 states:

> 'That the most efficient and orderly development of the subject acreage can be accomplished

by force pooling of the NW¼ of said Section 25 and the SW¼ of said Section 25 to form two standard gas proration units in the Tubb Gas Pool and that such order should be entered." (Tr. 102)

OBJECTIONS TO STATEMENT OF THE FACTS

Appellees object to the statement in Appellants' Statement of the Facts that:

> "The Application in this case did not recite that Order No. R-677 would be affected by the proceedings in Case No. 1567." (Applt's Br. in Ch. 5)

for the reason that said Application and Notice of Hearing show on their faces that said Order No. R-677 would be affected.

Appellees object to Appellants' statement that:

> "The record in Case No. 1567 (Tr. 90-100) does not contain any evidence of and Order No. R-1310 (Tr. 101-104) makes no finding that waste was being committed as a result of production from the gas well authorized by Order No. R-677 and attributed to the acreage of Appellants." (Applt's Br. in Ch. 5)

for the reason that said Order No. R-1310 in Paragraph 7 finds

> "That the most efficient and orderly development of the subject acreage can be accomplished by force pooling of the NW¼ of the said Section 25 and the SW¼ of the said Section 25 to form two standard gas proration units in the Tubb Gas Pool and that such order should be entered. (Tr. 102)

and for the further reason that the recognized expert Dewey Watson, a Geological Engineer, testified in the hearing that the most efficient manner in which the 320 acres could be drained would be the two standard quarter section units established by

the order (Tr. 96).

Appellees object to Appellants' statement that they sought relief before the Commission in Case No. 2051 asking that Order No. R-1310 be vacated and declared void for the reason that Case No. 1567 amounted to a collateral attack on Order No. R-677 and that the Commission was without jurisdiction to enter Order No. 1310 (Applt's Br. in Ch. 5) for the reason that Appellants' Application in Case No. 2051 discloses that relief was sought solely upon the ground that the Appellee oil company withheld information from the Oil Conservation Commission of the existence of a voluntary pooling agreement pooling the SE¼ NW¼, E½ SW¼ and the SW¼ SW¼ of Section 25, Township 22 South, Range 37 East, N.M.P.M. (Tr. 4-5).

Appellees object to Appellants' statement that the only notice received by Appellants was a notice mailed to them of the hearing for the reason that the record fails to show any of the proceedings prior to the hearing in Case No. 1567 and it must be presumed that from Order No. R-1310 that notice by publication as required by statute was given Appellants in addition to the actual notice mailed to Appellants (Tr. 101, Applt's Br. in Ch. 15).

ANSWER TO POINT 1

THE OIL CONSERVATION COMMISSION WAS WITHIN ITS JURISDICTION IN ENTERING ORDER NO. R-1310 IN CASE NO. 1567.

a) THERE WAS SUBSTANTIAL EVIDENCE BEFORE THE COMMISSION THAT WASTE WOULD BE PREVENTED BY THE ISSUANCE OF ORDER NO. R-1310.

Appellees agree with Appellants that this is the first case in New Mexico concerning the provisions of the laws of New Mexico concerning the force pooling of oil interests. Appellees agree that the Commission had authority to force pool the original non-standard unit in Case No. 929, having been granted such authority under Rule 5c, Order N o. R-586, which Order in Rule 5a provides for a standard unit to consist of a square quarter section of the United States Public Land Service (Tr. 139). Appellees deny that the Commission was inhibited in any manner by the agreement of Appellants and Oil Company which was signed on September 11, 1957, (Tr. 127) for the reason that said agreement in Paragraph 6 provides that it is subject to all applicable laws, orders, rules and regulations (Tr. 129) and for the further reason that a contract depriving the Commission of jurisdiction over the gas under the land involved would in any event be subject to the laws of the State of New Mexico and rules and regulations of the Oil Conservation Commission. La Baue v. Doneiger Oil Co., 49 S.2d 93 (La.). As pointed out by Appellants, Sub-section (e) of Section 65-3-14 NMSA 1953, provides that any such agreement upon hearing and after notice may be modified to prevent waste as was done in this case. This authority coupled with the authority granted by Sub-section (c) for force pooling in the absence of agreement constituted

complete authority in the Commission for its entry of Order No. R-1310.

The witness Randolph in Case No. 1567 testified that he had attempted to obtain from the royalty owners a voluntary pooling agreement pooling the NW¼ of Section 25, Township 22 South, Range 37 East, N.M.P.M., as one unit and the SW¼ of said Section as another unit, and that the royalty owners had refused to execute such an agreement after it was explained to them (Tr. 97-98). In Case No. 1567 the expert witness Watson, a Geological Engineer known to the Commission (Tr. 81-82), testified that the most efficient manner in which to drain the 320 acres would be by two standard quarter section units (Tr. 96). In this respect the witness is further substantiated by the previous findings of the Commission in Case No. 738, Order No. R-586, Rule 5a (Tr. 139).

It is submitted that Order No. R-1310 was within the jurisdiction, that waste was considered and that undisputed testimony was that the most efficient manner of producing the most gas from the W½ of said Section 25 was by the two standard units comprising the NW¼ and the SW¼ of said Section 25 and that the order itself in Paragraph 7 finds that the most efficient and orderly development of the W½ of Section 25 would be by the standard quarter sections (Tr. 102), which finding infers that any other manner of producing the gas from said section would be inefficient or wasteful.

The case of Carter Oil Well Co., et al, v. State, et al, 205 Okla. 374, 238 P.2d 300, cited by Appellants, is actually authority for Appellees' position herein. Appellants here attempt to modify Order No. R-1310 without any evidence of changed conditions since the entry of said order except that after said order was entered with knowledge of Appellants, the second well drilled in reliance on said order was disappointing to Appellants as a producer although commercial production was obtained (Tr. 3, 12, 75). Just as in the Carter case Appellants here, with notice in conformity with the statute, sat by and watched the oil company drill the well on the SW¼ of Section 25, and after it was not a good well, as they had hoped or expected, they then sought to have Order No. R-1310 set aside for the reason that their original pooling agreement as to part of the W½ of Section 25 had not been called to the Commission's attention in Case No. 1567, which resulted in Order No. R-1310 (Tr. 4-5).

It is interesting to note that Appellants' Application to set aside Order No. R-1310 is on this single question of alleged fraud depriving the Commission of jurisdiction to enter the order. At the time of the hearing on Appellants' Application to set aside Order No. R-1310, no question was presented by Appellants as to the adequacy of the evidence in Case No. 1567 nor did Appellants question the finding of the Commission in said case insofar as Paragraph 7 of Order R-1310 provided that waste

could be prevented by the establishment of said Order (Tr. 108-120), nor did Appellants in their Petition for Review in Cause No. 18,860 apprise the Court that they relied or intended to rely upon the insufficiency of the evidence or inadequacy of said Order No. R-1310 in seeking to have said order set aside. It is urged that under Rule 20, Sub-sections 1 and 2, the Appellants are precluded from urging this portion of their Point 1, having not raised the same before the Commission nor in their Petition for Review in the District Court.

The case of Wood Oil Co., et al, v. Corporation Commission, et al, 205 Okla. 534, 239 P.2d 1021, is authority for Appellees sustaining their position that Appellants cannot at this time seek revision of Order No. R-1310 for the reason that no evidence was offered showing any changed conditions after the entry of said order which would justify entry of the Order sought by Appellants herein. Both the Carter case and the Wood case deny the applicants the type of relief they seek here. In those cases, as in this case, an order was entered and action taken in reliance thereon and thereafter dissatisfied parties sought revision or cancellation of the orders upon the basis of errors in the original order which could have been urged on appeal in timely appeal proceedings from the orders, and there, as here, the applicants failed to appeal from the original orders just as Appellants have done in this case. Then, as Appellants have done in this case, they sought a change of the orders to

their benefit after actions by the developers in reliance upon the original orders. It is urged and contended by Appellees that Appellants are barred by Rule 20 of the Supreme Court from presenting this portion of their Point 1 to the Supreme Court and that in any event adaquate evidence was adduced at a hearing, notice was given to Appellants in due and lawful manner and that Order No. R-1310 contains a finding that the establishment of said order would prevent waste in the area under consideration. Appellants not having moved for re-hearing or appeal from said order nor having raised the same before the Commission in this hearing or including the same in their petition for review cannot now urge this point and could not under the state of the record in any event successfully attack the order based upon substantial evidence and containing the finding that such order prevented waste.

b) THAT THE NOTICE GIVEN APPELLANTS BY THE COMMISSION IN CASE NO. 1567 SHOWS ON ITS FACE THAT ORDER NO. R-677 COULD BE MODIFIED, VACATED OR RESCINDED BY THE COMMISSION AND THAT UNDER SUPREME COURT RULE 20 (2) APPELLANTS ARE PRECLUDED FROM RAISING POINT 1 (b).

It is submitted by Appellees that Appellants' Point 1 (b) was not raised or urged in Case No. 2051 (Tr. 108-121, 4-5) nor in the hearing before the District Court in Cause No. 18,860 (Tr. 67-80) and it is further urged by Appellees that said point is without merit in any event for the reason that the notice received by the Appellants and quoted by Appellants

in Tr. 13 shows on its face beyond question that all of the property of Appellants in the W½ of Section 25, Township 22 South, Range 37 East, N.M.P.M., Lea County, New Mexico, was involved in said hearing and would be affected by the outcome of said hearing. Appellees specifically deny that the quoted notice is all of the notice that Appellants received. Appellants make the unsupported statement that they requested of the Conservation Commission complete records of the cases and such records did not include a copy of such notice. There is no evidence in the record of such a request and the record affirmatively discloses that the complete proceedings in Case No. 1567 were not introduced into evidence, and examination of the record shows in this case that there was introduced in evidence a transcript of the hearing (Tr. 90-100), Order of the Commission (Tr. 101-104), a plat of the area involved (Tr. 105), a contour map of the area (Tr. 106) and a photostatic copy of return receipt for registered mail (Tr. 107). The records of the Commission showing the Application, Order Setting Hearing, Publication of Notice and Service of Notice or lack of the same are not disclosed by the transcript of record in this case except that the Order of the Commission in Case No. 1567, being Order No. R-1310, contains a finding that due public notice of said hearing was given as required by law (Tr. 101) and Appellants in the hearing before the Commission in Case No. 2051 admit that in addition to the public notice as required by law

that his clients received notice of the hearing in the mail five days before the hearing (Tr. 115), nor was there any testimony offered concerning these proceedings. It is submitted that this Court cannot consider the question of Notice and Service of Notice in the state of the present record and if so, the Court, upon the basis of said finding above quoted from Order No. R-1310, must find that due public notice was given as required by law in addition to the actual notice received by Appellants.

c) APPELLANTS WERE DULY AND LAWFULLY SERVED WITH NOTICE OF HEARING IN CASE NO. 1567 AND APPELLANTS ARE BARRED BY SUPREME COURT RULE 20, PARAGRAPH 2, FROM RAISING THEIR POINT 1 (c).

Appellant makes a point of the fact that they were not personally served with process by an agent of the Commission or any person over the age of eighteen years. Section 65-3-6, NMSA 1953, provides that service of notice on a person affected in a Commission hearing shall be by personal service or by publication once in a newspaper of general circulation in Santa Fe, New Mexico, and once in a newspaper of general circulation published in the county, or each of the counties if there be more than one in which any land, oil or gas or other property which may be affected shall be situated. In the absence of the record of proceedings or testimony concerning service on Appellants, this Court must accept Paragraph 1 of Order No. R-1310 that due public notice was given as required by law

(Tr. 101). In addition, the Court must presume that the administrative officers of the State of New Mexico, to-wit the Oil Conservation Commission, perform their duties and cause to be published proper notice of the hearing once in a newspaper of general circulation in Santa Fe, New Mexico, and once in a newspaper of general circulation in Lea County, New Mexico.

It is submitted by Appellees that this point and the preceding point of Appellants' Brief discloses the very reason for the existence of Supreme Court Rule 20, Paragraph 2. A perusal of the testimony before the Commission in Case No. 2051 (Tr. 108-121) and the transcript of the proceedings before the District Judge in Cause No. 18,860, District Court of Lea County (Tr. 66-80), as well as Appellants' application to the Commission in Case No. 2051 (Tr. 4-5) and application for re-hearing (Tr. 9-13) discloses that Appellants did not raise this point until after the hearing in District Court in this case. There was no evidence or testimony offered by Appellants and no way in which Appellees could present this point to the Court so that an adequate record might be made for the Court to determine the lack or adequacy of notice in said case. Appellant lefthandedly acknowledges compliance with the statutes and rules of the Commission as to notice by publication, in that after asking under the previous point that Appellees admit no publication of notice which Appellees do not admit, they then

proceed in this point to assume this admission, a proper record on the matter and then apparently argue the unconstitutionality of Section 63-3-6, NMSA 1953 Comp. This matter was not urged until Appellants Brief in Chief in this Court and certainly in the absence of any record as to the contents of the notice the Commission's finding that due and lawful notice was given is binding and controlling. This, coupled with the fact that a ruling by the District Court on the constitutional proposition not being invoked, requires the rejection of this part of Appellants' Point 1. In re Rielly's Estate, 63 N.M. 352, 319 P.2d 1069, 1073; Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449.

Further, Appellant ignores cases authorizing service of notice of hearings before the Commission such as in the present case. Londoner v. Denver, 210 U.S. 373, 52 L.Ed. 1103. Appellants rely upon a 1904 Idaho case, Bear Lake County v. Budge, 91 Idaho 703, 75 P. 614, which holds that a statute authorizing service by publication in a court of law violates the Idaho constitutional provisions requiring general and uniform operations of the courts and that the organized judicial powers, proceedings, and practices of all courts or grades be uniform and an additional constitutional provision prohibiting special or local legislation regulating practice of courts of justice.

It is submitted for these reasons that this portion of Appellants' Point 1 must be rejected by the Court.

d) ALL OF THE JURISDICTIONAL FACTS WERE PRESENT IN CASE NO. 1567 WHEN THE COMMISSION ENTERED ITS ORDER POOLING THE PROPERTIES INVOLVED IN THIS SUIT.

Appellees assert that the evidence offered in Case No. 1567 in uncontested hearing was substantial and more than adequate to sustain Order No. R-1310. Appellant quotes some of the testimony of the expert witness Watson under this point (Applt's Br. in Ch. 17). However, the inference that the expert in speaking of his preference of two standard proration units as found to be most effective and less wasteful in recovering the Tubb gas involved in this suit (Tr. 139) is borne out and positively proven by the balance of the testimony of this witness which is not set out by Appellant and which is as follows (Tr. 96):

EXAMINATION BY MR. PAYNE:

Q Is your preference for the two standard units based upon the fact if we grant the non-standard unit you'll have all four wells in one quarter section with none in the other quarter section?

A I think we'll be able to drain the 320 acres more efficiently with the two wells. I mean, with the two wells not on the same 160 acres.

It is submitted that no order had been entered by the Commission prior to Order R-1310 in Case No. 1576 concerning the W½ of Section 25, Township 22 South, Range 37 East, N.M.P.M., and that the Wood Oil Company case, supra, is not controlling nor is the Carter Oil Company case controlling as to the author-

ity of the Commission to enter Order No. R-1310 in Case No. 1576. These two cases, however, in the opinion of Appellees, are controlling against the Appellants in their collateral attack in this case on Order No. R-1310. Appellants have adduced no testimony whatsoever showing any changed conditions since the entry of said order and the record affirmatively showing that Appellants failed to apply for a re-hearing or appeal from said order and the record further affirmatively shows that Appellants waited until the additional well was drilled in compliance with Order No. R-1310 before they complained in any manner whatsoever of the entry of said order. To allow Appellants to sit by and speculate upon the outcome of the new well and then allow Appellants by a collateral attack to question the propriety of Order No. R-1310 when they were dissatisfied with the production of the second well and to require an additional well to offset the two wells already drilled in this acreage which the Commission has found can be drained by two wells (Tr. 139) would result in a traversity of justice contrary to the principles set out in Yucca Mining and Petroleum Co. v. Howard C. Phillips Oil Co., 69 N.M. 281, 365 P.2d 925, and it is asserted by Appellees that even if the record were inadequate to sustain the order which is denied by Appellees, the laws of estoppel as recognized in the above case would prevent the Court from granting Appellants the relief they seek.

ANSWER TO POINT II

ORDER NO. R-1310 ENTERED IN CASE NO. 1567 IS NOT A COLLATERAL ATTACK ON ORDER NO. R-677 IN CASE NO. 939 AND APPELLANTS BY VIRTUE OF SUPREME COURT RULE 20, PARAGRAPH 2, ARE BARRED FROM RAISING THIS POINT.

The Appellants in their collateral attack in this case upon Order No. R-1310 attempt to place said order in the same category as their attempt here to change it. However, an examination of the title to this case (Tr. 90) shows that it is not the same case as Case No. 929 in which Order No. R-677 was entered. It is apparent from the examination of the title of these two cases that one involves 320 acres and one involves 160 acres. Further, the record does not give us the benefit of the applications so that a comparison of the applications out of which these two orders arose is not available to make the determination claimed by Appellant. The Wood Oil Company case is not authority for the proposition asserted by Appellants for the reason that collateral attacks upon the Oklahoma Corporation Commission orders are prohibited by statute, and further, the Court in Application of Bennett, 353 P.2d 114, announces and recognizes the rule allowing the Corporation Commission to modify previous unit areas upon the basis of new evidence for developments. It is submitted that in this case the development of the entire acreage (320 acres) was necessary and required and that the Commission in fixing the two 160 acre standard units for the development of the W½ of Section 25,

Township 22 South, Range 37 East, N.M.P.M., had jurisdiction and was operating within its authority and purpose and according to the duties prescribed for the Commission and upon the evidence in Case No. 1567 that two standard units fixed by the Order No. R-1310 would most efficiently drain the gas of the Tubb formation under said one-half section.

CONCLUSION

In conclusion it is urged that Order No. R-1310 entered in Case No. 1567 was a valid order containing a finding that the entry of the order was the most efficient manner in which to drain the W½ of Section 25, Township 22 South, Range 37 East, N.M.P.M., which finding was based upon substantial evidences herein above pointed out.

Appellants must fail in their attack upon the notice and service of notice for the reason that there is no evidence in the record concerning the proceedings before the Commission in Case No. 1567 prior to the hearing before the Oil Conservation Commission. As heretofore asserted, Appellants are barred from raising these propositions on appeal not having urged the same in the hearing before the District Court and in any event in order to invoke the ruling of the District Court or this Court the duty was incumbent upon appeal to present to the Court a record of the proceedings concerning notice and service of notice or evidence of the facts concerning such notice and service of the same before Appellants could invoke a ruling of

the court below or this Court and under the present record the Commission's order and the recitation therein that due and lawful notice was given Appellants is the only evidence concerning the notice and service of the same and is conclusive on this point. Mansfield v. Reserve Oil Co., 38 N.M. 187, 29 P.2d 491.

Appellants' Point II must fail for the reason that Case No. 1567 was a case involving drainage of a 320 acre tract wherein the evidence required the force pooling of the two standard quarter section units and Appellants' attempt to denominate Case No. 1567 a collateral attach upon Order No. R-677 only serves to point up Appellants' collateral attack upon Order No. R-1310, attacked by Appellants in this cause without evidence of any changed conditions since its entry and it is submitted that for this reason, as well as the other reasons hereinabove stated, Appellants must fail in their appeal herein.

Appellants assert that the Court suggested in its findings that the Appellants were barred by laches or estoppel (Applt's Br. in Ch. 21). Appellees agree that the Court did find both as a matter of fact and conclusion of law that Appellants were barred in this action by laches and estoppel (Tr. 41-43, 44-45). This attack without citing and setting out the finding of fact and the evidence supporting the same violates Rule 15, Paragraph 6, of the Supreme Court rules and

it is urged by Appellees that said finding and conclusion, not being properly attacked, are binding and conclusive in this cause. Arias v. Springer, 42 N.M. 350, 78 P.2d 153.

Appellees note the fact that at every hearing and in every proceeding of Appellants since their original application in Case No. 2051 before the Commission, Appellants have changed their position and grounds for relief, as pointed out in the Answer to Appellants' Arguments and Authorities under their points, but it is submitted that Appellants, for the reasons urged herein, are not entitled to any relief in this case and that the judgment of the District Court herein should be affirmed.

Respectfully submitted,

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FILED: May 27, 1963

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

AMANDA E. SIMS and GEORGE W. SIMS,

Petitioners-Appellants,

vs. NO. 7286

HON. TOMIE L. MORRIS, Chairman; E. S. (JOHNNY) WALKER, Member, A. L. PORTER, JR., Member, Secretary of the Oil Conservation Commission of the State of New Mexico; OLSEN OILS, INC., and TEXAS PACIFIC COAL AND OIL COMPANY, Successor to Olsen Oils, Inc.,

Respondents-Appellees.

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APPEAL FROM THE DISTRICT COURT OF LEA COUNTY

NEAL, JUDGE

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O P I N I O N

COMPTON, Chief Justice.

This appeal involves Order No. R-1310 of the Oil Conservation Commission, the validity of which is challenged here on jurisdictional grounds.

Reviewing the record, in August, 1955, the commission issued Order No. R-677 pooling contiguous acreage in Section 25, Township 22 South, Range 37 East, N.M.P.M., Lea County, consisting of 40 acres in the southeast quarter of the northwest quarter and 120 acres in the northeast quarter of the southwest quarter, and south half of the southwest quarter of Section 25 as a 160-acre non-standard production unit and approved the drilling of a well. In September, 1957, the appellants, being owners of the mineral interests in the above-described production unit, and the then holder of the outstanding oil and gas leases thereon, entered into a communitization agreement pooling the leasehold estate for development. In January, 1958, a well was completed in the center of the 40 acres in the southeast quarter of the northwest quarter and its production attributed to the 160-acre production unit as provided in Order R-677 and the communitization agreement.

Subsequently, the successor in interest to the leasehold estate applied to the commission for a 160-acre non-standard gas proration unit consisting of the balance of the acreage in the northwest and southwest quarters of Section 25, on which it held leases or, in the alternative, for an order force-pooling the northwest quarter of Section 25 and the southwest quarter of Section 25 as two separate standard 160-acre production units. It was proposed in this application that if the two standard units were force-pooled that a second well would be drilled in the northeast quarter of the southwest quarter of the section.

After a hearing on the application, the commission found that the most efficient and orderly development of the acreage in

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the west half of Section 25 could be accomplished by force-pooling it into two standard units and, on December 17, 1958, entered Order No. R-1310 establishing the northwest quarter and the southwest quarter of Section 25 as two separate 160-acre standard production units, and rescinded its previous Order No. R-677. The production from each pooled unit was allocated to each tract in that unit in the same proportion that the acreage in said tract bore to the total acreage in the unit.

Pursuant to Order R-1310 the production from the first well was attributed to the acreage in the northwest quarter of Section 25 in which appellants held only a 1/13th royalty interest, and a second well was drilled in the northeast quarter of the southwest quarter and its production attributed to the acreage in the southwest quarter of which appellants were principal owners. The second well was a smaller producer than the first, resulting in diminished royalties to appellants.

Thereafter, in October, 1960, appellants filed an application before the commission for an order to vacate and set aside as void Order R-1310 and to reestablish the non-standard 160-acre production unit in conformity with Order R-677 and the communitization agreement. The basis of this application was the alleged concealment from the commission of the agreement between the parties, and it challenged the jurisdiction of the commission to enter Order R-1310 in violation of the agreement and of the rights of appellants. The denial of this application is the basis of appellants' petition for review.

On the hearing of the petition for review, the trial court denied appellants' petition and from such ruling they have appealed to this court for review.

Appellants have argued several points, but, in view of our disposition of this appeal, we need only concern ourselves with a determination of a basic jurisdictional question.

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They now urge that the commission was without jurisdiction to enter Order R-1310 because the commission failed to find that waste was being committed under Order R-677 or that waste would be prevented by the issuance of Order R-1310. Insofar as can be ascertained from the record, the lack of jurisdiction of the commission to enter Order R-1310 is raised here for the first time. Consequently, this jurisdictional question must first be determined. Davidson v. Enfield, 45 N. M. 580, 3 P. 2d 979; State v. Eychaner, 41 N. M. 677, 73 P. 2d 805; Brown v. Brown, 38 N. M. 761, 276 P. 2d 399; In re Conley's Will, 53 N. M. 771, 276 P. 2d 906. Also compare Driver-Miller Corp. v. Liberty, 69 N. M. 259, 365 P. 2d 910; Warren Foundation v. Barnes, 37 N. M. 407, 334 P. 2d 145; Section 21-2-1 (20)(1), N.M.S.A. 1953.

Unquestionably the commission is authorized to require pooling of property when such pooling has not been agreed upon by the parties, § 65-3-14(c), N.M.S.A. 1953, and it is clear that the pooling of the entire west half of Section 23 had not been agreed upon. It is also clear from sub-section (e) of the same section that any agreement between owners and leaseholders may be modified by the commission. But the statutory authority of the commission to pool property or to modify existing agreements relating to production within a pool under either of these sub-sections must be predicated on the prevention of waste. Section 65-3-10, 1953 Comp.

The statutory authority of the Oil Conservation Commission was thoroughly considered by this court in the recent case of Continental Oil Company v. Oil Conservation Commission, 70 N. M. 310, 373 P. 2d 809, wherein we said:

> "The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it. The commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, but the basis of its powers is founded on the duty to prevent waste and to protect correlative rights. * * * Actually, the

> prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights."

Appellees contend that the commission's finding that

> "... the most efficient and orderly development of the subject acreage can be accomplished by force pooling the W/2 of said Section 25 and the SW/4 of said Section 25 to form two standard gas proration units in the Tubb Gas Pool, and that such an order should be entered."

is equivalent to a finding that this pooling will prevent waste. We do not believe the finding is susceptible to such construction. There is nothing in evidence before the commission tending to support a finding of waste or the prevention of waste by pooling the property into two standard units.

We conclude, therefore, that since commission order R-1310 contains no finding as to the existence of waste, or that pooling would prevent waste, based upon evidence to support such a finding, the commission was without jurisdiction to enter order R-1310, and that it is void. Continental Oil Company v. Oil Conservation Commission, supra.

The order denying appellants' petition for review should be reversed, with directions to the trial court to enter an order declaring order R-1310 of the commission void.

IT IS SO ORDERED.

s/ M. E. Noble
Chief Justice

WE CONCUR:

s/ M. E. Noble, J.

s/ Irwin S. Moise, J.