C. N. MORRIS
ATTORNEY AT LAW
CARLSBAD, NEW MEXICO

TELEPHONE
TUXEDO 5-4401

P. O. BOX 912
SUITE 201 COURTHOUSE

2 August 1962

Mr. Lowell C. Green, Clerk
Supreme Court of New Mexico
Santa Fe, New Mexico

Re: SIMS, et al
- v -
MECHEM, et al
No. 7207

Dear Mr. Green:

Enclosed herein please find the original and three (3) copies of Appellants Reply Brief and a Certificate of Service for filing.

Thank you.

Yours very truly,

C. N. Morris

CNM:sg

Enc.

CC: Richard S. Morris
Campbell & Russell
Girand, Cowan & Reese

C. N. MORRIS
ATTORNEY AT LAW
CARLSBAD, NEW MEXICO

TELEPHONE
TUXEDO 5-4401

P. O. BOX 912
SUITE 201 COURTHOUSE

25 July 1962

Richard S. Morris, Esq.
Special Assistant Attorney General
Oil Conservation Commission
Santa Fe, New Mexico

Re: Sims v Oil Conservation
Commission, Lea County,
No. 18860

Dear Mr. Morris:

This is to advise you that due to other commitments the Supreme Court of the State of New Mexico has approved our motion for an extension of time to August 5, 1962, in which to file our Reply Brief.

Thank you.

C. N. Morris

C. N. Morris

CNM:sg

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

AMANDA E. SIMS and GEORGE W. SIMS, Petitioners and Appellants, - vs - HONORABLE EDWIN L. MECHEM, CHAIRMAN, et al Respondents and Appellees.	)	No. 7207

APPEAL FROM DISTRICT COURT, LEA COUNTY,

Neal, Judge

APPELLANTS' REPLY BRIEF

C. N. Morris and Foster Windham
Carlsbad, New Mexico

Attorneys for Appellants

SUBJECT INDEX

TABLE OF CASES

REPLY TO ANSWER TO POINT I

ESSENTIAL JURISDICTIONAL FACTS WERE NOT PRESENT IN CASE NO. 1567 AND ORDER NO. R-1310 ENTERED THEREIN BY THE COMMISSION IS VOID.

a) NO EVIDENCE WAS OFFERED THAT WASTE WAS BEING COMMITTED UNDER ORDER R-677 AND ORDER NO. R-1310 IS THEREFORE VOID.

The only possible authority for the issuance of Order No. R-1310 is in sub-section (a) of Section 65-3-14 wherein the Commission is given authority,

> ". . . ; however, the Commission, upon hearing and after notice may subsequently modify any such plan to the extent necessary to prevent waste as prohibited by this act." (Emphasis ours.)

There is no testimony in the record of Case No. 1567 that waste was being committed or that entry of the new order was necessary to prevent such waste. On the other hand, the testimony is direct and conclusive that no waste was being committed. The witness, Watson, testified in the hearing, (Tr. 93).

> Q. In your opinion, would the granting of the application in either of the alternatives tend to prevent waste and protect correlative rights?
>
> A. Yes, sir.

The only other evidence in the record was to the effect that witness Watson preferred two standard units and (Tr. 96).

> "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." (Emphasis ours.)

It is the position of Appellants that this testimony cannot possibly be considered sufficient to support a finding that waste was being committed under Order R-677 thereby authorizing the entry of Order No. R-1310. Since the finding of waste is necessary and

since such finding is absent in this case and not supported by the testimony, Order No. R-1310 is void. Appellees argument, (Appellees Answer Brief, pg. 5) that the commissions finding that the most efficient manner of producing gas from the half section is by two standard units infers that any other manner of producing gas would be inefficient and wasteful, amounts to a request that this Court decide that an inference exists, and although it is not supported in any manner by the testimony, that it amounts to a finding of fact. Appellants insist that there is no jurisdiction in any case where jurisdictional facts are not supported by evidence and all jurisdictional findings must be made in plain terms from which no inferences can be drawn. Appellees for some reason choose to ignore the fact that Order No. R-1310 was a collateral attack upon Order R-677 and urge this Court that the Carter case, Carter Oil Well Co., et al, v. State, et al, 205 Okla. 374, 238 P.2d 300 and the Wood case, Wood Oil Co., et al, v. Corporation Commission, et al, 205 Okla. 534, 239 P.2d 1021, support their position. These two cases specifically deny the validity of an order such as Order No. R-1310. There is no merit to Appellees contention that Appellants are barred in any way by rule twenty (20) of the Supreme Court since such rule recognizes the right of any party to raise jurisdictional questions at any stage of judicial proceedings.

b) APPELLANTS WERE NOT NOTIFIED THAT THE MODIFICATION, VACATION, OR RESCISSION OF ORDER R-677 WOULD BE CONSIDERED BY THE COMMISSION AND THE COMMISSION WAS WITHOUT JURISDICTION TO MODIFY, VACATE OR RESCIND SUCH ORDER.

The notice received by Appellants did not

mention Order No. R-677 or in any way relate to Appellants that such Order would be considered by Commission, it appears that Appellees are here urging the Court that since the notice indicates that the west one-half of Section 25 is involved, that such indication is notice that the Commissions prior order would be subject to reconsideration. This amounts to a request that the Court draw an inference from an assumption. Since this question is also one of jurisdiction, it can be raised at any time.

c) APPELLANTS WERE NOT SERVED WITH SUFFICIENT PROCESS TO GIVE THE COMMISSION JURISDICTION.

For the purpose of making Appellants position (Its Point c) completely clear we wish to state that we do not object to the contention that notice by publication was given in the newspaper in Santa Fe County and in Lea County, as well as the mailing of notice to Appellants in Lea County. We do, however, contend and again point out to the Court, that the notice received by Appellants recited only the facts set out in Appellants Brief in Chief (Appellants Brief in Chief, pg. 13).

Even if this notice had been personally served on Appellants it would still be insufficient to give the Commission jurisdiction to modify, vacate, or rescind Order No. R-677 and since it was not personally served upon Appellants, the Commission did not have jurisdiction over Appellants or the subject matter.

Appellants have not urged this Court that Section 64-3-6, N. M. S. A., 1953 Comp. is unconstitutional and do not propose to do so. Appellants merely pointed out that the Court, in considering such

section, would interpret it to provide due process and that such interpretation would necessarily require actual personal service.

d) JURISDICTIONAL FACTS WERE MISSING IN CASE 1567 AND COMMISSION ORDER NO. R-1310 IS VOID.

The absence of jurisdictional facts in case No. 1567 as pointed out (Appellants Brief in Chief, pg. 16-18) render Order No. R-1310 void. The fact that additional lands were included in the application in such case cannot increase the power of the Commission with regard to the property of Appellants concerning which the Commission had previously assumed jurisdiction and acted. Since the essentials of jurisdiction were not present, the order entered in Cause 1567 was void.

This Court recently decided case No. 6630, Continental Oil Company, et al v. Oil Conservation Commission, et al (not yet reported) which deals at considerable length with questions which parallel the questions in this case. The Court stated,

> "....Referring to the commissions's finding No. 5, part of which is to the effect that the new formula will result in a 'more equitable allocation of the gas production in said pool than under the present gas proration formula does not protect correlative rights. Further, that portion of the same finding that there is a "general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the recoverable gas in place under the tracts dedicated to said wells" is not tantamount to a finding that the new formula is based on the amounts of recoverable gas in the pool and under the tracts, insofar as these amounts can be practically determined and obtained without waste. Lacking such findings, or their equivalents, a supposedly valid order in current use cannot be replaced. Such findings are necessary requisites to the validity of the order, for it is upon them that the very power of the commission to act depends. See, Hunter v. Hussey, supra; and Hester v. Sinclair Oil and Gas Company, supra." (Emphasis ours.)

Further along in the opinion, the Court, in referring to the necessity of making jurisdictional findings supported by evidence, stated as follows:

> ".....we therefore find that the order of the commission lacked the basic findings necessary to and upon which jurisdiction depended, and that therefore Order No. R-1092-C and Order No. R-1092-A are invalid and void. We would add that although formal and elaborate findings are not absolutely necessary, nevertheless basic jurisdictional findings, supported by evidence, are required to show that the commission has heeded the mandate and the standards set out by statute. Administrative findings by an expert administrative commission should be sufficiently extensive to show not only the jurisdiction but the basis of the commissions's order." Citing authorities. (Emphasis ours.)

Appellants contend that this decision is directly in line with Appellants position in this case and that the Court should find Order No. R-1310 to be void.

The argument of Appellees that Appellants are estopped is without merit, for, since Order No. R-1310 is void, Appellees cannot alter, change or inhance their position in any way in reliance thereon, for such order is a nullity. The Supreme Court of Virginia in Harris v. Deal, 189 Va. 75, 54 S.E., 2d, 161, stated

> ".....A void judgment is in legal effect no judgment, and by it no rights are obtained and all claims flowing out of it are void, and such judgment may be attacked in any proceeding by any person whose rights are affected."

The Court of Appeals of Tennessee in treating on the same subject in Hunt v. Liles, 243 S.W. 2d, 145, stated

> ".....A void judgment binds nobody and bars nobody but is a nullity and no judgment at all and justifies no act done under it."

Appellants urge the Court that these authorities be followed in determining the rights of Appellees under Order R-1310 for the action of Appellee oil company since the entry of Order R-1310 was taken with full awarness of the circumstances under which such order was obtained.

REPLY TO ANSWER TO POINT II

ORDER NO. R-1310 ENTERED IN CASE NO. 1567 IS A COLLATERAL ATTACK ON ORDER NO. R-677 AND THE COMMISSION HAD NO JURISDICTION TO ENTER SUCH ORDER.

Appellees support their argument under this point with the statement that Appellants are making a collateral attack on Order R-1310. With this contention, Appellants do not agree. It is our position that we are directly attacking the validity of Order R-1310. Case 1567, insofar as the relief asked for amounted to an upsetting of Order R-677 was a collateral attack. Heverstead v. First National Bank and Trust Company (Appellants' Brief in Chief, pg. 20) Appellees then attempt to come in under the rule announced in Application of Bennett, 353 P 2d 114, which recognized the right to modify prior orders when the statutory prerequisites were present. Appellees position in Case No. 1567 would come within the rule announced in the Bennett case if the Commission had obtained jurisdiction over the parties and the subject matter, and found on substantial evidence that waste was being committed under Order No. R-677 and that issuance of Order R-1310 was necessary to prevent the further commission of waste. The testimony in Case 1567 by the witness Watson concerning any new evidence (Tr. 52-53) the following appears:

> Q. Directing your attention to Exhibit 2, state what that is?

A. This is a contour map on the Tubb Formation of the area surrounding the leases in question

Q. Now, did you at the time of the hearing involving the properties outlined in red on the Tubb Unit introduce a similar contour map?

A. Yes, sir, I did.

Q. Now, have you since the hearing on that unit outlined in red changed the contours as outlined in that map?

A. No, sir, we have not.

Q. Now, did you testify in that prior case?

A. Yes, sir, I did.

Q. Based upon your knowledge of geology in this area, is it youropinion that the Tubb Gas Unit proposed as shown in blue on Exhibit One may be reasonably presumed to be productive of Tubb gas.

A. Yes, sir.

Not only is the record completely devoid of any testimony that waste was being committed under Order No. R-677 but also it appears from the testimony of the witness Watson that the application in Case 1567 was supported by the same testimony and documents which were used to secure the issuance of Order 677.

CONCLUSION

For the reasons set forth in the Brief In Chief and herein, Appellants request the Court to reverse the Judgment of the District Court of Lea County, and hold herein that Order No. R-1310 is void and without any force or effect.

Respectfully submitted,

C. N. MORRIS and FOSTER WINDHAM

By _____
Attorneys for Appellants

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

AMANDA E. SIMS and GEORGE W. SIMS, Petitioners and Appellants, - vs - 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.	)	No._____

APPEAL FROM DISTRICT COURT, LEA COUNTY,

Neal, Judge

APPELLANTS' BRIEF IN CHIEF

C. N. Morris and Foster Windham
Carlsbad, New Mexico

Attorneys for Appellants

SUBJECT INDEX

TABLE OF CASES

STATEMENT OF THE CASE

At various times herein it is necessary to refer to the Appellee, oil company, and for the purpose of clarification, we wish to state to the Court that although more than one oil company was involved, the present defendant, Texas Pacific Coal and Oil Company is the present successor to all prior companies involved, and has agreed to being substituted with full knowledge of all prior transactions.

In 1955 the Oil Conservation Commission entered Order No. R-677 in its Case No. 825, by which order properties of Appellants which were subject to separate oil and gas leases were pooled by the Commission as a gas production unit and production which was realized from a well drilled on such property was attributed to such acreage. The oil company owning the lease on such property also contracted with Appellants to pool such acreage as a production unit. At a later time the oil company, which also owned oil and gas leases over the balance of the half-section in which Appellants' property is located, made application to the Commission in Case No. 1567 for an order pooling the balance of such half-section as a production unit, or in the alternative, force pooling 40 acres of Appellants' property with 120 acres of the remaining properties and 40 acres of the remaining property with the 120 acre balance of Appellants' property. Appellants received notice of this hearing by mail, but such notice did not advise Appellants that the previous order, No. R-677, was to be affected by the proceeding and at the hearing in such case, 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. Following the hearing, the Commission

entered its Order No. R-1310 in which it pooled one-fourth of Appellants' property, the one-fourth containing the gas well previously drilled, with three-fourths of the remaining property in the half-section; and the remaining one-fourth of the other property in the half-section with the remaining three-fourths of Appellants' property. Such Order did not contain a finding that waste was being committed or that the entry of the order would prevent such waste.

Appellants contend that the Commission was without jurisdiction to enter its Order No. R-1310 which superceded and rescinded Order No. R-677, for the following reasons:

a) No proof was offered and the Commission did not find that waste was being committed under Order No. R-677 and that waste would be prevented by the issuance of Order No. R-1310.

b) Appellants were not notified that Order No. R-677 was to be considered or that it might be modified, vacated, superceded or rescinded.

c) Appellants who were residents of New Mexico and whose whereabouts were known, were not personally served with notice of the hearing in Case No. 1567.

Appellants also contend that Order No. R-1310, entered in Case No. 1567, is void for the reason that Order R-677 was a final order of the Commission from which no appeal was taken and that Case No. 1567 is a collateral attack on such final order.

STATEMENT OF FACTS

The property involved in this appeal is the SE¼NW¼, E½SW¼ and SW¼SW¼ of section 25, Township 22 South, Range 37 East, N.M.P.M., Lea County, New Mexico. All of the mineral interest in such property is owned by Appellants, subject to two outstanding oil and gas leases, one of such leases covering the SE¼NW¼ and the other lease covering the balance of such acreage. (Tr. 34-35).

On July 14, 1955, the Oil Conservation Commission heard Case No. 529 on the application of the then oil and gas leaseholder and issued its order No. R-677, on August 17, 1955, pooling the above acreage as a gas production unit from the Tubb Gas Zone. (Tr. 36). Such order established a standard allowable of production for such acreage and approved the drilling of a well to the Tubb Gas Zone in the center of the SE¼NW¼ of said section. Following the entry of this order, no further action was taken until September 11, 1957, at which time the leaseholder entered into an agreement with Appellants, which, in effect, reaffirmed the provisions of Order No. R-677, above referred to. (Tr. 127). After the signing of this agreement, a gas well was drilled in the SE¼NW¼ of said section and the production of such well was attributed to the acreage of Appellants, as provided by Order No. R-677 and the subsequent agreement of the leaseholder with Appellants. This gas well was produced for several months following which the leaseholder filed Case No. 1567 before the Oil Conservation Commission, in which it asked the Commission to establish the N½NW¼, the S½ NW¼ and the NE¼ SW¼ of said section as a Tubb Gas Production Unit, or in the alternative, to establish the NW¼ of such section as

a Tubb Gas Production Unit and the sale of such Section as another Tubb Gas Unit. The application in this case did not recite that Order No. R-677 would be affected by the proceedings in Case No. 1567. Appellants received notice of the hearing through the United States mail at their home in Lea County, New Mexico, and such notice contained the style and number of the case.

The record in Case No. 1567 (Tr. 98-100) does not contain any evidence of, and the Order No. R-1310, (Tr. 101-104) makes no finding that waste was being committed as the result of production from the gas well, authorized by Order No. R-677, and attributed to the acreage of Appellants. That no appeal was ever taken from Order No. R-677 or Order No. R-1310 (Tr. 101-104) which was entered in Cause No. 1567, and established the NW/4 of the section involved as a production unit and attributed the production of the well in the SE NW/4 to such unit. Sometime after the entry of Order No. R-1310, another Tubb gas well was drilled in the NE SW/4 of the section. Thereafter Appellants filed their application, Case No. 2051, before the Commission, asking that the Order entered in Case No. 1567, 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. R-1310. From Order No. R-1766 and Order No. R-1766A which were entered in Cause 2051 and which dismissed Appellants' application, Appellants appealed to the District Court of Lea County where such application was also dismissed by the District Court.

That in its finding No. 3, the District Court hearing

the petition for review herein among other things stated that due and lawful notice of this application was given to petitioners. Appellants contend that this statement by the Court is contrary to the record and not supported by the evidence for the reason that the record shows the only notice received by these Appellants was a notice mailed to them of the hearing, as previously recited, and these Appellants did not in anyway participate in such hearing. Appellants also contend that the Court's statement in the last sentence of sub-division 6 of its finding No. 4, is a conclusion of the Court, not a proper finding and not supported by evidence.

Appellants object to the statement of the Court in its finding No. [illegible] (Tr. [illegible]), The [illegible] brought about this status by failing to cause a review of Order No. [illegible], and permitted [illegible] that no drilling [illegible] of section 16.

POINT I.

THE OIL CONSERVATION COMMISSION WAS WITHOUT JURISDICTION TO ENTER ORDER NO. R-1310 IN CASE NO. 1567 FOR THE FOLLOWING REASONS:

a) THE OIL COMPANY OFFERED NO PROOF AND THE COMMISSION FAILED TO FIND THAT WASTE WAS BEING COMMITTED UNDER ORDER NO. R-677 AND THAT WASTE WOULD BE PREVENTED BY THE ISSUANCE OF ORDER NO. R-1310.

b) THAT ORDER NO R-1310, ENTERED IN CASE NO 1567, WAS VOID FOR THE REASON THAT APPELLANTS WERE NOT GIVEN NOTICE BY THE COMMISSION THAT ORDER NO. R-677 WOULD BE MODIFIED, VACATED OR RESCINDED.

c) APPELLANTS WERE RESIDENTS OF NEW MEXICO AND THEIR WHEREABOUTS WERE KNOWN, BUT THEY WERE NOT PERSONALLY SERVED WITH NOTICE OF THE HEARING IN CASE NO. 1567.

d) THE POOLING POWER OF THE COMMISSION WAS EXERCISED IN CASE NO. 1567 WITHOUT THE PRESENCE OF JURISDICTIONAL FACTS REQUIRED BY SECTION 65-3-14, NEW MEXICO STATUTES ANNOTATED, 1953 COMPILATION.

POINT II

THAT ORDER NO. R-1310, ENTERED IN CASE NO. 1567, IS VOID FOR THE REASON THAT IT IS A COLLATERAL ATTACK ON ORDER NO. R-677, ENTERED IN CASE NO. 929.

ARGUMENTS AND AUTHORITIES

Point I

THE OIL CONSERVATION COMMISSION WAS WITHOUT JURISDICTION TO ENTER ORDER NO. R-1310 IN CASE NO. 1567 FOR THE FOLLOWING REASONS:

a) THE OIL COMPANY OFFERED NO PROOF AND THE COMMISSION FAILED TO FIND THAT WASTE WAS BEING COMMITTED UNDER ORDER NO. R-677 AND THAT WASTE WOULD BE PREVENTED BY THE ISSUANCE OF ORDER NO. R-1310.

The questions urged by Appellants in this case are all questions of first impressions in New Mexico.

The authority of the Oil Conversation Commission, which hereafter in this brief will be referred to as Commission, to vacate, modify, rescind or otherwise affect an existing final order of the Commission with regard to the pooling of properties for the production of oil and gas is contained in Section 65-3-14, New Mexico Statutes Annotated, 1953 Compilation. In sub-section (c) of this statute, the Commission is given authority to require pooling of properties, or parts of properties, when the pooling of such properties has not been agreed upon by the parties. The pooling authority of the Commission, given in such sub-section, was fully effecutated when Order No. R-677 was issued in Commission Case No. 92[illegible] in 1955. This order pooled the leases of Appellants as a production unit and the order was based upon substantial evidence that its entry and the production of gas, under the authority granted by the order, would prevent waste. The authority of the Commission to order pooling of a portion of Appellants' property with other properties was further inhibited by the agreement of Appellants and the leaseholder which was signed on September 11, 1957 (Tr. 127), which such agreement in effect ratified the terms and provisions of pooling order No. R-677. The Commission's authority under sub-section (c)

of Section 65-3-14 to require pooling of properties is limited to the situation described therein.

> 65-3-14...(c) The pooling of properties or parts thereof shall be permitted, and, if not agreed upon, may be required in any case when and to the extent that the smallness or shape of a seperately owned tract would, under the enforcement of a uniform spacing plan or proration unit, otherwise deprive or tend to deprive the owner of such tract of the opportunity to recover his just and equitable share of the crude petroleum or natural gas, or both, in the pool;...." (Emphasis ours)

Since the Commission determined in Case No. 929, and provided in Order No. R-677, that the properties of Appellants did constitute a unit for production of gas which would prevent waste and since the landowners and oil company had signed an agreement pooling such properties, it is the position of Appellants that the Commission had no further jurisdiction under sub-section (c) of 65-3-14 to enter any order affecting these Appellants or their property.

The only other authority which Appellants have been able to find authorizing the Commission to make an order affecting these Appellants or their property involved in this case is sub-section (e) of the same statute. Such sub-section provides as follows:

> (e) Whenever it appears that the owners in any pool have agreed upon a plan for the spacing of wells, or upon a plan or method of distribution of any allowable fixed by the Commission for the pool, or upon any other plan for the development or operation of such pool, which plan, in the judgment of the commission, has the effect of preventing waste as prohibited by this act and is fair to the royalty owners in such pool, then such plan shall be adopted by the commission with respect to such pool; however, the commission, upon hearing and after notice, may subsequently modify any such plan to the extent necessary to prevent waste as prohibited by this act. (Emphasis ours)

The position of Appellants, with regard to this sub-section, is that the commission has authority to modify a pooling

arrangement or plan only to the extent necessary to prevent waste as prohibited by the statutes. Sub-section (e) clearly gives the commission only such authority and since there is no authority to act except on such condition, there is no jurisdiction to enter an order which is not necessary except to correct the condition of waste which is found by the commission to then exist. It is the position of Appellants that the foregoing is the exact state of the record and the exact condition which prevailed at the time the oil company made its application in Case No. 1567 before the commission in which Order No. R-1310 was ultimately entered.

The complete record of evidence in Case No. 1567 is included in the record here before this court (Tr. 57-100), and contains no evidence that any waste existed or would be committed by the continued operation of Appellants' properties as a production unit, as provided by commission Order No. R-677. Although no such evidence was offered to the commission at such hearing, the commission did thereafter enter its order No. R-1310 (Tr. 101-104) in which it divided the property of Appellants, as hereinbefore stated in the Statement of the Facts, and pooled the separate portions of Appellants' property with separate portions of other properties located in the same section. This order, No. R-1310, made no finding that waste was being committed by the operation of Appellants' property as a production unit, as provided by Order No. R-677, nor did such order find that its entry would prevent waste.

We have found two cases which deal generally with the authority of a regulating body to act in the

manner in which the commission dealt with the application in its Case No. 1567. The first case is Carter Oil Company, et al v. State, et al, 205 Okla. 374, 238 P.2d 300. This was an appeal from two orders of the Corporation Commission of Oklahoma dealing with an application to change a drilling unit which had been created by a prior order of the Commission, which such prior order had become final and from which there had been no appeal. The case in the Supreme Court of Oklahoma was decided in part on the basis of lack of due notice, which be urged upon this court later herein, but in dealing with the question of the right of the Corporation Commission to modify or vacate a prior order of the Commission, the Court stated at page 303:

> The question of the correlative rights of defendants in error and plaintiffs in error, with reference to said well as a source of supply, was necessarily involved and determined, as a matter of law, by the form of the unit established. The application herein to change the units established by Order No. 20585, solely upon the basis of the facts existing at the time the order was entered and in evidence is but an effort to have said order revived and modified on account of error therein and contrary to the provisions of 52 O.S. 1941, Section 111.

Following this declaration by the Court, the order which had been entered by the Corporation Commission modifying the previous production unit was declared by the Court to be void for want of authority in the Commission to enter such order. We believe this situation is identical with the one here before the Court, for here also the Commission has entered an order rescinding a previous order which established a production unit fixing the rights of the parties therein as a matter of law, and such rescinding order was based on no evidence which under our law would justify or

authorize such change.

The other case which deals with commission authority with regard to modifying or rescinding prior orders was occasioned by the situation where a drilling unit was established by agreement of the parties and order of the commission, with which such agreement one of the parties later became dissatisfied and petitioned the commission to modify the unit by taking certain properties from the unit and replacing such properties with adjoining properties owned by such party. No change of condition was urged upon the court to support this change. Wood Oil Company, et al v. Corporation Commission, et al, 205 Okla. 534, 239 P. 2d 1021. In deciding the issues of this matter, the Court stated:

> It is recognized that the Commission's order of April 1, 1947, became final because not appealed, and that it is not subject to collateral attack. But it is urged that the Commission was authorized to modify the order of April 1, 1947, so as to protect correlative rights and that the commission erred in not modifying said order.
>
> The power of the Commission at the time of entering its order of April 1, 1947, to thereafter modify same was prescribed in subdiv. (c), Section 37, Tit. 52, Cum. Supp. 1945 to O.S. 1941. This section was later repealed and the power of the Commission at the time of the application to modify previous orders is defined in subd. (c) Section 1, Tit. 52 S.L. 1945, pp. 328, 329. Plaintiffs contend the power of the commission in the premises is to be measured by the earlier law and that thereunder the commission was authorized to grant the relief sought. Defendants challenge both contentions. We think it unnecessary to consider these contentions. Whether the granting of the relief sought is authorized by the earlier or the later law is immaterial because the right to any such relief under either statute is expressly predicated upon proper proof of the need thereof. The exercise of the authority to modify the previous order necessarily involves a changed factual situation from that which obtained at the time of making the order sought to be modified. Otherwise the modification would constitute an attempt to change the original order in a manner not authorized by law.
>
> The motion to v cate and modify order No. 9890

did not specify any substantial change of condition of the area nor did the evidence reveal such change. The contentions urged in support of the motion were known and could have been urged at the hearing on which the original order was based. Plaintiffs now say that the order sought to be vacated was inequitable, unjust and unconscionable, but such complaints could properly have been urged only on appeal. Tit. 52 O.S. 1941, 1941, sec. 111. Plaintiffs consented to the order and it has become final.

The order appealed from is affirmed.

Appellants contend that these two cases support their position and urge the court that the commission had no authority to enter Order No. R-1310 without evidence of a nature authorized by statute and that such order is, therefore, void for want of jurisdiction to enter the same

b) THAT ORDER NO. R-1310, ENTERED IN CASE NO. 1567, WAS VOID FOR THE REASON THAT APPELLANTS WERE NOT GIVEN NOTICE BY THE COMMISSION THAT ORDER NO. R-677 WOULD BE MODIFIED, VACATED OR RESCINDED.

The notice of hearing received by Appellants recited the style of the case, which was:

BEFORE THE
OIL CONSERVATION COMMISSION
DECEMBER 10, 1953

IN THE MATTER OF:
Application of Olsen Oils, Inc., for a non-standard gas proration unit. Applicant, in the above-styled cause, seeks an order establishing a 160-acre non-standard gas proration unit in the Tubb Gas Pool consisting of the N/2 NW/4, SW/4 NW/4 and the NW/4 SW/4 of Section 25, Township 22 South, Range 37 East, Lea County, New Mexico; or in the alternative for a compulsory pooling order pooling all interests within the vertical limits of the Tubb Gas Pool in the NW/4 of said Section 25 as one Tubb Gas Unit and a like order pooling all interests within the vertical limits of the Tubb Gas pool in the SW/4 of said Section 25 as another Tubb Gas Unit. } Case 1567

Appellants herein made an application to the Oil

Conservation Commission for the complete records of the case and such records did not include a copy of such notice; however, Appellants urge the Court and request Appellees to agree that the above quoted notice is all of the notice which Appellants received of such hearing. This notice does not in anyway apprise Appellants of the fact that Order No. R-677 was to be considered for modification or to possibly be rescinded in the new hearing. This question was also before the Court in Wood Oil Company, et al v. Corporation Commission, et al, supra, and Carter Oil Company, et al v. State, et al, supra. In the Carter case, the Court stated at page 308:

> We hold that the Corporation Commission is without power or authority to review and modify a former order establishing a well spacing unit, which order has become final, without first giving statutory notice, to all interested parties, of a hearing to be had on the question of modification or change of the order.

The situation before the Oklahoma court in the Carter case is identical with the one here insofar as the modification or rescinding of a prior order is concerned, and we believe the decision in the Carter case is the only one which the Court can arrive at and protect the rights of these Appellants.

c) APPELLANTS WERE RESIDENTS OF NEW MEXICO AND THEIR WHEREABOUTS WERE KNOWN, BUT THEY WERE NOT PERSONALLY SERVED WITH NOTICE OF THE HEARING IN CASE NO. 1567.

Appellants were residents of Lea County during all of the proceedings in connection with the matters before the Court and this fact was well known to the commission records and to the other Appellees involved. Notwithstanding this, the only notice Appellants received of the hearing and the nature of the hearing in Case No. 1567 was that notice recited

in sub-section (b) of this Point, which such notice was delivered to them by mail. Appellants contend that such notice was not sufficient to give the commission jurisdiction over them or their property. The statute which establishes the manner of notice is Section 65-3-6, New Mexico Statutes Annotated, 1953 Compilation. With regard to service of such notice, such statute provides:

> .... any notice required to be given under this act or under any rule, regulation or order prescribed by the commission shall be by personal service on the person affected or by publication once in a newspaper of general circulation at 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.... Personal service thereof may be made by any agent of the commission or by any person over the age of eighteen (18) years, in the same manner as is provided by law for the service of summons in civil actions in the district courts of this state. Such service shall be complete at the time of such personal service or on the date of such publication, as the case may be. Proof of service shall be the affidavit of the person making personal service, or of the publisher of the newspaper in which publication is had, as the case may be....

Appellants in this case were certainly persons affected by the proceeding in Case No. 1567. For this court to hold that mere publication in a newspaper, one time in Santa Fe, County and one time in Lea County, to be sufficient process; to bind these Appellants by the order entered thereon, is, in our mind, a complete departure from all of the rules of due process. We contend that the only service upon these Appellants which would be sufficient to constitute due process and vest the commission with authority to affect Appellants would be personal service of a copy of a notice reciting the nature of the action proposed before the commission. A case which deals at length with the sufficiency of process to vest jurisdiction

in a court is Bear Lake County v. Budge, Judge, 91 Idaho 703; 75 P. 614. This was an action for a writ of prohibition against a district judge from proceeding to hear an action brought by a water commissioner under a statute authorizing such commissioner to determine the rights of various claimants to use water from a stream. The basis for the writ of prohibition was that the process was insufficient to vest jurisdiction in the court. In its opinion at page 617, the Court stated:

> The court is authorized, by said act, to procure jurisdiction of the person, and to settle by judgment and decree valuable property rights, not by service of summons as provided by the general law of the state for the service thereof, which operates alike on all citizens of the state and others desiring to have their titles quieted- but by a special, limited and constructive service that is not permitted by the general law of the state. Of course, if defendants are in reality unknown, or if known and reside outside or cannot be found within the state, publication of summons must, of necessity, be sufficient, as provided by our statutes. But in such cases, when the name and post office address of the defendant is known, a copy of the summons and complaint must be sent to him by mail.

In accordance with the decision in the Bear Lake case, Appellants urge the Court to find the only sufficient service in this case to be actual personal service and that to find the publication of such notice in the newspaper to be sufficient would be tantamount to finding such statute to be unconstitutional for lack of due process.

d) THE POOLING POWER OF THE COMMISSION WAS EXERCISED IN CASE NO. 1567 WITHOUT THE PRESENCE OF JURISDICTIONAL FACTS REQUIRED BY SECTION 65-3-14, NEW MEXICO STATUTES ANNOTATED, 1953 COMPILATION.

The evidence offered in Case No. 1567 in support of the petition for the issuance of Order No. R-1310(Tr. 90-100) contained no evidence that the issuance of such order was necessary to prevent waste as prohibited by our law. As

a matter of fact in the testimony offered to the commission in this case, the witness for the oil company stated that the granting of either of the alternatives in the application would tend to prevent waste and protect correlative rights. (Tr. 93) It would seem to us that this statement alone would be sufficient to deprive the commission of jurisdiction for it is a clear statement by the applicant that the continued operation under Order No. R-677 would prevent waste and protect the rights of the parties involved. The actual reason why the commission entered Order No. R-1310 is indicated by the testimony of the same witness. (Tr. 94):

By Mr. Payne:

Q I don't know whether this witness is the one that would be most familiar with this-- which of these two alternatives do you prefer?

A I prefer the two standard proration units.

Mr. Payne: Thank you.

Before a prior order of the Corporation Commission in Oklahoma can be vacated or modified it is necessary to show a substantial change of condition in the area. Under our statute it is necessary to show that such modification is necessary to prevent waste. In the Wood Oil Company, et al v. Corporation Commission case, Supra, the Court discussed the matter of an application to change a prior order without evidence of a substantial change in the following language:

> The motion to vacate and modify order No. 19690 did not specify any substantial change of condition of the area nor did the evidence reveal such change. The contentions urged in support of the motion were known and could have been urged at the

> hearing on which the original order was based. Plaintiffs now say that the order sought to be vacated was inequitable, unjust and unconscionable, but such complaints could properly have been urged only on appeal. Tit. 52 O. S. 1941, sec. 111. Plaintiffs consented to the order and it has become final.

The order appealed from is affirmed.

On the same subject, the case, Carter Oil Company v. State, Supra, beginning at page 303, stated:

> The application herein to change the units established by Order No. 20505 solely upon the basis of facts existing at the time the order was entered and in evidence is but an effort to have said order revived and modified on account of error therein and contrary to the provisions of 52 O.S. 1941, sec. 111.

In the transcript of testimony of the hearing in case No. 1567 (Tr. 92-93) the witness for the oil company stated that there was no change in the geology in the area and that the entire area was reasonably presumed to be productive of Tubb gas and the contour lines of the Tubb formation maps had not been changed since the entry of Order No. R-677. As previously stated, the witness also stated that no waste was being committed by operation of the production unit under Order No. R-677; therefore, we urge the Court to follow the rulings of the Carter and Wood cases and declare the commission to have no jurisdiction to enter Order No. R-1310.

POINT II

> THAT ORDER NO. R-1310, ENTERED IN CASE NO. 1567, IS VOID FOR THE REASON THAT IT IS A COLLATERAL ATTACK ON ORDER R-677, ENTERED IN CASE NO. 929.

On July 14, 1955, the Oil Conservation Commission called case No. 929 for hearing on the application of the oil company herein and heard evidence offered by the

company in support of the company's application to pool properties of Appellants as a production unit (Tr. 31-35). Thereafter on August 17, 1955, the commission entered Order No. R-677 in such case, establishing the property of Appellants as a production unit authorized the drilling of a gas well and attributing the production of such well, if any, to such production unit. No application for rehearing on this order was ever filed, and no appeal was taken. A gas well was drilled and the production of the well attributed to such acreage as provided by such order for a period of several months. Appellee oil company then filed its case No. 1567, in which Order No. R-1310 was entered, which order by its language rescinded the prior order No. R-677. Appellants contend that this latter action by the oil company amounted to a collateral attack upon a final order and that same is void for lack of jurisdiction in the commission to hear or allow a collateral attack on its final orders. In Hood Oil Company, et al v. Corporation Commission, the syllabus by the Court is as follows:

> 1. Orders of the Corporation Commission made in pursuance of the authority granted under Tit. 52 O. S. 1941, sec. 87, are not subject to collateral attack.
>
> 2. The Corporation Commission is without authority to entertain or grant an application to vacate, amend or modify a spacing and well drilling unit established by a former order of the Commission, which has become final, upon the grounds that the order was ill advised, inequitable or otherwise erroneous. The remedy for such complaints is by appeal to the Supreme Court.

It is our contention that a final order of the commission has all the force and effect of a judgment

entered by a court, and we believe the [illegible] Oil Company quotation bears out this contention.

In the case of Haverstead v. First National Bank and Trust Company, 76 S.D. 119; 74 N.W. 2d 43, the Court defined a collateral attack as follows:

> An attack is a 'collateral attack' if made on a judgment in an action that has an independent purpose other than impeaching a judgment, even though impeaching the particular judgment may be essential to the success of the action.

In the case here before the Court the circumstance is clearly parallel to the situation defined in the Haverstead case and Appellants urge the Court that the action by the oil company in case No. 1567 was a collateral attack on Order No. R-677 and that the Commission had no jurisdiction to hear such action and the order entered therein was void.

CONCLUSION

Based on the foregoing authorities and argument, it is Appellants' position that under sub-paragraph (a) and sub-paragraph (d) of Point I, the Order No. R-1310, entered in case No. 1567, must fail and the Court find that the Commission had no jurisdiction to enter such order for the reason that the jurisdictional facts required to be present were not found to be present by the Commission and the record discloses that no evidence of such jurisdictional facts was presented to the Commission. Since the presence of such facts is necessary to support the issuance of an order, the order entered in the absence of such facts should be declared void.

Appellants further contend that order No. R-1310 is void for the reason that the notice received by Appellants did not

specify that a modification or vacation or Order No. R-677 was to be considered by the Commission and the authorities declare that such notice is necessary to vest jurisdiction in the Commission.

Appellants urge the Court that the service of sufficient process is one of the most basic elements in the question of jurisdiction. Since the process served in this case was merely a mailing of a notice to Appellants, although their residence within the State of New Mexico was well known to the other parties herein, Appellants strongly urge the Court that such is not process to vest jurisdiction in the Commission.

As argued under Point II herein, Appellants urge the Court that case No. 1567 was a wholly unwarranted attack on Order No. R-677 amounting to a collateral attack, which was not supported by any evidence or authority to justify the attack and since Order No. R-677 was being carried out without waste and in accordance with the laws of New Mexico and the rules and regulations of the Oil Conservation Commission, such Commission was without jurisdiction to hear such an attack on one of its prior orders which had become final and upon which no appeal had been taken.

Appellants urge the Court that the suggestion in its findings by the District Court that Appellants are barred by laches or estoppel is not proper in this case for the reason that Order No. R-1310 was void by reason of the foregoing jurisdictional defects; that such void order was solicited and obtained by Appellee Oil Company at a time when it was fully familiar with the status of Order No. R-677

and fully aware that the application in case No. 1567 was in violation of the rights of Appellants; that this action by the oil company initiated and caused any additional expense which might have resulted, and said company should not be entitled to benefit by its own misconduct to the detriment of these Appellants.

Respectfully submitted,

C. N. Morris,
Foster Windham
Carlsbad, New Mexico
Attorneys for Appellants.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

AMANDA E. SIMS and GEORGE W. SIMS,

Petitioners and Appellants,

vs.

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.

No. 7207

CERTIFICATE OF SERVICE

I, Richard S. Morris, Attorney for the New Mexico Oil Conservation Commission, one of the Appellees in the above styled and numbered cause, do hereby certify that I mailed a copy of Appellees' Answer Brief to C. H. Morris and Foster Windham, Eddy County Court House, Carlsbad, New Mexico, on this 10th day of July, 1962.

Richard S. Morris

RICHARD S. MORRIS
Santa Fe, New Mexico
Attorney for Appellee-New Mexico
Oil Conservation Commission