BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

APPLICATION OF CONSOLIDATED OIL & GAS, INC., FOR AN AMENDMENT OF ORDER NO. R-1670-C, CHANGING THE ALLOCATION FORMULA FOR THE BASIN-DAKOTA GAS POOL, SAN JUAN, RIO ARRIBA AND SANDOVAL COUNTIES, NEW MEXICO — No. 2504

MEMORANDUM BRIEF

In connection with the rehearing in the above entitled cause, PUBCO PETROLEUM CORP. filed two pleadings, one entitled "Motion to Quash Subpoena Duces Tecum", and the other entitled "Objections to Order of Commission Granting Rehearing". The Commission considered these pleadings, and other pleadings filed in the cause, on September 13 and 14. Upon a recess, the Commission invited the participants to file briefs with the Commission within fifteen days from and after September 14. At the threshold of the rehearing it appears to Pubco that the Commission is confronted with a policy decision. The question arises as to whether or not Consolidated is acting in good faith in asking the Commission to change the formula in the Basin-Dakota Gas Pool.

Reference is made to an exhibit admitted into the record on September 14, on motion of Marathon Oil Co. (formerly known as The Ohio Oil Co.), to which no objection was made by Consolidated, of a communication dated July 6, 1962, designated "Memorandum to Participants", written on the letterhead of Consolidated Oil & Gas, Inc., signed "J. B. Ladd". The exhibit in question is most enlightening, and reveals the objective sought by Consolidated. In the second paragraph of the letter

this statement is made: "In essence, it is obvious that we won the battle but lost the war". In the second paragraph reference is made to the "famous New Mexico Supreme Court Jalmat decision", which points up the fact that Consolidated is seeking to bring itself within the framework of the Jalmat decision. How may Consolidated accomplish this objective? It is contended by Pubco that Consolidated resorted to the device of employing the processes of the Commission by having a subpoena duces tecum served on Pubco, and other interested participants, for the express purpose of compelling such participants to provide the information in regard to reserves, with which Consolidated hopes to bolster up its case. The enormity of the task and the hopes of achieving results satisfactory and acceptable to it, are set forth very definitely in the exhibit. Instead of providing engineering data gathered at its own expense, it is obvious that Consolidated planned to once again resort to the use of the data prepared by other companies, as it did on cross-examination at the time of the original hearing. There is here quoted the ambition of Consolidated as expressed in the third paragraph of the letter of July 6, 1962:

> "The impact of this on our proposal is indicated when one realizes that there are over 600 wells in the San Juan Basin Dakota reservoirs. We have now approached the Commission with the formal request that they require all operators to submit sufficient information regarding their particular wells such that the requirements of the Jalmat decision could be met. We are confident that a thorough engineering review, with objective conclusions based on all available data, would prove our proposed allocation formula more valid than the original formula which is now in effect. It is possible (and even quite probable) that while we may not be able to generate approval for our proposed new formula, we will succeed in invalidating the original formula. The net effect of this would be no proration at all. This would be good since we would then undeniably be governed by the unqualified intent of the contractual minimum-take guarantee; i.e., 50% of each well's ability rather than being limited to a lesser volume as suggested by the existing proration formula."

Basically, as Pubco views it, the Commission will be obliged to consider 65-3-14 N.M.S.A. 1953, particularly subsection (a). Such subsection is herein quoted for ready reference by the Commission:

> "(a) The rules, regulations or orders of the Commission shall, so far as it is practicable to do so, afford to the owner of each property in a pool the opportunity to produce his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practically determined, and so far as such can be practicably obtained without waste, substantially in the proportion that the quantity of the recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas or both in the pool, and for this purpose to use his just and equitable share of the reservoir energy."

Likewise the Commission should consider subsection (d) of 65-3-15 and (e) of the same subsection, here quoted as follows:

> "(e) Any common purchaser taking gas produced from gas wells from a common source of supply shall take ratably under such rules, regulations and orders, concerning quantity, as may be promulgated by the Commission consistent with this act. The Commission, in promulgating such rules, regulations and orders may consider the quality and the deliverability of the gas, the pressure of the gas at the point of delivery, acreage attributable to the well, market requirements in the case of unprorated pools, and other pertinent factors."

Pubco contends that all parties to this cause had their day in court at the time of the original hearing which began on April 18, 1962. Pubco contends that the order of the Commission of July 7, 1962, denying Consolidated's petition, should be considered as res ajudicata. The "Petition for Rehearing" filed with this Commission by Consolidated fails to allege any fact or thing which would justify the Commission to reopen this case.

Authority for the subpoena duces tecum is contained in Section 65-3-7 N.M.S.A. 1953, which provides that any member of the Commission shall be empowered to issue a subpoena duces tecum. This particular Section has never been tested in court. It is recognized, however, that courts are liberal in permitting an administrative body full exercise of its powers to require the production of books, papers and documents. Nevertheless, the subpoena power is limited by the Constitutional prohibition against unreasonable search and seizure. It was decided by the U. S. Supreme Court in the case of Hale v. Henkel 201 U.S. 43, 26 S.Ct. 370, 50 L. Ed. 652, (1906) that a corporation was entitled to freedom from unreasonable searches and seizures under the 4th Amendment. In the case of Fleming v. Montgomery Ward & Co. 114 F. 2d 384 (1940) the Administrator of the Wage and Hour Division of the Department of Labor had petitioned the U. S. District Court to enforce a subpoena duces tecum which had been issued pursuant to authorization of the Fair Labor Standards Act of 1938. The court, while holding that the subpoena would be enforced stated that the demand must be expressed in lawful process and that it was required that the lawful process:

> ". . . limit is requirement to certain described documents and papers which are easily distinguished and clearly described." (page 389)

It is stated in 73 C.J.S. Public Admin. Bodies 1962 Cumulative Annual Pocket Part at Section 92, page 53 that:

> "An administrative body, to avoid being arbitrary and oppressive in issuance of subpoenas duces tecum should call individuals and take testimony as to existence and custody of the documents sought, and should seek in advance to determine whether they are material and relevant to the issues before the board. In issuance of subpoenas for records of companies, it should not designate all documents in a particular class, but only those which it has found by its

preliminary inspection to be in the possession or under the control of the persons to whom the subpoenas are directed and to be relevant and material to the issue."

In oral argument before the Commission on September 14, counsel made reference to the matter of the subpoena duces tecum describing it as a "fishing expedition" and also a "shot gun" procedure. The subpoena in question was directed to Frank D. Gorham, and not to Pubco Petroleum Corp., which is considered a fatal defect. Frank D. Gorham does not own the documents in question. To compel Pubco to produce the material requested would be unreasonable and detrimental to its business relations. Pubco's figures on reserves, even if revealed, would not be official and would not assist the Commission to any great extent in determining the issues in this cause. Furthermore, any papers in Pubco's possession relating to reserves calculations are subject to the contention that Pubco does not have exclusive ownership of such records and retains the same for its own use only.

Several weeks ago a Subcommittee of the U. S. Senate issued a subpoena duces tecum directing some nine steel companies to furnish the committee with information relating to production figures and costs of manufacturing. Upon objection being made on behalf of the steel companies that such information was confidential and that the public interest would not be served by disclosing it, threats were made to find the steel companies in contempt of the Senate. On September 25, 1962, a majority of the Senate committee announced its decision, upholding the rights of the steel companies and absolving them from any charges of contempt.

There is no known method by which reserves of gas or oil can be accurately calculated. One Petroleum Engineer, using one method, will calculate reserves and reach one result; and another Engineer, using a different method, will reach a different result.

AS TO GRANTING THE REHEARING

Section 65-3-22 provides that within twenty days after the entry of any order or decision of the Commission, any person affected thereby may file with the Commission an application for rehearing in respect of any matter determined by such order or decision setting forth "the respect in which such order or decision is believed to be erroneous". It is respectfully submitted to the Commission that the petition for a rehearing, filed on June 27, fails to adequately state in what respect the decision of the Commission is believed to be erroneous. No question but that the applicant for a rehearing now attempts to come within the boundaries of the Jalmat case. However, the petition fails to point out any error, any act of omission or commission which would justify a rehearing.

CONCLUSION

In conclusion, it is respectfully submitted that Pubco's motion to quash should be sustained and likewise its objections to the order of the Commission granting a rehearing should be sustained.

Respectfully submitted,

PUBCO PETROLEUM CORP.

By _____

ITS ATTORNEY
First National Bank Building
Albuquerque, New Mexico

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

APPLICATION OF CONSOLIDATED OIL & GAS, INC.)
TO AMEND ORDER NO. R-1670-C RELATING TO)
BASIN-DAKOTA GAS POOL, SAN JUAN, RIO ARRIBA) CASE NO. 2504
AND SANDOVAL COUNTIES, NEW MEXICO - UPON)
REHEARING)

MEMORANDUM RE SUBPOENA DUCES TECUM

Consolidated Oil & Gas, Inc. caused a subpoena duces tecum to issue to Joe Salmon, Aztec Oil & Gas Company's district superintendent in Farmington, New Mexico, on September 10, 1962. Mr. Salmon's copy of the subpoena was forwarded to Aztec's Dallas office and received there on September 11, 1962, allowing only one intervening day to assemble the voluminous material covered by the subpoena prior to the commencement of the rehearing of the subject case on September 13, 1962. (By agreement with Consolidated, this subpoena was quashed on the understanding that L. M. Stevens, Aztec's witness at the April 18, 1962 hearing of the subject case, would be available for service of a similar subpoena at the rehearing. Mr. Stevens was subpoenoed in Santa Fe on September 13, 1962.)

The subpoena served on Aztec called for three categories of information: 1) reports, determinations, etc. relating to Aztec-owned or-operated Basin-Dakota Pool properties showing enumerated data from which reserves could be calculated (mentioned in detail below) and the reserve calculations themselves, 2) reserve calculations with respect to 29 particular wells and 3) any reports, etc. relating to recoverable gas reserves in the Basin-Dakota Pool not covered by 1) and 2), above.

The Commission has statutory authority for the issuance of subpoenas. Rule 1211 of the Commission's Rules and Regulations covers, as its title states, the "Power of Commission to Require Attendance of Witnesses and Production of Evidence." Rule 1212, Rules of Evidence, states in part, "In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served."

It is contended that if the Commission follows the rules of evidence applicable in a trial before a court without a jury, the information required

by Consolidated's subpoena would not be admissable in evidence and the subpoena would be quashed. It is further contended that the ends of justice would not be better served by relaxing this general rule. In support of its contentions, Aztec would respectfully show the following:

I.

RESERVE REPORTS AND CALCULATIONS

Aztec has spent a considerable amount of time, money and effort in developing reserve estimates in portions of the Basin-Dakota Gas Pool in order to make intelligent operations in the area possible, preserve and enhance its competitive position, evaluate its holdings, and direct its exploratory and development program. To compel Aztec to disclose the confidential reports of its experts would be grossly unjust.

> "Utmost discretion should be exercised in ordering the production of information which is confidential or which contains trade secrets."

Herman v. Civil Aeronautics Board 237 F.2d 359 (9th Cir. 1956), Korman v. Schull 184 F. Supp. 928 (D.C. W.D. Mich. 1960), Florida Co. v. Attapulgas Clay Co. 26 F. Supp. 968 (D.C. Del. 1939), 4 Moore's Federal Practice, Section 34.15, Pathe Laboratories, Inc. v. Dupont Film Mfg. Corp. 3 F.R.D. 11 (D.C.S.D. N.Y. 1943).

II.

INFORMATION AVAILABLE FROM OTHER SOURCES

Such a harsh requirement is even more onerous and unnecessary when the information on which the reserve reports are based is available to Consolidated from other sources.

> "Good cause for the production of an expert's report is not shown where the documents on which the report was based are available to the moving party."

Colonial Airlines v. Jonas (13 F.R.D. 199)

In addition to reserve calculations and reports, the first category of information which Consolidated's subpoena required included data which is readily available to Consolidated from other public sources. The items and the sources from which they may be obtained are listed below:

a) Description of the property and the acreage - The forms C-101, Notice of Intention to Drill and C-128, Well Location and Acreage Dedication Plat of the Commission which are required to be filed for each well drilled in the Basin-Dakota Gas Pool contain this information.

b) Initial reservoir pressure - C-105, Well Record Form of the Commission.

c) Average porosity, total and net gas saturation - Logs accompanying Form C-105 allow measurement of porosity and calculation of total and net gas saturation, if suitable logs were run. If not, this information is not available to Aztec unless cores were taken and analyzed.

d) Average permeability - This data is not necessary to calculate reserves.

e) Initial open-flow potential - C-122, Multi-Point Back Pressure Test for Gas Wells Form of the Commission.

f) Deliverabilities, initial and most recent - C-122a, Gas Well Test Data Form of the Commission; this data is also available from the Commission's monthly Proration Schedules.

g) Gross gas pay - Logs accompanying Form C-105 allow measurement of gross gas pay.

h) Net gas pay - Logs accompanying Form C-105 allow measurement of net gas pay.

In addition to these public sources, such information is obtainable in part from commercial well reproduction companies and the completion reports provided by commercial petroleum information services.

> "Interrogatories requiring a substantial amount of compilation need not be answered where the information is otherwise available to the interrogating party."

Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co. 12 F.R.D. 531, Zenith Radio Corp. v. Radio Corp. of America 106 F. Supp. 561.

III.

PROPERTIES OF WHICH AZTEC IS NOT SOLE OWNER

The subpoena would compel the disclosure of reserve calculations and the data on which they were based relating to properties in which parties other than Aztec own interests. The rules of evidence do not require nor is justice served by forcing a party to disclose confidential information which is the property of third persons. Herman v. Civil Aeronautics Board 237 F. 2d 359 (9th Cir. 1956).

In summary, the disclosure of Aztec's expert reserve calculations to a competitor is not required under the rules of evidence or in the interests of justice and would create a dangerous precedent. It is not necessary since the data on which the calculations were based is readily available to the competitor from which, if he desires to commit himself to the time and effort required, his

own reserve determinations may be made. Further, to compel Aztec to furnish the data outlined in the subpoena when available from public records and commercial sources, particularly on such short notice, would be both unreasonable and oppressive and would unduly interfere with Aztec's business operations. Consolidated has neither made nor offered to make any showing as to good cause for the disclosure of this information.

Accordingly, the subpoena duces tecum should be quashed.

Respectfully submitted,

By Kenneth A. Swanson
Kenneth A. Swanson
Attorney for

AZTEC OIL & GAS COMPANY

BEFORE THE OIL CONSERVATION COMMISSION

OF NEW MEXICO

APPLICATION OF CONSOLIDATED OIL AND GAS, INC. for an Amendment of Order No. R-1670-C Changing the Allocation Formula in the Basin-Dakota Gas Pool.	CASE 2504

MEMORANDUM ON MOTION TO QUASH SUBPOENAS

The subpoena power of the Commission is derived from Section 65-3-7, N.M.S.A., 1953 Comp. and Rule 1211 of the Commission's Rules and Regulations. Rule 45 of the Rules of Civil Procedure for the District Courts of the State of New Mexico also is applicable.

No contention is made that the Commission does not have the power of subpoena; the contention is that the Commission's exercise of that power is governed by the general law applicable to subpoenas - particularly that part of the law relating to oppressive use of and unreasonable demands in subpoenas duces tecum.

I. RAINEY'S MOTION

The subpoena duces tecum issued by the Oil Conservation Commission at the request of Consolidated Oil and Gas, Inc. and served on David H. Rainey on August 14, 1962, demands, in its third paragraph, that Rainey produce:

> "Any reports, determinations or tabulations of initial and subsequent reserve calculations made by or in the possession of El Paso Natural Gas Company concerning recoverable gas reserves in the Basin-Dakota Gas Pool not included in the eight data sheets subpoenaed above."

The Affidavit of David H. Rainey on file with the Commission states that he has neither the custody nor the posses-

sion of the reports and determinations demanded, and that he does not have the authority to remove them from the possession of the custodian.

A subpoena duces tecum should be quashed where it has been served on a person not having possessimn and not being authorized to take possession of the documents, records or things demanded. See Moore's Federal Practice, Vol. 5, Section 45.05.

In Keiffe v. La Salle Realty Co., 163 La. 824, 112 So. 799, the Court stated the general rule to be that the subpoena should issue directly to the officer or employee of the corporation who is the custodian of the records desired, or, if the subpoena is directed to the corporation, it should designate some officer of the corporation as the person who shall respond thereto.

The rule as stated in 97 C.J.S., Witnesses, Section 25, is as follows:

> "The person who has the control of, and the ability to produce, the desired books or papers is the proper person to be subpoenaed..."

David Rainey, being neither an officer of El Paso nor the person having custody of the records demanded, is not the proper person upon whom the subpoena should have been served. Accordingly, the subpoena duces tecum should be quashed.

II. EL PASO'S MOTION

A. The information demanded in paragraph 3 of the subpoena duces tecum, quoted above, has been compiled by El Paso over a period of years. These records are in constant use by El Paso in its normal course of business, and to remove them from their location at the home office of the company in El Paso, Texas, would seriously disrupt and interfere with El Paso's business operations. Furthermore, the records are quite bulky and their

transportation to and from Santa Fe would be expensive as well as troublesome.

By failing to specify and indentify the material demanded, Consolidated places an unreasonable burden on El Paso, for if El Paso is to comply with the subpoena, it must produce all of these voluminous records.

Where the production of information demanded by a subpoena duces tecum is a burden in that a mass of documents is demanded without specifying and identifying the exact material sought, the subpoena duces tecum may be quashed as being unreasonable. U. S. v. Woerth , 130 F. Supp. 930 (D. C. Iowa 1955), affirmed, 231 F.2d 822; 2Am. Jr. 2d, Administrative Law, Sec. 264, p. 95.

In U. S. v. Woerth, supra, at page 824 of 231 F. 2d, the Court stated the test for upholding the validity of a subpoena duces tecum as follows:

> "The subpoena duces tecum in question is not couched in broad and sweeping language. It does not call for indefinite records or a mass of records. It is very specific and limited in its terms. The production of the records called for by the subpoena duces tecum would not disrupt or interfere with the respondent's business activities or place an undue burden on him or cause hardship to him."

It is submitted that the subpoena duces tecum issued by the Commission at Consolidated's request meets not one single element of the test quoted above.

In 5 Moore's Federal Practice, Section 45.02, at p. 1725, the rule is stated as follows:

> "A subpoena is unreasonable or oppressive if it is too broad and sweeping. It should normally be limited to a reasonable period of time and should designate the documents desired, or the subjects to which the docu-

ments relate with reasonable particularity...

> "That undue inconvenience or expense would be involved in producing the papers may be a ground for quashing a subpoena..."

See also annotation, Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records and documents, 23 A.L.R. 2d 862

Where the information demanded would be largely cumulative the subpoena duces tecum may be quashed. See Pittsburgh & Lake Erie R. Co. v. Pennsylvania Public Utility Commission, 85A.2d 646 (1952). See also Chapman v. Maren Elwood College, 225 F.2d 230 (9th Cir. 1955) concerning the reasonableness of the demand made by a subpoena duces tecum.

In Hermann v. Civil Aeronautics Board, 237 F.2d 359 (9th Cir. 1956), a case concerned with the enforcement of a subpoenas duces tecum issued by the CAB, the party upon whom demand had been made to produce information objected on the ground that the subpoenas were "oppressive and unreasonable" and "that compliance with the said subpoenas would unduly and unreasonably hamper and interfere with the business conducted by the companies named in the said subpoenas." The Court prescribed the proper procedure to be followed in this language:

> "(1-5) The Civil Aeronautics Board is given broad powers of subpoena of individuals for the purpose of testifying to the matters which are before them.*** Obviously, it will be assumed that these matters will not be irrelevant to the proceeding. The Board is also given an extremely comprehensive power of inspection of all of the documents, books and papers in the office of any of the corporations or individuals operating under the control of the Board.*** In order to prevent their action from being arbitrary and oppressive, the Board should call the individuals and take testimony as to the existence and custody of the documents. Materiality and relevancy to the issues

before the Board can be established in this method without the necessity of bringing truck loads of records to the hearing officer. Likewise, by the power of inspection, all the documents can be gone over, photographed and copied without regard to materiality and relevance. It is obvious that, if after these inspections the Board finds that the existence of other documents relevant and material to the issue is probable or that they are being concealed, then again a witness can be called and examined regarding these features, but the subpoenas thereafter issued should not designate all the documents in the class, but only those which the Board has found are in the possession or under the control of the persons to whom directed and which are relevant and material to the issue." (Emphasis supplied)

B. Some of the information in El Paso's possession concerning recoverable gas reserves in the Basin-Dakota Gas Pool is confidential in nature and relates to the property of other parties.

The privacy of third persons should not be invaded by use of a subpoena duces tecum directed to a party having in his possession confidential material. Herman v. Civil Aeronautics Board, 237 F.2d 359 (9th Cir. 1956); Floriden Co. v. Attapulgus Clay Co., 26 F. Supp.968. And discretion should be exercised to avoid unnecessary disclosure of such material, particularly where the action is between competitors. See 4 Moore's Federal Practice, Section 34.15.

Accordingly, El Paso should not be required to produce this confidential information pursuant to the subpoena duces tecum. Had Consolidated been more specific concerning the documents and material desired, this problem may have been obviated.

Respectfully submitted,

SETH, MONTGOMERY, FEDERICI & ANDREWS

By Wm Federici

Attorneys for El Paso Natural Gas Company.

BEFORE THE OIL CONSERVATION COMMISSION

OF NEW MEXICO

APPLICATION OF CONSOLIDATED OIL AND GAS, INC. For an Amendment of Order No. R-1670-C Changing the Allocation Formula in the Basin-Dakota Gas Pool.

CASE 2504

BRIEF OF EL PASO NATURAL GAS COMPANY AND DAVID H. RAINEY IN SUPPORT OF MOTIONS TO QUASH SUBPOENA DUCES TECUM

The subpoena power of the Commission is derived from Section 65-3-7, N.M.S.A., 1953 Comp. and Rule 1211 of the Commission's Rules and Regulations. Rule 45 of the Rules of Civil Procedure for the District Courts of the State of New Mexico also is applicable.

We do not contend that the Commission does not have the power of subpoena; that right is conferred by Statute; However, the exercise of that power by the Commission is governed by the general law applicable to subpoena.

POINT I.

THE SUBPOENA DUCES TECUM WAS NOT SERVED ON A PERSON HAVING CUSTODY OR CONTROL OVER THE MATERIAL DEMANDED.

The subpoena duces tecum issued by the Oil Conservation Commission at the request of Consolidated Oil and Gas, Inc. and served on David H. Rainey on August 14, 1962, demands, in its third paragraph, that Rainey produce:

> "Any reports, determinations or tabulations of initial and subsequent reserve calculations made by or in the possession of El Paso Natural Gas Company concerning recoverable gas reserves in the Basin-Dakota Gas Pool not included in the eight data sheets subpoenaed above."

The Affidavit of David H. Rainey on file with the Commission states that he has neither the custody nor the possession of the reports and determinations demanded, and that he does

not have the authority to remove them from the possession of the custodian.

A subpoena duces tecum should be quashed where it has been served on a person not having possession and not being authorized to take possession of the documents, records or things demanded. Alma-Schuhfabrik AG v. Rosenthal, 25 F.R.D. 100 (D.C.E.D.N.Y. 1960). See Moore's Federal Practice, Vol. 5, Section 45.05.

In Kaiffe v. La Salle Realty Co., 163 La. 824, 112 So. 799, the Court stated the general rule to be that the subpoena should issue directly to the officer or employee of the corporation who is the custodian of the records desired, or, if the subpoena is directed to the corporation, it should designate some officer of the corporation as the person who shall respond thereto.

The rule as stated in 97 C.J.S., Witnesses, Section 25, p. 380, is as follows:

> "The person who has the control of, and the ability to produce, the desired books or papers is the proper person to be subpoenaed..."

David Rainey, being neither an officer of El Paso nor the person having custody of the records demanded, is not the proper person upon whom the subpoena should have been served. Accordingly, the subpoena duces tecum should be quashed.

POINT II.

THE SUBPOENA DUCES TECUM IS AN UNREASONABLE SEARCH AND SEIZURE.

The subpoena duces tecum demanding the production of reserve calculations and information in the possession of El Paso constitutes an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States and of Section 10, Article II of the Constitution of the State of New Mexico.

The subpoena demands the compulsory production of private papers, unlimited as to the number of documents and extending over an indefinite period of time. The effect of complying with these demands would be a disruption of El Paso's business operations for the sole purpose of allowing Consolidated to conduct an inquisitorial examination of these private business papers.

The courts, repeatedly, have refused to permit unreasonable and oppressive demands to be made.

In the leading case of Hale v. Henkel, 201 U.S. 43, 26 S.ct. 370 50 L. Ed. 652 (1906), the Court said (p. 666 of 50 L. Ed.):

> "We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still... the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, be he individual or corporation, is entitled to protection."

The Constiution of the State of Oklahoma contains a provision similar to Section 10, Article II of the New Mexico Constitution prohibiting unreasonable searches and seizures. The Oklahoma Supreme Court construed and applied this provision in the case of State v. Chickasha Milling Co., Okla., 71 P. 2d 981 (1937), saying (71 P. 2d at p. 985):

> "Section 30, Art. 2 of the State Constitution protects such parties /corporations and individuals/ from unreasonable search and seizure of their private papers and effects, and the courts may not permit an examination thereof in an adversary proceeding without particular description of the papers sought..."

In the Chickasha case, the court further stated (71 P. 2d at p. 984):

> "Our attention is called to no decision of this or any other court where one party, upon the theory that he may discover some competent evidence to support his cause or defense, has been permitted to examine promiscuously into the private affairs of his adversary."

In Shell Oil Co. v. Superior Court, Cal., 292 P. 531, the court construed the California constitutional provision relating to unreasonable search and seizures as applied to the compulsory production of corporate records, documents and papers relating to oil and gas leases, and stated (292 P. at p. 536):

> "The affidavit further shows, through its length, that it is a mere "fishing device," as contended for by petitioner. Being a fishing device, it is in direct violation of the constitutional immunity against unlawful searches and seizures."

Among the many cases adhering to this view are the following: Mobile Gas Co. v. Patterson, 293 F. 208; In Re United Shoe Machinery Corporation, 6 F R. D. 347; Kullman, Salz & Co. v. Superior Court, Cal. App., 114 P. 589.

POINT III.

THE SUBPOENA DUCES TECUM IS UNREASONABLE AND OPPRESSIVE.

The information demanded in the subpoena duces tecum has been compiled by El Paso over a period of years. These records are in constant use by El Paso in its normal course of business, and to remove them from their location at the home office of the Company in El Paso, Texas, would seriously disrupt and interfere with El Paso's business operations. Furthermore, the records are quite bulky and their transportation to and from Santa Fe would be expensive as well as troublesome.

By failing to specify and identify the material demanded, Consolidated places an unreasonable burden on El Paso for if El Paso is to comply with the subpoena, it must produce all of these voluminous records.

Where the production of information demanded by a subpoena duces tecum is a burden in that a mass of documents is demanded without specifying and identifying the exact material sought, the subpoena duces tecum may be quashed as being unreasonable. Walling v. American Rolbal Corp., 135 F. 2d 1003 (2nd Cir. 1943), followed in Walling v. Golebiewski, 142 F. 2d 1015 (2d Cir. 1944); U. S. v. Woerth, 130 F. Supp 930 (D. C. Iowa 1955), affirmed, 231 F. 2d 822; 2Am. Jr. 2d, Administrative Law, Sec. 264, p. 95.

In Walling v. American Rolbal Corp., the Court said (p.1005):

> "Requiring records to be produced away from the place where they are ordinarily kept may impose an unreasonable and unnecessary hardship which in itself would make the issuance of the subpoena, otherwise proper, arbitrary and capricious."

In U. S. v. Woerth, supra, at page 824 of 231 F. 2d, the Court stated the test for upholding the validity of a subpoena duces tecum as follows:

> "The subpoena duces tecum in question is not couched in broad and sweeping language. It does not call for indefinite records or a mass of records. It is very specific and limited in its terms. The production of the records called for by the subpoena duces tecum would not disrupt or interfere with the respondent's business activities or place an undue burden on him or cause hardship to him."

It is submitted that the subpoena duces tecum issued by the Commission at Consolidated's request meets not one single element of the test quoted above.

In 5 Moore's Federal Practice, Section 45.02, at p. 1725, the rule is stated as follows:

> "A subpoena is unreasonable or oppressive if it is too broad and sweeping. It should normally be limited to a reasonable period of time and should designate the documents desired, or the subjects to which the documents related with reasonable particularity...

"That undue inconvenience or expense would be involved in producing the papers may be a ground for quashing a subpoena..."

See also annotation, Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records and documents, 23 A.L.R. 2d 862.

Where the information demanded would be largely cumulative the subpoena duces tecum may be quashed. See Pittsburgh & Lake Erie R. Co. v. Pennsylvania Public Utility Commission, 85A 2d 646 (1952). See also Chapman v. Haren Elwood College, 225 F 2d 230 (9th Cir. 1955) concerning the reasonableness of the demand made by a subpoena duces tecum.

In Hermann v. Civil Aeronautics Board, 237 F. 2d 359 (9th Cir. 1956), a case concerned with the enforcement of a subpoenas duces tecum issued by the CAB, the party upon whom demand had been made to produce information objected on the grounds that the subpoenas were "oppressive and unreasonable; and constitute an unreasonable search and seizure", that the subpeonas constituted "a general fishing expedition of the affairs of the parties" and "that compliance with the said subpoenas would unduly and unreasonably hamper and interfere with the business conducted by the companies named in the said subpoenas." The Court prescribed the proper procedure to be followed in this language:

"The Civil Aeronautics Board is given broad powers of subpoena of individuals for the purpose of testifying to the matters which are before them. *** Obviously, it will be assumed that these matters will not be irrelevant to the proceeding. The Board is also given an extremely comprehensive power of inspection of all of the documents, books and papers in the office of any of the corporations or individuals operating under the control of the Board. *** In order to prevent their action from being arbitrary and oppressive, the Board should call the individuals and take testimony as to the existence and custody of the documents. Materiality and relevancy to the issues

before the Board can be established in this method without the necessity of bringing truck loads of records to the hearing officer. Likewise, by the power of inspection, all the documents can be gone over, photographed and copied without regard to materiality and relevance. It is obvious that, if after these inspections the Board finds that the existence of other documents relevant and material to the issue is probable or that they are being concealed, then again a witness can be called and examined regarding these features, but the subpoenas thereafter issued should not designate all the documents in the class, but only those which the Board has found are in the possession or under the control of the persons to whom directed and which are relevant and material to the issue." (Emphasis supplied)

POINT IV.

THE INFORMATION DEMANDED BY THE SUBPOENA DUCES TECUM IS CONFIDENTIAL, AND THE COMMISSION SHOULD EXERCISE UTMOST DISCRETION BEFORE ORDERING IT PRODUCED.

Some of the information in El Paso's possession concerning recoverable gas reserves in the Basin-Dakota Gas Pool is confidential in nature and relates to the property of other parties. Some of the information has been derived at great expense by El Paso's staff; some may properly be classified as "trade secrets".

The information demanded by Consolidated is not just the facts -- it is the work product of highly skilled reservoir engineers and geologists which constitutes the stock-in-trade of a competitor in the petroleum industry. To require this type of information to be produced in response to a subpoena duces tecum, even though the Commission may have the power to do so, would be manifestly unfair and oppressive.

The privacy of third persons should not be invaded by use of a subpoena duces tecum directed to a party having in his possession confidential material. Herman v. Civil Aeronautics Board, 237 F. 2d 359 (9th Cir. 1956); Floriden Co. v. Attapulgus

Clay Co., 26 F. Supp. 268. And discretion should be exercised to avoid unnecessary disclosure of such material, particularly where the action is between competitors. See 4 Moore's Federal Practice, Section 34.15; Pathe' Laboratories Inc. V. Dupont Film Mfg. Corp., 3 F.R.D. 11 (D.C.S.D. N.Y. 1953); Korman v. Schull, 184 F. Supp. 928 (D.C.W.D. Mich. 1960).

Consolidated has made no showing that the information demanded could not be obtained from its own analysis of available well logs and other data. True, it would not be El Paso's reserve data; true, it would be expensive to obtain, but it could be done. It is submitted that the Commission should require it to be done, should require Consolidated to carry its own burden of proof-onerous though it may be, and that the subpoena duces tecum issued at the request of Consolidated should be quashed.

Respectfully submitted,

Ben R. Howell
Garrett C. Whitworth
SETH, MONTGOMERY, FEDERICI & ANDREWS

By William R. Federici
Attorneys for El Paso Natural Gas Company

William R. Federici
William R. Federici
Attorney for David H. Rainey

BEFORE THE OIL CONSERVATION COMMISSION

OF

NEW MEXICO

IN THE MATTER OF THE APPLICATION OF CONSOLIDATED OIL & GAS, INC., FOR AN AMENDMENT OF ORDER NO. R-1670-C, CHANGING THE ALLOCATION FORMULA FOR THE BASIN-DAKOTA GAS POOL, SAN JUAN, RIO ARRIBA AND SANDOVAL COUNTIES, NEW MEXICO.

CASE NO. 2504

MEMORANDUM BRIEF

Consolidated Oil & Gas, Inc., by application filed with the Oil Conservation Commission of New Mexico, sought an order changing the allocation formula for the Basin-Dakota Gas Pool, San Juan, Rio Arriba and Sandoval Counties, New Mexico. The proposal of Consolidated was to change the provisions of Order No. R-1670-C to provide that the allowable production from the Basin-Dakota Gas Pool be allocated on the basis of a formula giving weight of 60% to acreage, and 40% to acreage times deliverability.

After notice and hearing on April 18 through April 22, 1962, the Commission entered its Order No. R-2259, denying the application of Consolidated. This denial was based upon the single finding No. 4, "That the evidence presented at the hearing of this case concerning recoverable gas reserves in the subject pool is insufficient to justify any change in the present allocation formula."

Consolidated sought a rehearing, requesting among other things, that the Commission inquire into reserves in the Basin-

Dakota Gas Pool, and to that end, to make full use of its subpoena powers. The Commission by Order No. R-2259-A granted a rehearing, but by its ordered stated "That the scope of such rehearing shall be limited to matters concerning recoverable gas reserves in the Basin-Dakota Gas Pool."

Pursuant to this order for rehearing, Consolidated securedthe issuance of subpoenas by the Oil Conservation Commission. Two of these subpoenas were fully filled in, directed to named individuals, when issued by the Commission Secretary. The remainder were issued in blank, and were filled in by Consolidated prior to service.

Written motion to quash the subpoenas were filed by Pubco Petroleum Corporation, El Paso Natural Gas Co., and George Eaton. In addition a motion to modify subpoena was filed by David H. Rainey. Motions to quash were made orally at the hearing on September 14 as to the subpoenas served on other persons.

Generally, the motions to quash the subpoenas were based upon the same grounds, and may be discussed together, with the exception of the issues raised in the motion filed on behalf of George Eaton. This motion raises certain legal questions that should be disposed of first.

The Subpoena Duces Tecum Was Issued By Authority of the Commission and is Valid

The authority of the Oil Conservation Commission to subpoena witnesses, require their attendance, and giving of testimony before it, is found in Section 65-3-7, NMSA, 1953. This statute vests in the "Commission, or any member thereof," the power to subpoena witnesses, require their attendance and

giving of testimony, and to "require the production of books, papers and records in any proceeding before the Commission." The Commission has implemented this statute by its Rule 1211.

In compliance with this statute and the rules of the Commission and upon written request by petitioner, the subpoenas complained of here were issued by the Commission.

On behalf of George Eaton, it is asserted that the subpoena duces tecum directed to him was issued without authority of the Commission and is invalid and void, in that it was signed by the Commission in blank, and was later completed by petitioner in this case. Admittedly, the subpoena when signed and sealed by the Secretary-Director of the Oil Conservation Commission, did not bear the name of the witness George Eaton, nor was it completed as to the papers, and documents sought to be obtained by the subpoena. This is in accordance with the law on the subject, and the subpoena was valid and effective when completed and served.

Issuance of subpoenas in blank has long been recognized by the courts as a ministerial function, and subpoenas issue as a matter of right, not as a matter of judicial discretion. In Southern Pacific Co., vs. Superior Court, 15 Cal. 2d 206, 100 P.2d 302, the court held that the issuance of a subpoena is merely ministerial, since the purpose of the subpoena is to initiate proceedings to have the documents and other matters described in the subpoena brought before the court in order that the court may determine whether they are material evidence in the case pending before it.

While at one time it may have been supposed that the issuance of a subpoena was a judicial function, requiring full

information on the part of the court before it would be issued, that day has long since passed. VIII Wigmore on Evidence, § 2200, points out:

> " * * * But modern demands for convenience and informality have resulted in the issuance of the subpoena, by practice in many states, from the clerk of the court alone, or even by the party himself. The name of the court thereon is a mere form in such cases. Ultimately, this goes back to the modern custom of granting the subpoena without any conditions imposed and without any showing of necessity, so that the court's discretion is not invoked and thus the judge's intervention would be needless."

In New Mexico practice, this rule has been embodied in the Rules of Civil Procedure as it has in the Federal Rules of Civil Procedure. Sec. 21-1-1(45) New Mexico Statutes Annotated, which sets out the Rules of Civil Procedure provides:

> " * * * The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service."

The provisions of Rule 45 of the Federal Rules of Civil Procedure are identical. 4 Barron & Holtzoff, Federal Practice and Procedure, 128, 277.

The practice is not dependent upon rule of the court, however, nor on statutory provisions.

In Coney Island Dairy Products Co. v. Baldwin, 276 N.Y. Supp. 682 (1935), the party asked the commissioner in an administrative proceeding for the issuance of twenty subpoenas without stating the names to be inserted thereon, nor the contents of the subpoenas. The statute was similar to that of the New Mexico Oil Conservation Commission, making no explicit provision for the issuance of subpoenas in blank, but providing that "all subpoenas shall be signed and issued by the commissioner." It was

held that the subpoenas should have issued, the court holding:

> "the issuance of a subpoena for a witness during the progress of a cause at the request of a party is a matter of right, and not a matter where the discretion of a judge or a clerk may be exercised." (Emphasis added).

The reasoning the court in reaching this conclusion is clear:

> "The privilege of litigants to enforce the attendance of witnesses is an ancient right and should not be denied by prejudging the materiality of the testimony which may be given. * * * It is the function of the trial court to determine admissibility when evidence is offered. It may not be prejudged by withholding a subpoena for the witness."

The right to issuance of a subpoena is an ancient right, founded in the Statute of Elizabeth in 1562-63, and is thus a part of our common law, except as modified by statute or rule of court. 8 Wigmore, Evidence, 65.

Being a matter of right, whether the name of the party upon whom the subpoena is to be served is inserted before or after the Commission has signed and sealed it, is immaterial. If there existed a duty on the part of the Commission to determine in advance, the names of the parties and the matters to be produced on a subpoena duces tecum that would vest in the Commission the right to prejudge the materiality, relevancy, and admissibility of the testimony to be elicited from the witness.

It may be argued that there is a difference in the right to a subpoena where the production of books and documents is concerned.

The argument falls when the facts of this case are considered. When application for subpoenas was made, the petitioner sought the issuance of subpoenas in the form attached. Two of these subpoenas duces tecum were fully filled in, in the form desired, and no material change was made in the form as to the

other subpoenas issued. If it were proper for the Commission to pass upon the form and content of the subpoena at the time it was issued, which is not admitted, the Commission actually did so.

The right to a subpoena duces tecum, absent a statute, will be implied from the power to issue a subpoena. 8 Wigmore, Evidence, 122-123. It is thus on the same footing as a subpoena to compel testimony, except as modified by statute. No such modification is found in the instant case as would affect the right to the subpoena by petitioner. The witness has his remedy in a motion to quash, a remedy that has been sought in this proceeding. The issuance of the subpoena duces tecum without passing on the materiality of the evidence to be produced does not violate the prohibition against unreasonable searches and seizures where the party is afforded ample opportunity to protect his rights before the tribunal in which the action is pending, as is the case here. 58 Am. Jur. Witnesses § 22.

The Subpoenas are not Vague and Indefinite And There is No Violation of Due Process

Probably the most serious attack that has been made upon the subpoenas is the rather broad assertion that they are vague and indefinite in the matters called for, fail to specify with sufficient clarity the papers, documents or material to be produced, and amount to a violation of the constitutional safeguards against unreasonable searches and seizure and thus violate due process of law.

These are broad, general allegations which are directed in the main to the sound discretion of the Commission. In effect the parties seeking to quash the subpoenas allege an

abuse of discretion on the part of the Commission, amounting to a violation of their constitutional rights.

There has been no assertion that the information and material sought is not relevant and material to the question before the Commission, and it is submitted that the information sought to be obtained is essential to a decision by the Commission, under the provisions of New Mexico Statutes, particularly Sec. 65-3-13, et seq., and the decision of the court in the Jalmat case, Continental Oil Co. vs. Oil Conservation, N.M. , 373 P.2d 809.

The subpoena duces tecum should be struck down only on a clear and convincing showing that some constitutional right has been violated, or will be violated if the subpoena is enforced. 97 C.J.S. Witnesses § 19.

The reasons for this were stated in U. S. v. Byran, 339 U.S. 323, 94 L.Ed. , 70 S. Ct. 724, where the court held that persons summoned as witnesses by competent authority have a public duty, the discharge of which is essential to orderly operation of legislative and judicial machinery.

> "Every exception from testifying or producing records presupposes a very real and substantial individual interest to be protected."

To the same effect is the ruling in Shotkin v. Nelson, 146 F.2d 402.

As we have previously stated, the constitutional protection against an unlawful search and seizure extends only to an abuse of discretion on the part of the Commission. 79 C.J.S. Searches & Seizures, § 36, states:

> "The constitutional guaranty does protect a corporation to the extent that the books and papers which it may be required to produce must be relevant to the subject of inquiry, must be clearly described with sufficient particularity, must be proportionate to the ends sought, and their production must be

> required by lawful and sufficient process. Nevertheless, as has been said by the highest authority, in cases involving production of a corporation's books and papers in response to any order or subpoena authorized and safeguarded by judicial sanction, the constitutional guaranty, if applicable, at most guards against abuse only by way of too much indefiniteness or breadth in the things required to be particularly described."

In support of this, the text cites Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186, 90 L.Ed. 614; and News Printing Co. v. Walling, 327 U. S. 186, 90 L.Ed. 614.

The question then resolves itself into whether the books, papers, documents and other material sought by the subpoenas were designated with sufficient particularity, and whether they are proportionate to the ends sought.

They are proportionate to the ends sought. No argument was raised as to the necessity for reservoir information to be presented to the Commission, by any of the parties. The Jalmat Case, supra, was explicit in directing the Commission, in considering a proration order, to consider recoverable gas in the pool, and under the tracts dedicated to the wells in the pool "insofar as practicable." (373 P.2d at p. 815). How is this to be done if the Commission is to be denied access to the studies and the information of the only parties in a position to furnish such information? The Commission must of necessity obtain this basic information as the basis of a valid proration order insofar as it is practicable for it to do so.

The purpose of specifying with certainty the books, documents and records in a subpoena duces tecum is to protect the witness, and advise him in what manner he should comply. It was asserted in argument that the subpoenas issued by the Commission lack this definite, certain quality, and should therefore be quashed.

It should be remembered that the persons subpoenaed are experts in their field, most of whom have appeared and testified before the Commission. In the case of the witness David Rainey, and the witness Frank D. Gorham, both testified as experts in this case, testifying as to the reserves and recoverable gas in the pool and under some of the tracts in the pool. The information and material presently sought was, to a large extent, utilized by them in the previous hearing of this case.

In 97 C.J.S., Witnesses, § 25, at p. 386, the need for definiteness and certainty in such a subpoena is discussed as follows:

> "The books, papers or documents of which production is sought to be compelled by subpoena duces tecum should be specified in the motion or application, with all the certainty practicable under the circumstances. Inasmuch, however, as applicant has not usually the means of knowledge to describe them particularly, while the witness, if he has possession of them, ordinarily can have little difficulty in determining what is desired, considerable latitude should be allowed, in the motion, and a motion or application is sufficiently definite, with respect to the documents required, where the description is specific enough to enable the witness to produce them without uncertainty." (Emphasis added.)

And again at p. 391:

> "* * * The description (of books, records and documents to be produced) need not, however, be exact and full in all particulars, but it is sufficient if the books and papers desired are designated with reasonable certainty, so that the witness may know what is required of him."

No definite rule can be laid down as to what is definite and certain in a subpoena duces tecum, but each case must stand on its own. In re Eastman Kodak Co., 8 FRD 760 (N.Y.). Attention is directed to the annotation in 23 ALR 2d 826.

Several of those resisting the subpoenas have asserted that "a great mass of information is called for," and at least one claimed that the papers sought constituted records in daily

use and that to bring them in would seriously interfere with their business. This is not a valid ground for objecting to a subpoena duces tecum. The rule is stated in 97 C.J.S., Witnesses § 25, at p. 394:

> " * * * A witness cannot lawfully refuse to comply with a subpoena duces tecum on the ground that compliance will cause him to suffer great inconvenience, or will entail great expense, or that the production of the documents called for will result in the disclosure of valuable business secrets, or otherwise adversely affect his pecuniary interests."

It will be noted that the above citation holds, also, that the secret and confidential nature of the information sought is not a grounds for refusal to comply with the subpoena. The rule is stated in 59 Am. Jur., Witnesses § 31:

> "A party to an action may be compelled to produce books or papers in his possession or under his control to be inspected by the opposite party, and a witness or a party may be required to produce books or papers to be used as evidence on the trial, and this, notwithstanding the papers may be private. A corporation may be compelled to produce books and papers in like manner as if it were a natural person. Thus the officers of a corporation cannot refuse to produce its books in court or before an officer authorized to take a deposition, in response to a subpoena, on the theory that the privacy with which its business is carried on is a trade secret which it is entitled to protect from the inspection of strangers."

And in Sec. 32, it is held that it is no ground for the refusal of a witness to produce books and papers that they are private.

That a great mass of material is sought is no ground for quashing a subpoena duces tecum where the material is essential to some lawful function of the state, as is the case here. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L.Ed. 530; and see the annotation 23 ALR 2d 875. See also 2B Barron and Holtzoff, § 1004, p. 291.

If it be determined that the subpoenas are somewhat broader or call for more material than is essential to the functions

of the Commission in exercising its powers to prorate gas production, this fact does not affect the legality of the subpoena, which may be modified by the Commission. 97 C.J.S., Witnesses § 25, p. 394, states:

> "The fact that a subpoena is broader or more inclusive as to the documents to be produced, than it should be, or includes confidential matter with that rightfully subpoenaed, or directs the witness to produce books and papers which he cannot lawfully be required to produce, does not, ordinarily, affect the legality of the issuance of the subpoena or the obligation of the witness to appear in obedience to it; but he may refuse to produce, or permit the use or inspection of, documents which are of such confidential or privileged character that they could not be received in evidence over his objection. If he has doubts as to whether or not he should produce the document called for, he may submit it to the inspection of the court, and obtain a decision on the question of its production."

Thus the witnesses may be fully protected as to the production of any "confidential" information, if such there be. A ruling may be obtained from the Commission at the time the production of such evidence is called for.

Other Matters

Several other matters remain to be discussed briefly.

It was asserted during argument that the petitioner in this case was seeking to obtain information requiring judgment and expert opinion from the witnesses subpoenaed. When it is remembered that several of the witnesses subpoenaed have already submitted themselves in this case as expert witnesses, the absurdity of the argument is patent. An expert witness may be compelled to state his opinion upon hypothetical or other questions involving his professional knowledge, and that is all that is being sought here from these witnesses. Barnes v. Boatmen's National Bank, 348 Mo. 1032, 156 SW2d 597.

It has also been argued that the witnesses do not have possession or custody of the books and papers sought. Certainly

it is apparent that such books and papers were available to Mr. Rainey, who testified at length on reserves in the Basin-Dakota pool. Can it be said they are available to him for one purpose but not for another? At least, he can produce the papers used and relied upon in his previous testimony, and the commission has the power to require the basic documents and information upon which his expert opinion was based in order to reach its own conclusion as an expert commission. Certainly at a minimum, the want of possession of some documents and records does not excuse the production of those within the possession of the witness and those which he is able to produce. McGarry v. Securities and Exchange Commission, 147 F2d 389.

Pubco Petroleum Corporation, in their motion to quash the subpoena duces tecum directed to Frank D. Gorham, assert "That the matters and things referred to in the item described in the subpoena have been fully submitted and presented to the Commission at the hearing, * * * ." If this be the case, there is nothing more for Mr. Gorham to produce, and he can so state on the witness stand.

It was also alleged by some that the subpoenas should be quashed because of the shortness of time allowed for the production of the "great mass" of material sought in the subpoenas. This would properly be grounds for a motion for extension of time, which, in effect, they now have. It is not a ground for a motion to quash the subpoena. Even as an excuse for non-compliance with the subpoena, shortness of time is an excuse at best, directed to the discretion of the Commission. Due to the extension of time granted in this case, the argument becomes meaningless to this proceeding. In any event, time for compliance with the subpoena may be extended, within the sound discretion of the Commission. 97 C.J.S., Witnesses §§ 25, p. 396.

Another objection to the subpoenas was that there was no limit as to the period of time to be covered by the records sought. This is a defense occasionally asserted, and actually is nothing more than a claim that the subpoena is burdensome. Again this is within the discretion of the Commission, and it should be remembered that this is a relatively new pool, and any determinations of reserves, and books, records, and other matter relating thereto is of fairly recent vintage because there was no material upon which to base these determinations prior to the last few years.

Conclusion

In conclusion, we can do no better than to paraphrase the language of 97 C.J.S. at page 397: In determining, on such a motion or application to quash or vacate a subpoena duces tecum, whether the production of documents and other material should be enforced by the commission, it is proper to consider whether the subpoena duces tecum calls for the production of specific documents or proof; that is, documents or proof that can be identified by the witness from whom they are sought, with sufficient certainty for him to comply. If so, the commission must then consider whether that proof is prima facie sufficiently relevant and necessary to justify enforcing its production.

In general, whether the subpoena shall be set aside is a matter within the discretion of the commission. While in a proper case the subpoena may, or should be quashed or vacated, such relief will be granted only on a very clear showing of the right thereto; and the subpoena should not be quashed or set aside, on the ground that the evidence called for by it is not relevant or material, but only where the futility of the process to uncover anything useful or legitimate is inevitable

or obvious. Clearly this is not the case here.

It is submitted that the subpoenas are lawful, where issued in a valid exercise of the power of the Commission, seek information essential to the Commission in the performance of its duties, and should be enforced.

Respectfully submitted,

CONSOLIDATED OIL & GAS, INC.

By Jason W. Kellahin

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

Ted P. Stockmar
Holme, Roberts, More & Owen
1700 Broadway
Denver, Colorado

ATTORNEYS FOR CONSOLIDATED OIL & GAS, INC.

BEFORE THE OIL CONSERVATION COMMISSION

STATE OF NEW MEXICO

APPLICATION OF CONSOLIDATED OIL AND GAS, INC., for an amendment of Order No. R-1670-C, changing the allocation formula for the Basin-Dakota Gas Pool, San Juan, Rio Arriba and Sandoval Counties, New Mexico.	]	Case No. 2504

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ATWOOD & MALONE
P. O. Drawer 700
Roswell, New Mexico

Attorneys for George Eaton

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MEMORANDUM BRIEF IN SUPPORT OF THE MOTION OF GEORGE EATON TO QUASH SUBPOENA DUCES TECUM

This Memorandum Brief is filed in the support of the Motion of George Eaton to quash the subpoena duces tecum issued in the above styled and numbered case and served on George Eaton on September 11, 1962, at Farmington , New Mexico.

The applicable facts on the basis of which the Commission's decision will be made, insofar as Respondent George Eaton is concerned, were stated to the Commission in oral argument and, under the Commission's ruling, an opportunity will be afforded to establish these facts by testimony should this be required as a result of any further proceedings. The pertinent facts are believed to be these:

1. George Eaton is a resident of Farmington, New Mexico, is employed by Pan American Petroleum Corporation as a Senior Reservoir Engineer in its Farmington District Office. The subpoena duces tecum in this case was served on him at Farmington on September 11, 1962, less than 48 hours prior to the time at which he was required to present himself with the voluminous records specified by this subpoena before the

Commission at Santa Fe, New Mexico.

2. The subpoena duces tecum which was served on George Eaton was issued by the Commission in blank; that is to say, at the time that the subpoena duces tecum was signed on behalf of the Commission and the seal of the Commission affixed thereto, the subpoena was in blank. Neither the name of the person to whom it was directed nor the documents that he was required to produce appeared in the instrument. These blanks were subsequently filled in by the attorney for Petitioner, Consolidated Oil and Gas, Inc. and the Commission had no knowledge of the person to whom the subpoena was directed as completed, nor as to the instruments which it required him to produce.

3. The records, reports, data sheets, determinations and tabulations of reserve information specified by the subpoena duces tecum are maintained in the Farmington District Office of Pan American Petroleum Corporation under the control and direction of the Superintendent in charge of that District and were not in the physical custody of George Eaton at the time the subpoena was served on him, nor does he have custody of them in the normal course of the operation of the Farmington office. Mr. Eaton does have unrestricted access to these records in connection with the performance of his duties for Pan American but no right to custody or control of them for any other purpose. He is not responsible to the West Texas-New Mexico Division office at Fort Worth for the custody of the records, or for the information contained in them.

4. Reserve calculations and tabulations are the "stock in trade" of every operating oil company. They are the most highly confidential

record maintained by the production department of Pan American Petroleum Corporation. Existing directives of the company prohibit the disclosure of reserve information to any person not an employee of the company requiring the use of the information in the performance of his duties, unless written authorization has first been obtained from the Vice President in charge of the West Texas-New Mexico Division of the company. The safeguards erected around the confidential reserve information of the company are typical of the safeguards in effect in companies throughout the industry. Oil and gas properties are bought, sold, developed, abandoned and produced on the basis of the reserve information of the company. Disclosure of this information to outside individuals would severly handicap the company in all of its dealings and result in irreparable injury to company operations.

5. Pan American Petroleum Corporation, the employer of George Eaton, did not enter an appearance in this case. While it entered an appearance in the original hearing on the application of Consolidated Oil and Gas, Inc., it presented no testimony and its activity in that hearing was limited to a statement at the conclusion of the hearing.

6. The subpoena served on George Eaton is directed to him as an individual. He is not an officer, director, or managing agent of Pan American Petroleum Corporation and the subpoena is not directed to him as an employee of that company. It does, however, direct him to produce before the Commission, reports, records and tabulations made by or in the possession of Pan American Petroleum Corporation.

7. George Eaton was present at the hearing of the Commission at the time and place specified in the subpoena duces tecum. At that time he filed the Motion to Quash Subpoena Duces Tecum which is now under consideration.

On the basis of the foregoing facts, it is respectfully submitted that the subpoena duces tecum served on George Eaton should be quashed for the following reasons.

1. GEORGE EATON DID NOT HAVE CUSTODY NOR CONTROL OF THE INSTRUMENTS SPECIFIED IN THE SUBPOENA AND HAS NO AUTHORITY TO REMOVE THEM FROM THE POSSESSION OF THE PERSONS RESPONSIBLE THEREFOR.

The general rule as to the effect of service of a subpoena duces tecum upon a witness who does not have custody of the documents specified is discussed at 8 Cyclopedia of Federal Procedure, §26.21, page 34 as follows:

> "But one may not be held in contempt as for disobedience to a subpoena duces tecum if he is unable, in good faith, to comply with it, as where documents which he is commanded to produce are neither in his possession nor subject to his control, and, if he were to produce them, he would first have to obtain them by unlawful means. However, the fact that a subpoena calls for documents which the witness cannot lawfully be required to produce does not affect his obligation to appear in obedience to it***."

At 97 C.J.S., Witnesses, Section 25, page 380, the rule is thus stated:

> "Whoever can be a witness can be compelled by a subpoena duces tecum to attend at a trial or hearing with books or papers desired in connection therewith; and the person who has the control of, and the ability to produce, the desired books or papers is the proper person to be subpoened.

* * *

> "Servant. A servant ordinarily cannot be compelled to produce his master's books or papers; but where the master is a corporation, which can be acted on only through its officers or servants, a subpoena duces tecum will properly run against the person having the actual custody of the books or papers desired, without regard to the master's orders." (Text underlining added)

The case of Schwimmer v. United States of America, 232 Fed. 2d 855 (8th Cir. 1956) recognizes the fact that, as a basis for a subpoena to compel the production of books and papers, there is no distinction between construction possession with control, on the one hand, and physical possession on the other. One or the other of these situations, however, must exist on the part of the person on whom the subpoena is served before he can be required to produce the documents in question.

As stated above, and as will be shown by testimony if required, George Eaton had neither constructive possession with control nor physical possession of the records in question at the time the subpoena was served. He only had access to the records for the purpose of performing his duties to his employer.

The following statement from Jones On Evidence, Volume 4, Section 884, is considered to be a correct statement of the rule as it is applied to the situation of Mr. Eaton. On the basis thereof, it is respectfully submitted that the subpoena directed to Mr. Eaton should be quashed. This well recognized authority states at page 1656:

> "Obviously, a witness cannot be compelled to produce documents by the subpoena duces tecum unless such documents are under his control or his possession.

> A mere clerk or employee is under no obligation to produce books which are properly under the control of his employer or superior. But one having the actual custody of documents may be compelled to produce them, although they may be owned by others. (underlining added).

On the basis of the foregoing authorities it is respectfully submitted that the subpoena duces tecum to which this Motion is directed was issued to, and served upon, the wrong person, if it was sought to obtain the reserve computations and related information of Pan American Petroleum Corporation. George Eaton, only having access to the records, and not having control, custody or possession of the records sought cannot be held responsible for their production. Under these circumstances, the subpoena should be quashed and George Eaton thereby discharged of responsibility to produce records which are not legally subject to production through him.

2. THE SUBPOENA DUCES TECUM WAS ISSUED IN BLANK BY THE COMMISSION AND IS INVALID. ITS SUBSEQUENT COMPLETION BY COUNSEL FOR A PARTY DOES NOT CONSTITUTE EXERCISE OF THE POWER OF THE COMMISSION.

Counsel for Consolidated, at the hearing before the Commission, agreed that the subpoena served on George Eaton had been signed by the issuing officer in blank and the seal affixed so that at the time the control of the subpoena was lost by the Commission it was a blank instrument directed to no one and specifying no documents to be produced. Subsequently, it was completed by counsel for Consolidated who filled in the name of Mr. Eaton and the instruments designated therein. It is respectfully submitted that such an instrument does not constitute a valid exercise

by the Commission of the subpoena power granted to it by the legislature and that the completion of the subpoena by the attorney for one of the parties litigant does not validate it.

Section 65-3-7 New Mexico Statutes Annotated, 1953, provides in part as follows:

> "The Commission, or any member thereof, is hereby empowered to subpoena witnesses, to require their attendance and giving of testimony before, it and to require the production of books, papers and records in any proceeding before the Commission. No person shall be excused from attending and testifying or from producing books, papers and records before the Commission, or from obedience to the subpoena of said Commission, whether such subpoena be signed or issued by one or more of the members of the said Commission. * * *" (Underlining added.)

It is to be noted that the legislature vested the subpoena power in "the Commission, or any member thereof". It did not vest the subpoena power in the attorney for a litigant appearing before the Commission. It also is apparent from the foregoing provision that the legislature contemplated that the subpoena would be both signed and issued by the Commission or a member thereof. The issuance of a subpoena is an act separate and apart from its signing. At the time of issuance it must be a completed subpoena or it does not constitute an exercise by the Commission itself of the power as granted to it by the legislature. It has been suggested by counsel for Consolidated that because the clerks of the District Courts of the State of New Mexico have been authorized to issue subpoenas duces tecum in blank, the Commission should have the same power and authority. The position is untenable. The court clerk would have no authority to issue a

subpoena in blank were it not for an express grant of authority which appears in the Rules of Procedure of the District Court. Thus Section 21-1-1 (45) N.M.S.A. 1953 provides in part "The Clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service".

The foregoing provision is identical to the provision of Rule 45 of the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure, however, expressly extend the application of the rules to proceedings for the production of evidence before federal administrative agencies. There is no such extension or authorization by the State of New Mexico, and the rules of the District Courts have not been adopted by this Commission as rules of procedure in matters before it. The provision of the Federal Rules of Civil Procedure referred to, appears as Rule 81, Section (a), paragraph (3), as follows:

> "*** these rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of United States under any statute of the United States except as otherwise provided by statute or rules of the District Court or by order of the Court in the proceedings * * *" 28 U.S.C. §81(a)(3)

There is no provision of the New Mexico Rules of Civil Procedure comparable to the federal provision referred to above. By the same token, there is no authority for the issuance by the Commission of a blank subpoena duces tecum when the legislature has vested the subpoena power in the Commission and its members and has not made provision for issuance of other than a completed document.

The general rule as to delegation of powers by administrative bodies is stated at 73 C.J.S. Public Administrative Bodies and Procedure, Section 57, page 380 as follows:

> "Administrative officers and bodies cannot alienate, surrender,or abridge their powers and duties,or delegate authority and functions which under the law may be exercised only by them; and,although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they cannot delegate powers and functions which are discretionary or quasi-judicial in character or which require the exercise of judgment."

At page 382 of the same authority, this statement appears:

> "Under some statutes, administrative offices or bodies have been held not to be authorized to delegate their power to issue subpoenas. Under other statutes, they have been held authorized to delegate the power to issue subpoenas, but not the power to determine whether or not a requested subpoena should be issued."

It is respectfully submitted that under either type statute referred to above the action of the Commission in this case would not have constituted a valid exercise of the subpoena power which the legislature has given to the Commission for the reason that when a subpoena is issued in blank, the Commission has not exercised "the power to determine whether a requested subpoena should be issued". When the Commission does not know to whom the subpoena is to be issued, or what documents he is going to be required to produce, it certainly cannot make a determination of any character that such a subpoena should be issued. The result of such an attempt is that the subpoena is invalid and void and that the subpoena served on George Eaton should be quashed.

3. THE SUBPOENA DUCES TECUM WAS UNREASONABLE IN THAT INADEQUATE TIME WAS ALLOWED FOR THE COLLECTION AND PRODUCTION OF THE MATERIALS REQUIRED BY ITS TERMS.

Disregarding for the moment all other respects in which it is asserted that the subpoena is invalid, it is submitted that the service of a subpoena duces tecum on a witness in Farmington, New Mexico, requiring him to accumulate the tremendous mass of materials specified by this subpoena duces tecum and to present the materials in person in Santa Fe in approximately 48 hours is so unreasonable as to constitute a violation of the constitutional prohibition against unreasonable searches and seizures.

There was no basis whatever for delay until 48 hours before the opening of this hearing for the service of the subpoena George Eaton. The files of the Commission will show that similar subpoenas duces tecum had been served upon other companies, particularly El Paso Natural Gas Company, and Pubco weeks prior to the hearing. Then presumably as an afterthought, and without any consideration for the demands that were being made upon the witness, Consolidated filled in the blank subpoena which the Commission had entrusted to it and served it on George Eaton requiring action which could not reasonably be taken within 48 hours.

The rule in this connection is well established. At 97 C.J.S. Witnesses, Section 19, page 369, it is said:

> "However, a witness is not punishable for failure to attend in obedience to a subpoena where it is served so late that sufficient time to comply with it is not afforded him; and in general, where the service of a subpoena is so delayed as not to give the witness reasonable time to prepare to attend

> the trial, his non-attendance will be excused on comparative slight grounds, although the shortness of the notice is not per se an excuse."

The Commission is not faced with a case of non-attendance on the part of the witness. Mr. Eaton presented himself at the time specified. The demands of the subpoena as regards the instruments which he was required to produce however, were wholly unreasonable. The all inclusive character of the documents and information described in the subpoena duces tecum, climaxed by the third paragraph which required him to produce "any reports, determinations, or tabulations of initial or subsequent reserve calculations made by or in the possession of Pan American Oil and Gas Company concerning recoverable gas reserves in the Basin Dakota Gas Pool, not included in paragraphs 1 and 2 above" would have required the witness to examine every sheet of paper in every file of the company in Farmington having any relation to the matter of reserves, whether on properties of Pan American or other operators, the withdrawal of these documents and transportation of them to Santa Fe for presentation at 9:00 A.M. on September 13, 1962.

At 42 Am. Jur., Public Administrative Law, Section 34, page 328, the general rule is stated that:

> "The power to require the production of books, papers, and documents may be conferred on administrative agencies, but this will not be construed to be an unlimited authority. It will be held within the restrictions of constitutional provisions against unreasonable search and seizure, and exercise of the power will be permitted only as to matters reasonably relevant to the inquiry and only as to books, papers, and documents as to which there is some ground for supposing that they contain such relevant matter."

The same authority at Section 88 elaborates on the rule in this manner:

> "Although the courts are liberal in permitting an administrative agency full exercise of its powers to require the production of books, papers and documents, and declare that a subpoena duces tecum must be obeyed if the documents called for contain evidence which relates to the matter in question, such power is circumscribed by the constitutional prohibition of unreasonable search and seizure. A subpoena duces tecum, by reason of its scope and onerous requirements, may be unreasonable or constitute an abuse of discretion or an unreasonable search, as where the search involved is out of proportion to the end sought * * *".

It is respectfully submitted that the subpoena under attack was unreasonable and invalid and should be quashed by virtue of the unreasonable requirements of the subpoena in relation to the documents which the witness was required to assemble and produce on less than 48 hours notice.

> 4. THE UNRESTRICTED RANGE OF THE INSTRUMENTS REQUIRED BY THE SUBPOENA AND ITS APPARENT USE AS A "FISHING EXPEDITION" MAKE IT UNREASONABLE AND INVALID.

At 97 C.J.S., Witnesses, Section 25, page 377. The general rule with reference to subpoenas duces tecum is stated that:

> "**the constitution requires that the forced production of documents by subpoena be not unreasonable, and the production of records may not be required under such circumstances as to contravene such constitutional provisions. In determing whether a subpoena duces tecum is invalid as unreasonable and oppressive, each case must be judged according to the peculiar facts arising from the subpoena itself and other proper sources."

At page 381 of the same authority under the title "What May be Required to be Produced" the following statement appears.

> "A subpoena duces tecum may be used to compel the production of any proper documentary evidence, such as books, papers, documents, accounts and the like, which is desired for the proof of an alleged fact relevant to the issue before the court or officer issuing the subpoena; but such a subpoena may not be used for the purpose of discovery, either to ascertain the existence of documentary evidence or to pry into the case of the adverse party.
>
> * * *
>
> "A subpoena duces tecum may not be used for the purpose of discovery, either to ascertain the existence of documentary evidence, or to pry into the case of the adverse party, so, such a subpoena is not proper to be used for the purpose of obtaining facts or information needed by the party, at whose instance it is issued, in order to enable him to prepare proper pleadings, or to supply the facts needed therefor, * * * nor can it lawfully be employed for a mere 'fishing expedition', or general inquisitorial examination of books, papers or records with a view to ascertaining whether something of value may not show up therefrom, * * *."

It is only necessary to examine the provisions of the subpoena in this case to demonstrate that it goes far beyond any reasonable limitation such as is envisaged by the foregoing authorities. Mr. Eaton was required to produce any reports, data sheets, determinations, or tabulations, pertaining to some 168 wells of Pan American in the Basin-Dakota Pool which would show any of the following:

> acreage, initial reservoir pressure, average porosity, total and net gas saturation, average permeability, initial open flow potential, deliverabilities including initial and most recent figures available, gross gas pay, net gas pay, gas reserves, both original and most recent calculations.

When the provisions of paragraph 3 in addition are considered, the witness was also required to produce any reports, determinations, or tabulations of either initial or subsequent reserve calculations on any well and property in the Basin-Dakota Pool.

It is respectively submitted that such a shot-gun description does not meet the requirements of a reasonable subpoena duces tecum and that the enforcement of such a subpoena would constitute an unreasonable search and seizure violating the constitutional prohibition. It is the function of a subpoena duces tecum to require the production of specified documents. The normal procedure requires identification, with particularity, of the documents which are sought in order that it can be determined by the witness when he has met the requirements of the subpoena and it can likewise be determined by the issuing authority whether or not the witness in fact has met the requirements of the subpoena. The subpoena under consideration does not meet this standard in any respect. Neither George Eaton nor the Commission could ever know or would ever know when or whether Mr. Eaton had fully complied with the requirements which remained in the subpoena, yet the rule as stated at 58 Am. Jur. Witnesses, Section 25, Page 36, is as follows:

> "A subpoena duces tecum should describe the documents desired with sufficient definitness to enable the witness to identify them without any prolonged or extensive search. The writ may not be issued for a mere 'fishing' expedition. A Plaintiff is not entitled to have brought in a mass of books and papers in order that he may search them through to gather evidence. A subpoena so sweeping in its terms as to be unreasonable violates the prohibition against an unreasonable search and seizure."

Consolidated, in issuing this subpoena, has described no particular instrument whatsoever. It has sought to have the witness review all of the instruments and the files of Pan American to produce all instruments which have any of the information specified in the subpoena. It is respectfully submitted that such a requirement is a "fishing expedition" and that it contravenes the constitutional prohibition hereinabove referred to. For this additional reason the subpoena should be quashed.

5. WHETHER OR NOT THE COMMISSION HAS THE POWER TO ISSUE AND ENFORCE THE SUBPOENA, FOR THE PURPOSE INTENDED, IT SHOULD QUASH THE SUBPOENA BY REASON OF THE CHARACTER OF INFORMATION SOUGHT AND THE CIRCUMSTANCES UNDER WHICH THE PETITIONER SEEKS TO OBTAIN IT.

Without reference to whether or not the subpoena, as prepared and served on the witness, is valid or invalid, and without reference to whether or not the confidential material of Pan American Petroleum Corporation, which it seeks to obtain, can or cannot be reached by such a subpoena of the commission, it is respectfully submitted that the commission should exercise its discretion under the circumstances of this case and quash the subpoena.

For the reason stated in the statement of facts at the outset of this memorandum, the reserve calculations of operating oil companies, both as to the reserves of their own wells and the reserves underlying other properties in which they have a present or potential interest, constitute some of the most highly confidential information which the company

possesses. The safeguards which have been erected in Pan American and other companies to avoid the disclosure of this information to any outside person whomsoever, evidence the value of this information to the company and indicate the irreparable injury which could result from disclosure of the information. If the Commission is to permit every operator who seeks a change of a proration formula to subpoena all of the reserve computations of the operators in that pool in order to provide the petitioning operator with proof by which he might seek to obtain a change of proration formula, the Commission will be opening a Pandora's Box. It not only will do irreparable injury to the operations of the oil industry in New Mexico, but undoubtedly will plague the Commission for many years to come.

One of the first, and an inevitable, result of such action on the part of the Commission would be that all companies operating in New Mexico, which have offices outside of the state, will transfer all reserve information on New Mexico pools, outside of the state in order that it will not be subject to subpoena at the whim of competing operators in a pool in New Mexico. A second result which is inevitable is that the invitation to abuse of the Commission's process, as a means available to an operator to obtain information which he could not otherwise obtain under any circumstances, will be accepted by every unscrupulous operator who wants the information, whether or not he has any real desire to obtain a change in the proration formula.

Reserve information of operating oil companies constitutes a trade secret in every sense of the word. The protection which may be

afforded to trade secrets against disclosure through a subpoena duces tecum is a developing, and as yet somewhat uncertain, area of the law. It is submitted, however, that there is adequate authority to support the Commission in refusing, under the circumstances of this case, to require the disclosure of trade secrets in the form of reserve calculations of operators in the Basin-Dakota Pool.

8 Wigmore on Evidence § 2212, p. 155 discusses the trade secret problem in these words:

> "In a day of prolific industrial invention and active economic competition, it may be of extraordinary consequence to the master of an industry that his process be kept unknown from his competitors, and that the duty of a witness be not allowed to become by indirection the means of ruining an honest and profitable enterprise. This risk, and the necessity of guarding against it, may extend not merely to the chemical and physical composition of substances employed, and to the mechanical structure of tools and machines, but also to such other facts of a possibly private nature as the names of customers, the subjects and amounts of expense and the like.
>
> "Accordingly, there ought to be, and there is, in some degree, a recognition of the privilege not to disclose that class of facts which, for lack of a better term, have come to be known as trade secrets."

It is recognized that the cases generally support the proposition that there is no protection for a trade secret where the secret is material to the issue being tried, the information is in possession of one of the parties and its production is indispensable. But this is not such a case. The above quotation from Wigmore indicates, however, that there is a developing body of law which would protect such secrets against disclosure. At page 156 of the volume above quoted this further statement appears with reference to the protection of trade secrets:

> "What the state of the law actually is would be difficult to formulate precisely. It is clear that no absolute privilege for trade secrets is recognized. On the other hand, courts are apt not to require disclosure except in such cases and to such extent as may appear to be indispensible for the ascertainment of truth. More than this can hardly be ventured."

It is interesting to note in this respect that both the Model Code of Evidence and the Uniform Rules of Evidence contain provisions affording protection to trade secrets under circumstances such as those here involved.

In the case at bar it should be borne in mind that Pan American Petroleum Corporation, whose information Consolidated seeks to obtain by the subpoena, is not a party to the re-hearing and was not an active party so far as the original hearing was concerned. This in itself is a factor weighing against the enforcement of the subpoena. In Ex parte Hart, 200 So. 783 (1941) at p. 786 the Alabama Court said:

> "A document, which may become material evidence on some issue in the cause, may be produced by such process issued on order of the Court where, under the circumstances, the ends of justice require it.
>
> "There can be no sound reason for requiring an outside party, having no concern with the litigation, to bring in his private documents for the use of the litigants, other than like documents in the possession of the parties themselves." (Underlining supplied.)
>
> Later in this opinion the Court observed:
>
> "However, justice to all concerned, including the witness or the owner of private documents, may be considered in passing upon whether a document is of such evidential value as to demand its production. A judicial discretion is recognized on

this line, but not touching documents not legally subject to such process."

It is submitted that here, too, there is no sound reason for requiring an outside party to bring in its confidential reserve figures and there is the same discretion in this Commission to determine whether or not, under the circumstances of this case, the information which is sought to be obtained is of such character as to demand, that it be produced in the interest of justice. We suggest that the interests of justice, in fact, are all the other way, and that they can only be served by protection of the confidential trade secrets of the operators in the pool and the quashing of the subpoena under attack.

Whether or not there exists absolute authority for the protection of trade secrets, under the circumstances presented by this case, the Commission clearly has discretion which may be exercised in passing upon this motion to quash. Its choice is between overruling the motion and inviting the abuse of the subpoena power of the Commission by unscrupulous operators to obtain confidential information which is not otherwise available to them whether or not it actually has any relation whatever to conservation of oil and gas. The alternative is to draw the line now and establish a precedent which will contribute to the continued sound development of the industry in New Mexico and the protection of the powers of the Commission against abuse.

CONCLUSION

For each and all of the foregoing reasons it is respectfully submitted that the subpoena duces tecum served on George Eaton in this case should be quashed and Mr. Eaton should be discharged from any further responsibility by reason thereof.

ATWOOD & MALONE

By Ross L. Malone Jr

Attorneys for George Eaton
P. O. Drawer 700
Roswell, New Mexico

Memo

From

JAMES M. DURRETT JR.
GENERAL COUNSEL

To file:

Attached two subpoenas should be quashed. Counsel stipulated that Salamon & Smith would not be called (Tr. p 31 - 32).

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

COPY

October 29, 1962

William J. Cooley, Esq.
Verity, Burr & Cooley
Attorneys at Law
Suite 152 Petroleum Center Building
Farmington, New Mexico

Re: Case No. 2504 - (Rehearing)

Dear Mr. Cooley:

Reference is made to your letter of October 24, 1962.

Please be advised that the Commission will not require Mr. Leon Wiederkehr to appear in compliance with the ruling on subpoenas duces tecum if the proposed affidavit is filed with the Commission along with a stipulation between yourself and Mr. Kellahin that Mr. Wiederkehr's appearance will not be necessary.

Very truly yours,

A. L. PORTER, Jr.,
Secretary-Director

ALP/JMD/esr

cc: Jason W. Kellahin, Esq.
Kellahin & Fox
Attorneys at Law
P. O. Box 1713
Santa Fe, New Mexico

VERITY, BURR & COOLEY
ATTORNEYS AND COUNSELORS AT LAW
SUITE 152 PETROLEUM CENTER BUILDING
FARMINGTON, NEW MEXICO

GEO. L. VERITY
JOEL B. BURR, JR.
WM. J. COOLEY
NORMAN S. THAYER
RAY B. JONES

TELEPHONE 325-1702

October 24, 1962

Mr. A. L. Porter
Oil Conservation Commission
Post Office Box 871
Santa Fe, New Mexico

Re: Case No. 2504 - (Rehearing)

Dear Mr. Porter:

This is to confirm our conversation of this date wherein I advised you that Southwest Production Company had never cored any wells in the Basin-Dakota Gas Pool and that all electric and radioactivity logs which have been run by Southwest Production Company on its wells in the Basin-Dakota Gas Pool have heretofore been filed with the Commission as required by its rules and regulations.

I have reached an oral agreement with Mr. Jason W. Kellahin, of Kellahin & Fox, attorneys for Consolidated Oil & Gas, Inc. in the above referenced case, to the effect that Southwest Production Company would file an Affidavit with the Commission containing the information set forth in the above paragraph and that Consolidated Oil & Gas, Inc. would waive objection to the non-appearance of Leon Wiederkehr at the hearing in this case set for 9:00 A. M. on December 19, 1962. I have prepared and signed a Stipulation which formally sets forth the foregoing agreement and forwarded the same to Mr. Kellahin for his signature, together with an executed copy of the above referenced Affidavit.

Assuming that the aforementioned Stipulation and Affidavit are filed with the Commission, please advise whether the Commission will waive the appearance of Mr. Leon Wiederkehr in the above referenced hearing.

Very truly yours,

VERITY, BURR & COOLEY

By William J. Cooley

WJC/dh

cc: Mr. Jason W. Kellahin
Southwest Production Company

Telephone calls made to:

Dave Rainey
George Eaton
W. A. Keleher 11/3
Kenneth Swanson
Leon Wiederkehr

and to Frank Renard 11/4

regarding the continuance of Case 2504 to the February 14, 1963 regular Commission hearing.

Calls made by James M. Durrett and charged to
Credit Card of Jason Kellahin

Memo

From IDA RODRIGUEZ

To DOCKETS AND MEMORANDUM

MAILED TO INTERESTED PARTIES.

12/6/62
ir

KELLAHIN AND FOX
ATTORNEYS AT LAW

JASON W. KELLAHIN
ROBERT E. FOX

54½ EAST SAN FRANCISCO STREET
POST OFFICE BOX 1713
SANTA FE, NEW MEXICO

TELEPHONES
983-9396
982-2991

October 29, 1962

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

Gentlemen:

Enclosed find original of affidavit together with stipulation for filing in the case of Consolidated Oil & Gas, Inc., Case No. 2504.

Very truly yours,

Jason W. Kellahin

JASON W. KELLAHIN

jwk:mas
enclosures

cc: Mr. William J. Cooley

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

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

CASE NO. 2504
REHEARING

APPLICATION OF CONSOLIDATED OIL & GAS,
INC., FOR AN AMENDMENT OF ORDER NO.
R-1670-C, CHANGING THE ALLOCATION FORMULA
FOR THE BASIN-DAKOTA GAS POOL, SAN JUAN,
RIO ARRIBA, AND SANDOVAL COUNTIES, NEW MEXICO.

RULING ON MOTIONS TO QUASH SUBPOENAS DUCES TECUM

BY THE COMMISSION:

This matter came on for hearing at 9 o'clock a.m. on September 13, 1962, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission," upon written Motions to Quash Subpoenas Duces Tecum filed by George Eaton, El Paso Natural Gas Company, Pubco Petroleum Corporation, and David H. Rainey, and upon oral Motions to Quash Subpoenas Duces Tecum by Aztec Oil & Gas Company and Frank Renard.

NOW, on this 18th day of October, 1962, the Commission, a quorum being present, having read and heard the Motions and heard the arguments of counsel thereon, and being otherwise fully advised in the premises,

FINDS:

(1) That the Commission has jurisdiction over the subject matter and the parties to this cause.

(2) That during oral argument before the Commission, it was stipulated by counsel for the applicant, Consolidated Oil & Gas, Inc., and counsel for Southwest Production Company, that Carl Smith would not be called as a witness as Leon Wiederkehr had been subpoenaed and would appear in lieu of the said Carl Smith.

(3) That during oral argument before the Commission, it was stipulated by counsel for the applicant, Consolidated Oil & Gas, Inc., and counsel for Aztec Oil & Gas Company that Joe Salmon would not be called as a witness as L. M. Stevens had been subpoenaed and would appear in lieu of the said Joe Salmon.

(4) That the Subpoenas Duces Tecum served in this cause upon the said Carl Smith and Joe Salmon should be quashed.

(5) That under the subpoenas served in this cause on George Eaton, Frank D. Gorham, David H. Rainey, Frank Renard, L. M. Stevens, and Leon Wiederkehr, and subject to a determination of custody and/or control, the Commission should require only the production of all core analysis reports and all electric and radioactivity logs concerning any and all wells that have been cored in the Basin-Dakota Gas Pool by the respective companies of the subpoenaed witnesses.

(6) That the Commission should allow all parties subpoenaed in this cause to present evidence concerning custody and/or control of core analysis reports and electric and radioactivity logs concerning any and all wells that have been cored in the Basin-Dakota Gas Pool by the respective companies of the subpoenaed witnesses.

(7) That all persons subpoenaed in this cause and determined by the Commission to have custody of core analysis reports and electric and radioactivity logs concerning any well or wells cored in the Basin-Dakota Gas Pool by their respective companies should appear before the Commission at 9 o'clock a.m., on December 19, 1962 in Morgan Hall, State Land Office Building, Santa Fe, New Mexico, and produce the aforesaid documents and/or reports in accordance with this ruling.

IT IS THEREFORE ORDERED:

(1) That the Subpoenas Duces Tecum served in this cause upon Carl Smith and Joe Salmon, be, and they are hereby, quashed.

(2) That under the subpoenas served in this cause and subject to a determination of custody and/or control, George Eaton, Frank D. Gorham, David H. Rainey, Frank Renard, L. M. Stevens, and Leon Wiederkehr, shall be, and they are hereby ordered to appear before the Commission at 9 o'clock a.m., on December 19, 1962 in Morgan Hall, State Land Office Building, Santa Fe, New Mexico, and there produce all core analysis reports and all electric and radioactivity logs concerning any and all wells that have been cored in the Basin-Dakota Gas Pool by their respective companies.

(3) That all persons subpoenaed in this cause shall be allowed to present evidence concerning custody and/or control

of all core analysis reports and all electric and radioactivity logs concerning any and all wells that have been cored in the Basin-Dakota Gas Pool by their respective companies before the Commission at 9 o'clock a.m., on November 14, 1962 in Morgan Hall, State Land Office Building, Santa Fe, New Mexico.

(4) That jurisdiction of this matter is retained for the entry of such further orders as the Commission may deem necessary.

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

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

EDWIN L. MECHEM, Chairman

E. S. WALKER, Member

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

ir/

E X H I B I T "B"

Adobe Oil Company
1223 Petroleum Life Building
Midland, Texas

Amerada Petroleum Corporation
Drawer 601
Durango, Colorado

Arizona Explorations, Inc.
417 Meadows Building
Dallas, Texas

Aspen Crude Purchasing Co.
P. O. Box 2060
Farmington, New Mexico

Atlantic Refining Co.
Petroleum Club Building
Denver, Colorado

Bayview Oil Corporation

Benson-Montin-Greer
58 Petroleum Center Bldg.
Farmington, New Mexico

Blackwood & Nichols Co.

M. J. Brannon, Jr.
P. O. Box 1728
Farmington, New Mexico

British American Oil Producing Co.
P. O. Box 180
Denver, Colorado

Alex N. Campbell

Caulkins Oil Company
1130 First National Bank Bldg.
Denver, Colorado

Congress Oil Company

Delhi-Taylor Oil Corporation
Fidelity Union Tower Bldg.
Dallas, Texas

Stella Dysart
220 Simms Building
Albuquerque, New Mexico

El Paso Natural Gas Co.
P. O. Box 1492
El Paso, Texas

El Paso Natural Gas Products Co.
P. O. Box 1161
El Paso, Texas

Elliott Production Co.

Bert Fields

Frontier Refining Company
4040 East Louisiana
Denver, Colorado

Greenbriar Oil Company
19 La Plata Place
Durango, Colorado

Gulf Oil Corporation
P. O. Box 2097
Denver, Colorado

W. H. Hudson
c/o J. B. Avart
1126 Mercantile Bldg.
Dallas, Texas

International Oil Corporation
512 East 2nd Street
Salt Lake City, Utah

Kern County Land Co.
304 Korber Building
Albuquerque, New Mexico

Kingswood Oil Company
1700 Broadway
Denver 2, Colorado

Kay Kimball
P. O. Box 1540
Fort Worth, Texas

La Plata Gathering System

Montosanto Chemical Co.
Denver Club Building
Denver, Colorado

Northwest Production Corp.
520 Simms Building
Albuquerque, New Mexico

Occidental Petroleum Corp.
5000 Stockdale Highway
Bakersfield, California

Ohio Oil Company
P. O. Box 159
Casper, Wyoming

Pan-American Petroleum Corp.
P. O. Box 40
Casper, Wyoming

Pioneer Production Co.

KELLAHIN AND FOX
ATTORNEYS AT LAW

JASON W. KELLAHIN
ROBERT E. FOX

54½ EAST SAN FRANCISCO STREET
POST OFFICE BOX 1713
SANTA FE, NEW MEXICO

TELEPHONES
983-9396
982-2991

August 14, 1962

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

Re: Case No. 2504, Application of Consolidated Oil & Gas, Inc., for an Order Amending Order No. R-1670-C, changing the allocation formula for the Basin-Dakota Gas Pool.

Gentlemen:

Applicant in the above-captioned case, in conformity with the provisions of Sec. 65-3-7, New Mexico Statutes, Annotated, 1953 Compilation, and Rule 1211 of the Commission's Rules and Regulations, requests issuance of subpoenas to the persons and in the form attached hereto, and directing the appearance of witnesses and the production of the books, papers and documents listed.

Yours very truly,

TED P. STOCKMAR
JASON W. KELLAHIN

By Jason W. Kellahin
Attorneys for Consolidated
Oil & Gas, Inc.

jwk:mas
enclosure

SUBPOENA DUCES TECUM

BEFORE THE OIL CONSERVATION COMMISSION

OF THE STATE OF NEW MEXICO

CASE NO. 2504

TO: _____, Greeting:

You are hereby commanded to appear before the Oil Conservation Commission of the State of New Mexico at Morgan Hall, State Land Office Building, Santa Fe, New Mexico, on September 13, 1952, at the hour of 9 o'clock a.m., then and there to testify in the cause therein pending wherein Consolidated Oil & Gas, Inc., is the applicant in Case No. 2504, and that you bring with you and there produce the following-named documents, to-wit:

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And this do you under penalty of the law.

Given under my hand and the official seal of the Oil Conservation Commission of New Mexico this 14th day of August, 1962.

(SEAL)

A. L. PORTER, Jr.
Secretary-Director and Member,
Oil Conservation Commission of
New Mexico.

ILLEGIBLE

SHERIFF'S RETURN

STATE OF NEW MEXICO)
) ss
COUNTY OF _____)

I, _____, Sheriff of _____ County, State of New Mexico, do hereby certify that I served the within subpoena by delivering a copy thereof, in the County aforesaid, in person to _____

_____

on _____.

Dated: _____

Fees: _____

_____
SHERIFF

By _____
Deputy.

RETURN

STATE OF NEW MEXICO)
) ss
COUNTY OF _____)

_____, being duly sworn, upon his oath says, I am over the age of eighteen years, I served the within subpoena by delivering a copy thereof, in the county aforesaid, in person to _____

_____

on _____.

_____

Subscribed and sworn to before me this ____ day of _____, 1962.

(SEAL)

_____
NOTARY PUBLIC

My Commission Expires:

_____.

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CLASS OF SERVICE

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

WESTERN UNION

TELEGRAM

W. P. MARSHALL, PRESIDENT

1201 (4-60)

SYMBOLS

DL = Day Letter

NL = Night Letter

LT = International Letter Telegram

The filing time shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination

LA092 SSA195

1962 NOV 12 PM 2 00

L FRA055 PD=FARMINGTON NMEX 12 150P MST=

:A L PORTER, NEW MEXICO OIL CONSERVATION COMMISSION=

SANTA FE NMEX=

:RE CASE NO 2504 THIS IS TO INFORM YOU THAT MR FRANK RENARD IS AUTHORIZED TO FURNISH THE DATA AS ORDERED CONCERNING BASIN DAKOTA WELLS THAT HAVE BEEN CORED BY BRITISH AMERICAN OIL PRODUCING CO=

BRITISH AMERICAN OIL PRODUCING CO THOMAS M HOGAN=

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

AZTEC OIL & GAS COMPANY

920 MERCANTILE SECURITIES BLDG.
DALLAS 1, TEXAS

LAND DEPARTMENT
H. L. SNIDER, JR., MANAGER
KENNETH A. SWANSON, ATTORNEY
GORDON E. COE, ATTORNEY

October 29, 1962

AIR MAIL

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

Attention: Mr. James M. Durrett, Jr.

Re: NMOCC Case No. 2504 Rehearing

Gentlemen:

Receipt is acknowledged of a copy of the Commission's ruling with respect to the Motions to Quash Supoenas Duces Tecum.

As required by ordering paragraph (2), Mr. L. M. Stevens will appear before the Commission at 9:00 a.m. on December 19, 1962 and will there "produce all core analysis reports and all electric and radioactivity logs concerning any and all wells that have been cored in the Basin-Dakota Pool" by Aztec Oil & Gas Company.

Mr. Stevens has been given custody and control of such logs and reports for such purpose; therefore, Aztec Oil & Gas Company does not plan to argue that some party other than Mr. Stevens actually has custody and control of this data at the November 14, 1962 hearing.

Yours very truly,

Kenneth A. Swanson

KAS/et

cc: Mr. Jason Kellahin
Attorney at Law
P. O. Box 1713
Santa Fe, New Mexico

BEFORE THE OIL CONSERVATION COMMISSION

OF THE STATE OF NEW MEXICO

CASE NO. 2504

MOTION TO QUASH SUBPOENA DUCES TECUM

Comes now George Eaton, hereinafter referred to as "Respondent", on whom subpoena duces tecum in the above entitled and numbered cause was served on September 10, 1962, and moves the Commission to quash said subpoena and discharge him from obligation to respond thereto, and as grounds therefor states:

1. That said subpoena duces tecum was issued without authority of the Oil Conservation Commission and is invalid and void in that as signed and issued by the Commission it was not directed to Respondent, or to any other person, and specified no documents to be produced; that its subsequent completion and service by, or on behalf of, Petitioner in this case does not constitute a valid exercise of the power of the Commission.

2. That said subpoena was served on Respondent on September 10, 1962 and that it is unreasonable, arbitrary and oppressive, in requiring Respondent to produce in Santa Fe on September 13, 1962 the mass of material specified by said subpoena.

3. That the reports, determinations and tabulations therein specified contain information of the highest confidential character constituting exercise of judgment and opinion on the part of various employees of Pan American

Petroleum Corporation, in addition to Respondent. That said material was prepared for the confidential use of Pan American Petroleum Corporation and is not made available to third parties.

4. That said subpoena is so vague, general and all inclusive that it constitutes a "fishing expedition" by which Petitioner, in violation of constitutional safeguards, seeks to acquire instruments and material the existence of which is not specified or known.

5. That said subpoena fails to specify or identify any particular instrument or instruments to be produced in response thereto and therefore violates the constitutional prohibition against unreasonable searches and seizures, and is invalid.

6. That portions of the information included in the broad and all inclusive terms of said subpoena are the property of third persons, or the product of computations made by them, or on their behalf, and Respondent has no authority to produce them and would be in violation of express or implied prohibitions if required to do so.

7. That said subpoena is otherwise violative of the constitutional rights of Pan American Petroleum Corporation by whom Respondent is employed.

WHEREFORE, Respondent prays that the subpoena duces tecum served on him on September 10, 1962 in this cause be quashed and that Respondent be discharged from any obligation to respond thereto and that Respondent have such further relief as the Commission considers appropriate.

George Eaton
Respondent

Atwood & Malone
P. O. Box 700
Roswell, New Mexico

By Hunt L Malone
Attorneys for Respondent

BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

APPLICATION OF CONSOLIDATED OIL & GAS, INC. FOR AN AMENDMENT OF ORDER NO. R-1670-C, CHANGING THE ALLOCATION FORMULA FOR THE BASIN-DAKOTA GAS POOL, SAN JUAN, RIO ARRIBA AND SANDOVAL COUNTIES, NEW MEXICO.

CASE NO. 2504

MOTION TO QUASH SUBPOENA DUCES TECUM

Comes now PUBCO PETROLEUM CORP., by its attorney, W. A. Keleher, and respectfully moves the Commission to quash the Subpoena Duces Tecum heretofore served upon Frank D. Gorham, and respectfully shows to the Commission:

1. That at the hearing in taking testimony in this cause, Consolidated Oil & Gas, Inc., which requested the issuance of such subpoena, had ample opportunity to examine the reports placed in evidence by Pubco and to cross-examine the witnesses who identified such exhibits.

2. That all reports have been filed with the Commission and are available and have been available to Consolidated since the time of filing.

3. That the subpoena is general in terms and not specific, and in substance and effect is nothing more than a "fishing expedition".

4. That the matters and things referred to in the item described in the subpoena have been fully submitted and presented to the Commission at the hearing, and the Commission

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should not now give Consolidated an opportunity to re-try its case in an attempt to cure any defects or omissions which could have been avoided by the exercise of reasonable diligence.

Dated September 12, 1962.

Respectfully submitted,

PUBCO PETROLEUM CORP.

By _____

ITS ATTORNEY
First National Bank Building
Albuquerque, New Mexico

MOTION TO QUASH SUBPOENA

BEFORE THE OIL CONSERVATION COMMISSION

OF THE STATE OF NEW MEXICO

CASE NO. 2504

Now comes EL PASO NATURAL GAS COMPANY, a Delaware corporation with license to do business in the State of New Mexico, hereinafter called "El Paso," and files this Motion to Quash Subpoena duces tecum in Case No. 2504 and in support thereof alleges and states:

I

El Paso is one of the interested parties in Case No. 2504, an application of Consolidated Oil and Gas, Inc. for an order of this Commission to change the allocation formula for the Basin-Dakota Gas Pool.

II

On August 14, 1962, this Commission caused a subpoena duces tecum to be served on David H. Rainey, an employee of El Paso, commanding him, among other things, to bring and produce at the hearing on said case in Santa Fe, New Mexico, September 13, 1962:

> "Any reports, determinations or tabulations of initial and subsequent reserve calculations made by or in the possession of El Paso Natural Gas Company concerning recoverable gas reserves in the Basin-Dakota Gas Pool not included in the eight data sheets subpoenaed above."

III

The reports, determinations and tabulations called for in said subpoena duces tecum have been accumulated over a period of several years and constitute

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records constantly used by El Paso comprising a bulk in excess of five hundred pounds.

Transportation of these reports, determinations and tabulations from El Paso, Texas to Santa Fe, New Mexico and return would constitute an unnecessary and expensive interference with El Paso's business operations.

IV

Said reports, determinations and tabulations contain some items which are the property of other parties, are confidential in nature, relating to the properties of such other parties. To require production of all such material instead of specifying and identifying documents and papers which are easily distinguished and clearly described and which are shown to be relevant, is violative of the constitutional prohibition of unreasonable searches and seizures.

V

Said subpoena duces tecum is oppressive and unreasonable and should be quashed.

VI

In the event any subpoena issue to El Paso the party or parties on whose behalf it was issued should be required to specify and describe the particular reports, determinations or tabulations required.

WHEREFORE, El Paso hereby moves the Commission that said subpoena duces tecum be quashed or that the Commission issue an order to provide for the above described alternative.

Garrett C. Whitworth

Attorney

EL PASO NATURAL GAS COMPANY

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BEFORE THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

* * * * * * *

APPLICATION OF CONSOLIDATED OIL & GAS, INC. FOR AN AMENDMENT OF ORDER NO. R-1670-C, CHANGING THE ALLOCATION FORMULA FOR THE BASIN-DAKOTA GAS POOL, SAN JUAN, RIO ARRIBA AND SANDOVAL COUNTIES, NEW MEXICO.

CASE No. 2504
Order No. R-2259-A

MOTION TO VACATE ORDER NO.R2259-A

Comes now Marathon Oil Company (formerly known as The Ohio Oil Company), having heretofore appeared herein and now appearing herein in opposition to the above captioned application of Consolidated Oil & Gas, Inc. (hereinafter called Consolidated), and respectfully moves this Commission to vacate its Order No. R-2259-A, dated July 7, 1962, granting Consolidated's petition for rehearing herein, and in support of this motion states and alleges that:

I.

Consolidated appeared at the hearing in October, 1960 in opposition to the allocation formula then proposed and later adopted by this Commission in its Order No. R-1670-C on November 4, 1960 effective February 1, 1961. Consolidated offered no evidence or testimony in support of its opposition. It did not upon the entry of the order or upon the effective date thereof or within the statutory period thereafter or within any reasonable time seek a rehearing of this Commission or a court review of said order. Since the entry and effective date of said order a great number of Basin-Dakota gas wells have been drilled in the Basin-Dakota pool and produced under said order.

II.

Consolidated on February 23, 1962 filed its application herein specifically requesting this Commission to adopt a special formula "pertaining to the Basin Dakota gas pool, reading as follows:

> "The pool allowable remaining each month after deducting the total allowable assigned to marginal wells shall be allocated among the non-marginal wells entitled to an allowable in the following manner:
>
> "1. Forty percent (40%) of the pool allowable remaining to be allocated to non-marginal wells shall be allocated among such wells in the proportion that each well's 'AD Factor' bears to the total 'AD Factor' for all non-marginal wells in the pool.
>
> "2. Sixty percent (60%) of the pool allowable remaining to be allocated to non-marginal wells shall be allocated among such wells in the proportion that each well's acreage factor bears to the total acreage factor for all non-marginal wells in the pool."

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III.

After proper notice was given setting the application for hearing, this Commission did hold a full hearing thereon in Santa Fe, New Mexico commencing April 18, 1962. Said hearing continued without interruption for several days and nights and was concluded on April 21, 1962. At said hearing Consolidated (and those joining in or supporting the application) failed to prove the allegations of the application and failed to discharge the burden of proof in the presentation of applicant's exhibits and testimony offered in support of the application. They were afforded every opportunity to do so. Those parties appearing in opposition to the application presented Exhibits and testimony supporting Order No. R-1670-C and opposing the application; their exhibits and witnesses were then available for complete cross-examination by anyone at the hearing and were thoroughly cross-examined by Consolidated and those joining with it.

IV.

This Commission, as stated in its order No. R-2259 of July 7, 1962, "having considered the testimony presented and the exhibits received at said hearing, and being fully advised in the premises,

FINDS:

* * *

"(2) That by Order No. R-1670-C, entered in Case No. 2095 effective February 1, 1961, the Basin-Dakota Gas Pool was created and prorated under an allocation formula based on seventy-five (75) percent acreage times deliverability plus twenty-five (25) percent acreage. " and * *

"(4) That the evidence presented at the hearing of this case concerning recoverable gas reserves in the subject pool is insufficient to justify any change in the present allocation formula." and then concluded

IT IS THEREFORE ORDERED:

"(1) That the subject application is hereby denied.

"2) That jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary."

V.

On June 27, 1962, Consolidated filed with the Commission a petition for rehearing "on any basis agreeable to the commission" and therein sought to compel (as if it could) opposition witnesses and parties to furnish expert opinion evidence favorable to Consolidated's already denied application. The Commission (prior to the time that Marathon had an opportunity to appear and object to said petition) did by its Order No. R-2259-A of July 7, 1962

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grant a rehearing in the subject case. Consolidated's correspondence and subpoenas duces tecum in Commission files prove beyond question that Consolidated is not seeking a rehearing on any newly discovered evidence of anything which occurred prior to April 21, 1962. Consolidated (and those supporting its application herein) have not and cannot truthfully claim prejudice by reason of not having a full and complete hearing on its application. Consolidated has not alleged or proven that any competent evidence it now seeks in this so-called rehearing could not, with the exercise of reasonable diligence, have been obtained prior to April 21, 1962 or elicited from witnesses and parties on cross-examination at the hearing concluded on that date.

VI.

Consolidated, by its application herein, has expressly recognized (and is estopped in this case from questioning) deliverability and acreage as appropriate and proper items in the allocation formula adopted November 4, 1960.

VII.

Consolidated has failed:

a. to take timely action in connection with Order No. R-1670-C and is guilty of laches;

b. to show in support of its application herein (1) the amount of recoverable gas under each producer's tract, (2) the total amount of recoverable gas in the pool, (3) the proportion that (1) bears to (2); and (4) what portion of the arrived at proportion can be recovered without waste; and (5) just how under such determinations the correlative rights of producer's will be better protected than under the present formula;

c. to sustain the burden of proof by failing to present sufficient evidence to justify the Commission in making any change in Order No. R-1670-C;

d. in its endeavor to discredit any opposition exhibit or witness or to make its case therefrom.

Consolidated is no doubt disappointed with its failures and in Commission Orders No. R-1670-C and No. R-2259 but its failures and disappointments are not legally or equitably sufficient to warrant either (1) the granting of a rehearing or (2) any further proceedings under Order No. R-2259-A. To permit Consolidated to proceed under such order (at great expense and inconvenience to those opposing it) to "re-hash" and "re-hash" and "re-hash" a valid order of this Commission (entered after a full hearing nearly two years ago) and sustained only a few weeks ago (after another full hearing) would be unconscionable, inequitable and highly irregular tending to violate orderly proceedure and due process of law. Consolidated has had its'day in court'.

WHEREFORE, Marathon Oil Company respectfully requests that Order No. R-2259-A, dated July 7, 1962, be in all things set aside, vacated and held for naught.

Respectfully submitted this 13th day of September, 1962.

MARATHON OIL COMPANY

BY W. Hume Everett

W. Hume Everett, Attorney
Suite 508 Consolidated Royalty Bldg.
P. O. Box 636
Casper, Wyoming.

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