BEFORE THE
OIL CONSERVATION COMMISSION
Santa Fe, New Mexico
September 14, 1962

REGULAR HEARING

IN THE MATTER OF:

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. Applicant seeks an amendment of Order No. R-1670-C to establish an allocation formula based 60% on acreage and 40% on acreage times deliverability. The Commission will hear opening statements and under the provisions of Rule 1214, and Rule 1215, may refer the presentation of evidence concerning recoverable reserves in the Basin-Dakota Gas Pool to Daniel S. Nutter, duly appointed examiner, or A. L. Porter, Jr., alternate examiner. The Commission would then hear all closing arguments.

CASE 2504
(Rehearing)

BEFORE:
A. L. (Pete) Porter
E. S. (Johnny) Walker

TRANSCRIPT OF HEARING

MR. PORTER: The hearing will come to order, please. The case to be heard this morning is Case 2504.

MR. DURRETT: Case 2504: 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.

MR. KELLAHIN: If the Commission please, Jason Kellahin,

Kellahin and Fox, Santa Fe, appearing in behalf of Applicant. I have associated with me Mr. Ted P. Stockmar, a member of the Colorado Bar. I would like at this time to also enter an appearance in behalf of Harry A. Trueblood and Associates, as owners of working and oil interests in the Pool involved.

MR. FEDERICI: May it please the Commission, William Federici of Seth, Montgomery, Federici and Andrews for El Paso Natural Gas Company, and associated with me Mr. Ben Howell, attorney, and Mr. Garrett Whitworth. Also making an appearance for Aztec Oil and Gas Company, and also Mr. Ken Swanson for Aztec Oil and Gas Company. Also making an appearance for Calkins Oil Company and Sunset International, Mr. Tom Pope, also present.

MR. SANCHEZ: Manuel A. Sanchez, attorney at law, Santa Fe, New Mexico, appearing for Southern Union Gas Company. Associated with me is Mr. Oran Haseltine of Dallas, Texas.

MR. PORTER: Are there other appearances to be made in this case?

MR. VERITY: George L. Verity of Verity, Burr and Cooley for Southwest Production, and associated with me is Mr. Gordon Llewelyn of the Dallas, Texas, Bar.

MR. PORTER: Mr. Keleher.

MR. KELEHER: W. A. Keleher, Pubco Petroleum Corporation, Albuquerque.

MR. PORTER: Mr. Kelly.

MR. KELLY: Booker Kelly, Gilbert, White and Gilbert,

appearing for Sunray, DX, and Texaco.

MR. PORTER: Mr. Everett.

MR. EVERETT: W. Hume Everett for Ohio Oil Company.

MR. PORTER: Is that Marathon?

MR. EVERETT: If you please, that's what I was going to ask you, if the name would be changed in the record to Marathon Oil Company. Also I appear in the record as Division Attorney for the Ohio Oil Company. The same day they changed their name, two things happened, the name was changed and I was retired, and I am now in private practice and I would like the record to show me as an attorney in general practice, the address being Suite 504, Consolidated Royalty Building, Casper. I would also like at this time, first, to introduce to the Commission and to those present the new Division Attorney of Marathon Oil Company, Mr. Kent B. Hampton. Stand up, Kent, let them see what you look like -- and to ask that his appearance be entered in this case along with mine, and that of Atwood and Malone, who initially entered an appearance for all of us except Mr. Hampton herein.

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

MR. CAMERON: John Cameron for Tidewater Oil Company.

MR. WYNN: R. C. Wynn, Delhi Taylor Oil Corporation.

MR. MILES: George Miles for Atlantic Refining.

MR. PORTER: Anyone else desire to make an appearance? We have two motions before us this morning, one filed by Mr. Keleher for Pubco Petroleum Corporation. It's not a motion,

it's objection to the Commission granting the rehearing. We have a motion filed by Mr. Hume Everett for Marathon Oil Company to vacate Order No. R-2259-A, which is the order granting the rehearing. Do you desire to argue the motion?

MR. KELEHER: May it please the Commission, I would like to state our position.

MR. PORTER: Mr. Keleher, at this time I just wanted to determine whether or not arguments are to be made, and I intend to set a time limit on the arguments.

MR. KELEHER: I would like to argue briefly.

MR. EVERETT: Yes, sir, I would like to argue my motion.

MR. PORTER: We are going to combine the objections and the motions for the purpose of argument. We will limit each side to twenty minutes. You can divide that time any way you see fit.

MR. KELEHER: I will take five minutes, Mr. Everett can have fifteen. May it please the Commission --

MR. PORTER: Mr. Keleher. Mr. Kellahin.

MR. KELLAHIN: We have not been served a copy of Mr. Keleher's motion. I ask if we could have a copy.

MR. KELEHER: I don't have an extra copy.

MR. PORTER: You can take a look at this one. The Commission recognizes Mr. Keleher at this time.

MR. KELEHER: If it please the Commission, our objections are as follows: That the Petitioner, Consolidated Oil and

Gas, Inc., had ample opportunity to present its case at the time of the hearing. The preamble of this respectfully objects to the Order of Commission granting the rehearing in this above-entitled cause, and in support of this hereby says that Petitioner Consolidated had ample opportunity to present its case at the time of the hearing; that the matters and things that have been submitted to the Commission by all parties before the Commission have been decided, and that said cause was res adjudicata.

Our Motion to Quash Subpoena Duces Tecum, we move to quash the Subpoena Duces Tecum heretofore served upon Frank D. Gorham, and respectfully shows to the Commission: Number 1, That at the hearing in taking testimony in this cause, Consolidated, which requested the issuance of such subpoena --

MR. PORTER: Mr. Keleher, we intend to grant time for the argument on the Motion to Quash at a later time. Right now we would like to confine this to the Motion to Vacate Order, or your objection to granting the rehearing.

MR. KELEHER: Our objection is just that this case was tried before the Commission on the merits, and at that time the so-called Jalmat case had been decided by the Supreme Court, and all lawyers in New Mexico know that the Supreme Court never grants a motion for rehearing, so it might have been anticipated that the Supreme Court wouldn't do anything toward a rehearing in the Jalmat case; that at that time all parties before the Commission presented their case and tried it.

Now the question now is going to be, are we going to try this case over again and take up the time of the Commission and of the companies and of the lawyers and everybody involved, or are we going to stand on the Order of the Commission? We believe that the rehearing was inadvertently granted without notice to counsel, and we object to it and don't believe that the Commission should retry this case.

MR. PORTER: Mr.Everett.

MR. EVERETT: May it please the Commission, W. Hume Everett, representing Marathon Oil Company. I will endeavor to meet the time limit set by the Chairman, but we feel that this is a very serious matter, so much so that after we read the petition for rehearing which I saw for the first time in the Commission files here day before yesterday, we recognized that we were in serious procedural trouble.

We would feel remiss if we did not call the Commission's attention to that situation which we feel the Commission may have gotten itself into inadvertently. So that what we have to say is not to be taken in any spirit of criticism, but we would like to be helpful if we can, to orderly procedure and orderly process.

I know the lawyers are all familiar with the Statute. I would refer to two Sections thereof, Section 65-3-20, and Section 65-3-22 of the New Mexico Statutes Annotated. Very briefly, 20 says that before any order shall be made under the provisions of this act, that a public hearing shall be held at such time, place

and manner as prescribed by the Commission. It has an exception in that paragraph for emergency orders, which I think it's admitted this rehearing order is not. It provides notice in no case less than ten days, except in emergency, and that any person having an interest in the subject matter of the hearing shall be entitled to be heard.

Then we look at 65-3-22, which has two time elements in it, one twenty days after an order is entered by the Commission within which any interested party may file a petition for rehearing, and then it provides that in that petition they should set forth the respect in which the order or decision is believed to be erroneous and requires the Commission to grant or refuse that application in whole or part within ten days. It has no provision with reference to hearing.

After viewing this petition for the first time, I then prepared a Motion to Vacate the Order granting the rehearing, inasmuch as no one had any notice of the hearing, which is required by the Statute, and inasmuch as no one was afforded an opportunity to be heard, to voice any objection they might have with reference to the form of petition or with reference to the matter of rehearing. This was the only procedure left to any of us who rejected rehearing which I could think of. As a matter of fact, it's the only way that I know of to present the matter.

Very briefly, the law with reference to such items, and I have not had an opportunity to brief this extensively, but I

think it's very well summarized in 73 Corpus Juris Secundum, Paragraph 158 at Page 495, under Public Administrative Bodies and Procedure, C, where it is said, and I am quoting just a part that is applicable to this matter, as I view it: "Where an order is void for lack of due process, as where there was no hearing, the aggrieved party is entitled, if he has been prejudiced, to have the order set aside and the case reopened; and the agency has the power to do so."

Further, Paragraph 130, Page 453, "Where administrative action is taken in an adversary proceeding without affording adequate notice and opportunity to defend to interested parties, basic rights are invaded. The quality of the act rather than the character of the agency exercising the authority is determinative of the need for notice and hearing."

Then at Page 453, still quoting from 73 Corpus Juris Secundum, "The fact that the legislature may direct the doing of a certain act does not mean that an administrative body may be empowered without notice or hearing to direct the doing of such act."

Gentlemen, I submit that the order granting the rehearing in this case is void, and to proceed would be highly prejudicial to Marathon and other interested parties who are opposed to the application in this case. I have done my utmost to comply with the rule of the Commission with reference to service of copies of motions, and if there's any attorney or anyone else present to whom I have not already given a copy of the Motion, I wish they would

please raise their hand and I'll see that they get one at this time. I have handed out about twenty of them to as many of the attorneys and parties I know who have entered appearances in this case. If there are any others, would you please raise your hand and I'll be delighted to give you a copy of the Motion at this time. It was impossible to get it to anyone by mail, having not seen the petition for rehearing until the day before yesterday, and having prepared my Motion which I filed yesterday afternoon. I see no hands raised, so I assume that everyone here in attendance, at least, has a copy of the Motion.

The Motion itself I would like to review very briefly. Then I wish to offer some correspondence and ask the Commission to take judicial notice of some items in its file in support of the Motion.

That Consolidated Oil and Gas, Inc. is the applicant herein, and I will refer to them in my argument and I also refer to them in the Motion as Consolidated. In October of 1960, Consolidated appeared in opposition to the allocation formula which was then adopted on November 4th, 1960, effective February 1, 1961. At that time they offered no evidence or testimony in support of this opposition to the formula.

Then herein, in this case, on February 23, 1962, they filed their application requesting the Commission to adopt a special formula "pertaining to the Basin Dakota gas pool," in which they did not object to acreage and deliverability as proper factors

in the formula, but simply asked that the percentage of weight given to those two factors be changed. So after proper notice was given and this case was set, and as the Commission well remembers and the rest of us here, it started on April 18, 1962, and it was continued without interruption for several days and nights and was concluded on April 21, 1962. At that time Consolidated,and those joining with them in supporting their position,failed to prove the allegations of their application. They failed to discharge the burden of proof which was upon them, wanting to upset an order of this Commission. They were afforded every opportunity to make the best case they could make. Those parties who appeared in opposition to Consolidated's application offered evidence in support of Order No. R-1670-C which established the present formula, and opposed the application of Consolidated. At that time all of the witnesses, their exhibits, were available for complete cross examination by anyone at that hearing, including Consolidated and those supporting it, and they were thoroughly cross examined by Consolidated and those supporting it.

The Commission on July 7th, by its Order No. R-2259, found that the evidence presented at the hearing of the case concerning the recoverable gas reserves in the pool"is insufficient to justify any change in the present allocation formula", and then proceeded to deny Consolidated's application.

On June 27, 1962, Consolidated filed its petition for rehearing in this case, not specifying, as required by Section

65-3-22, any error which might have been committed, but submitted that application to the Commission with a request for rehearing, and I'm quoting from the petition for hearing, "on any basis agreeable to the Commission." In that petition and in their subsequent action have sought to compel, as if they could, opposition witnesses and parties to furnish expert opinion evidence favorable to Consolidated's already denied application.

The Commission, prior to then, I think inadvertently, and prior to the time that Marathon had any opportunity or even knew about this petition, prior to the time we had any opportunity to object to it, and without any hearing whatever, entered its Order R-2259-A granting a rehearing in this case. I think that Consolidated's correspondence, its subpoenas duces tecum, prove beyond question they are not seeking a rehearing on any newly discovered evidence of anything which occurred prior to the close of the hearing on April 21, 1962. I don't think Consolidated, or any of those supporting them, can truthfully claim prejudice by reason of not having had a full and complete hearing on their application.

Consolidated has not alleged in its petition for rehearing nor has it proven that any competent evidence it now seeks in this so-called rehearing could not, with the exercise of reasonable diligence on its part, have been obtained prior to the close of the hearing on April 21,1962.

Consolidated has failed to take timely action in connection with Order No. R-1670-C and is guilty of laches as far as now

attacking that order is concerned. They have failed to show in support of their 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 producers will be better protected than under the present formula.

They failed to sustain the burden of proof by failing to present sufficient evidence to justify this Commission in making a change in Order No. R-1670-C, and they have failed in their endeavor to discredit any opposition exhibit or witness, or to make their case therefrom.

No doubt Consolidated is disappointed with its failures and with the Commission Orders R-1670-C and 2259, but that is not either legally or equitably sufficient to warrant the granting of a rehearing or any further proceedings under the order which has been granted. We think that to permit Consolidated to proceed under this rehearing order and at great expense and inconvenience to those who are opposed to it, and to again rehash and rehash and rehash a valid order of this Commission which was entered after a full and complete hearing two years ago and after another full and complete hearing a few weeks ago would be unconscionable, inequitable, and highly irregular procedure and would tend to violate due process of law.

Therefore we filed our Motion to Vacate. In support of that Motion to Vacate, I wish to ask the reporter to mark this as Marathon's Exhibit 1, these exhibits as Exhibits 1, 2, and 3.

(Whereupon, Marathon's Exhibits Nos. 1, 2 & 3 marked for identification.)

MR. EVERETT: I have here marked for identification -- I'm sorry I don't have copies of these, I will ask that the reporter make copies of these so I may have them in my file. Exhibit 1 is a letter dated July 6, 1962, which was received in the Casper Division, Office of the Division Manager, on July 9th, 1962, on the letterhead of Consolidated Oil and Gas, Inc., signed by Mr. J. B. Ladd. I would like to read very briefly from this letter, because to me it simply emphasizes the point which I have tried to make throughout this hearing, that Consolidated is not concerned with conservation, they are concerned with promotion; and they would have this Commission, in my opinion, act as a tool to aid them in that regard.

I want to read this letter to you. This is addressed: "Memorandum to Participants, In Re: --

MR. STOCKMAR: May we see the thing so we may decide if we want to object to it, so we can do so before you read it in evidence?

MR. EVERETT: If you don't count your reading time as my time.

MR. STOCKMAR: No objection.

MR. EVERETT: "Memorandum to Participants, In Re: Dakota Proration Formula, San Juan Basin. We have previously informed you of the New Mexico Oil & Gas Conservation Commission denial of our request for a change in the method by which Dakota gas withdrawals are allocated. Our hearing in April resulted in what is reported to be the longest Commission session in history - the hearing consumed four days."

"In essence, it is obvious that we won the battle but lost the war. The famous New Mexico Supreme Court Jalmat decision handed down recently said in principal that the Commission could not consider changing a proration formula unless detailed engineering reserve and performance data were included on each and every well in order that reservoir exploitation efficiency, and the always important issue of correlative rights, might be thoroughly and objectively defined."

"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." This last part I certainly don't agree with, but it's part of the letter and it's going to be introduced in evidence.

"In any event, Consolidated Oil & Gas, Inc. is being heard from and we have gained respect in both our administrative and technological profiles."

I offer that in evidence in support of our Motion.

The second item is a letter addressed to Participants, dated July 17, 1962. It has been marked for identification as Marathon's Exhibit 2.

MR. STOCKMAR: No objection.

MR. EVERETT: This simply advised the Participants, whoever they are, that this letter is going to keep them up-to-date. It's on the letterhead of Consolidated again, and signed by Robert B. Tenison, to keep them up-to-date on changes in the data. It's dated July 17, 1962.

"We are preparing our own information and sincerely hope that all other interested companies will supply the necessary information for the reserve study required for a commission decision."

I offer that in evidence in support of this Motion. The next item --

MR. STOCKMAR: No objection.

MR. EVERETT: -- is a letter and two attached sheets on the letterhead of Consolidated Gas and Oil, Inc. dated August 24, 1962, which shows it was received on August 24, 1962, Casper Division, Office of the Division Manager, marked Marathon Exhibit 3. It refers to and tells us that there has been a rehearing granted in this matter on September 13, 1962, and then with that they enclose a list of wells, they enclose a blank data sheet listing reservoir information needed for the determination of recoverable gas reserves. Then they respectfully request that as to the wells designated on the first list that we provide to them at our earliest convenience and prior to September 10th all the information suggested by the data sheet. "This should include, if you have made the calculations, your determinations of recoverable gas reserves. If you do not have any particular item of information, we would appreciate your furnishing all that you do have."

They want us to advise them whether we will attend the hearing or not. This last was unanswered.

I refer to the second page of it, which is the data sheet. There are eleven items listed on this sheet, and of the eleven, eight of them call for expert engineering interpretation and advice which, whether Marathon has it or not, it comes under the heading

of none of their business, since it's confidential information which they could not get a Court to force anyone to disclose, and we think that this is entirely out of line; and further emphasize the point that they do not make a case and we do not propose to be beat over the back because we think no one can legally force us to present reserve determinations which were made in the course of our business and which were made at great expense to us and which are confidential information for the sole use of our management.

I offer this Exhibit 3 in support of our Motion.

MR. DURRETT: Deducting the time opposing counsel spent examining the evidence for objection, you have two minutes left.

MR. EVERETT: Thank you. I'll try and finish. I would ask the Commission to take judicial notice of a letter in its files, copy of a letter in its files, particularly the second paragraph, the letter dated September 7, 1962, addressed to Mr. Whitworth, Attorney for El Paso, by Mr. Stockmar, Attorney for Consolidated.

In that letter, in that paragraph, Mr. Stockmar expresses his willingness to cooperate "so long as the desired information is made available at the rehearing of Case 2504 as expert testimony." There again, we get in the realm of the very thing I'm talking about in this Exhibit 3, and that is expert opinion which the Ohio Oil Company or the Marathon Company, its successor, has obtained and has in its file. It's the same thing with every other operator in this room, and I think that Consolidated has failed miserably to make its case and wants to rehash and rehash.

There has been no showing made whatever that they weren't afforded a full hearing and that they weren't given every opportunity to cross examine every expert and the basis of his decision. I would also ask the Commission to take judicial notice of the subpoenas duces tecum which were issued upon the request of Consolidated in this case. Items one and two of each of those reports call for evidence which was already presented to this Commission or was available to Consolidated upon cross examination prior to the conclusion of the hearing on April 21st; and I understand from the Chairman that there's going to be some arguments about those motions so I will not take further time talking about them, but if you will just take judicial notice of items one, two, and three in each of those, I think it becomes manifestly apparent that Consolidated does not want a rehearing, it wants a rehash; and it would like to endeavor, if it could get the strong arm of this Commission to help it, to get into the confidential files of each operator in hopes that it can make a case.

We think this is highly irregular procedure. They have had their day in Court, and as a matter of fact, in their own petition or in their own statements they have had four days in Court, and we don't think the matter should go any further, that it should stop here; and if Consolidated feels that it can make a case from its own evidence and testimony, let them file another application and we'll take off on another one, but let's not just go on and on and on in this case.

We respectfully request that the order granting the rehearing be vacated. Thank you very kindly.

MR. PORTER: Mr. Kellahin.

MR. KELLAHIN: If the Commission please, I would like to divide my time with Mr. Stockmar. On that basis, how much time do we have?

MR. PORTER: You have twenty minutes.

MR. KELLAHIN: Twenty minutes for our side?

MR. PORTER: Yes, sir.

MR. KELLAHIN: Of course, some of the matters presented by Mr. Everett actually pertain to the subpoenas which were issued by the Commission at the request of Consolidated. That will be fully discussed later, I am sure.

In Mr. Keleher's motion, he has based it on actually one thing. He says we have had full opportunity to present our case and it has been decided, and it is now res adjudicata. He further made the statement that the Jalmat case was available at the time. I would like to put the dates in the Commission's mind on that score. The hearings in the Consolidated application in the Basin Dakota Pool were April 18th to April 21st. The Jalmat decision of the State Supreme Court came down on May 16th. Certainly the reasoning the Court was going to follow was not available to us at the time hearings were held.

There has been some inference by Mr. Everett that we should have notified him forthwith when we filed our petition for

rehearing, and he should have had a full hearing on that petition. Rule 1208 of the Commission's Rules and Regulations provides that: "When any party to a hearing files any pleading, plea or motion of any character (other than application for hearing) which is not by law or by these rules required to be served upon the adverse party or parties, he shall at the same time either deliver or mail to the adverse party or parties who have entered their appearance therein, or their respective attorneys of record, a copy of such pleading, plea or motion."

Now the Commission well knows that in many, many cases numerous appearances are made which are in effect just pro forma appearances for the purpose of making a statement or taking a nominal interest in the proceedings.

For that reason, they added this further provision: "For the purposes of these rules, an appearance of any interested party shall be made either by letter addressed to the Commission, or in person at any proceeding before the Commission or before an Examiner, with notice of such appearance to the parties from whom such pleadings, pleas, or motions are desired."

Consolidated received no notice from any party or parties that they desired pleadings from us. Had they given us that notice, they would certainly have been furnished with them. Now it is true that Section 65-3-20 of the New Mexico Statutes provides that orders of the Commission be entered after notice of hearing. It also says, however, "except as provided for herein." Now, the

rehearing statute, 65-3-22, provides that: "Within twenty days after entry of any order or decision of the Commission, any person affected thereby may file with the Commission an application for rehearing." The Commission must either grant or deny it within ten days. That statute doesn't contemplate any hearing on the petition for rehearing. It's an administerial act on the part of the Commission. It's within their discretion as to whether they are going to grant a rehearing or not. The refusal of the rehearing has laid the foundation for an appeal to the Court.

In this instance, the Commission granted a rehearing. They did it by an order. It could have been done in the same manner as the original order was done, by application and advertising, notice that a rehearing be held. A notice is not necessary for this, and for that reason I couldn't conceive that 65-3-20 requires a hearing on a petition for rehearing. It's a little absurd to expect the Commission to do that all within ten days.

In regard to this question of res adjudicata, that is something which just has no application to the proceedings before this Commission. 2 American Jurisprudence 2d at 531 states: "The power of a court --" Now this is in the Public Administrative Law Section -- "The power of a court to open, modify, or vacate its own judgments exists despite the doctrine of res judicata, and a proceeding to open or modify a judgment of a court is generally regarded as a further proceeding in the original action. Accordingly, the doctrine may not properly be applied to restrict

the power of an administrative tribunal to reconsider or modify its own determinations, and in many cases the power of redetermination has been upheld against objections based on the res judicata doctrine." I think it is pretty clear that res judicata has no place in this hearing.

Now, Mr. Everett referred to the application for rehearing or the petition for rehearing, stating in effect that it set forth no grounds for the invalidity of the order. Without burdening the Commission by reading the whole matter, I would refer them to paragraphs 5, 6, 7, and 8 of the petition for rehearing, in which that was asserted at that time. We took issue with the Commission's finding, but in addition to that, available data can be provided, and we sought the Commission, if they saw fit, to present the further data. That is exactly what the Commission did in its order.

Now that asserts the grounds on which the order was invalid, the original order, and the Commission, fully within its jurisdiction, restricted this hearing to matters relating solely to reserves, basing it entirely upon the single finding of the order that there was insufficient information to enter an order on that basis.

Now the Motion filed in behalf of Marathon seems to assert that the Commission can grant a rehearing only on the basis of newly discovered evidence, that the Order 1670-C is a final order, and the Commission is without jurisdiction to review it or at this time receive additional evidence; and that rehearing violates the

due process of law. I don't know what the reasoning on that is. It wasn't discussed in the argument, to my knowledge, so I don't really have an answer to due process of law. It should be borne in mind, when the Commission acts to prorate gas in the gas pool, it's excess gas, and that is the finding in the Jalmat case that will be discussed a little further by Mr. Stockmar.

Among the statutory powers of the Commission is the power to grant a rehearing, which we have already discussed, and the powers of this Section are relatively broad. The Commission may grant or refuse any application, either in whole or in part, and in the instant case, the Commission did grant the rehearing only in part.

2 American Jurisprudence 2d, 522, "Even apart from any statutory provision expressly authorizing modification," and New Mexico has such a statute, "administrative determinations are subject to reconsideration and change where they have not passed beyond the control of the administrative agency, as where the determinations are not final, but interlocutory, incomplete, provisional, or not yet effective, or where the powers and jurisdiction of the administrative agency are continuing in nature."

Section 526. The power to review has been received in the order in this instant case, and the reservation of such authority is effective. I refer to the order that was entered by the Commission at the conclusion of the original hearing. At the end of the order, the Commission said, Paragraph 2, that "jurisdiction of this cause is to be retained for such further order...." As

the American Jurisprudence 2d says, that's a valid reservation of authority.

In Section 537 of the same reference, same work, "A rehearing may be granted even though the evidence claimed as the basis for the application is not newly discovered and could, in the exercise of due diligence, have been offered at the original hearing." That is an answer to Mr. Everett and Mr. Keleher's contention that this evidence was available. Granted it was available, that does not affect the rehearing. "The discretion to grant or deny a rehearing may be exercised by granting a rehearing but by limiting the scope of the matters to be considered thereon." That's a quotation from the textbook. That is what the Commission has done here. We have no quarrel with their order. We may have wished a little broader hearing than has been granted us, but we're ready to go forward under the terms of the Commission's order.

MR. STOCKMAR: Gentlemen of the Commission.

MR. PORTER: Mr. Stockmar.

MR. STOCKMAR: I would first like the record to show that Ohio's Exhibit 1 just entered does contain a notification that a formal petition for rehearing had been granted. That letter is dated July 6, 1962. I think Ohio's own exhibit again rebuts its statement that just now has it learned that there was a formal application filed, or just recently has it had an opportunity to see it, or something of that nature.

I will be very brief. I do want to state briefly what

might be a philosophical view of my own, but I think it arises out of the law, and that is with respect to the nature of the power that this Commission has. As an administrative body, it has been delegated certain legislative powers by the New Mexico Legislature. Matters of prevention of waste for the benefit of the people, the protection of the correlative rights of interested operators is a matter which the Legislature can act upon and has acted upon in enacting the Oil Conservation Statute.

It could have, case by case, reviewed the matters which are presented to you each month, and could have legislated the solution for each one. It is not technically equipped to do this, and this power has been delegated to you.

Also among your powers are certain judicial-type functions. These together constitute what we call administrative power. There's a great difference between a legislative function and a judicial function. It relates to the question of jurisdiction.

Now a Court and any body exercising a strictly judicial function acquires jurisdiction in accordance with the law. It acts upon the matters in that case. After its decision and after the expiration of all appeal rights and so forth, its jurisdiction terminates and it can no longer review or revise that decision.

The legislative function, however, is entirely different, and this is the function which you exercise in preventing waste and protecting correlative rights. It is continuing jurisdiction, is never lost. If you have made an order, the following day or at

least soon thereafter, pursuant to the reasonable requirements of notice and hearing, you may change that order. You may alter it; if an order is bad or invalid, you can recognize this and make a good order.

In this case, or in this State the so-called Jalmat decision states this principle very clearly, that the power that you have in these matters is a continuing legislative function. So without respect to the formalities for petitions for rehearing, for anything else, this body has the power at any time to hear and rehear, and in its discretion, permits it to hash and rehash these matters and to do its utmost to come up with valid orders.

I could easily drift into my opening statement, and I think that is all I need to say at this time.

MR. PORTER: Mr. Everett.

MR. EVERETT: If it please the Commission, very briefly I would call Mr. Kellahin's attention, he referred to 65-3-20, and would have the Commission think that the exception applies to everything in the Act. It applies to that paragraph. I noted the exception in my opening statement. I didn't burden the Commission by reading the entire statute, but I would call the Commission's attention to that. "Except as provided for herein, before any rule, regulation or order, including revocation, change, renewal or extension thereof, shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescriped by the Commission."

MR. PORTER: May I have yours? The Commission considers this rebuttal argument. If each side wishes, they may have five minutes.

MR. EVERETT: I won't need that long. Thank you very kindly, though. In referring to 65-3-22, the rule that I cited to the Commission, whether it provides for notice or hearing or not, whether this is a legislative or judicial function, a legislative body is still governed by due process, and that means notice and hearing; and if Mr. Kellahin didn't know what I meant by it -- Suppose they tell you to grant a rehearing, it doesn't mean that you can do so without notice or hearing, but with due process.

I cite in support of that statement 73 Corpus Juris Secundum, page 453. Unfortunately, the time element being such as it was in this case, I didn't have an opportunity to exhaustively brief the law points involved, but if Mr. Kellahin had read a little further in 2 American Jurisprudence 2d, if he had gone on to page 337, he would have found a statement which I quote: "The primary purpose of a continuing jurisdiction is to give the tribunal power to change a decision or order to do justice in the light of newly discovered evidence or to meet changed conditions." Then it goes on with a discussion, a discussion of other items which he might cite to you as authority for going ahead with changing your order, whether newly discovered evidence or changed conditions or not, but that still does not get around due process of law, which any body sitting in a hearing must extend to those who might be

adversely affected by their action.

I again submit that our motion is the only way we could proceed to advise the Commission of something which we honestly and earnestly believe was inadvertent but which would put a very serious cloud upon everything that might be done from this minute on unless that order is vacated. That would not preclude your jurisdiction, but it would put it back in orderly procedure where if Consolidated is disappointed, it is in not having presented evidence. As the counsel told me this morning, "We didn't present evidence, we presented cartoons." They now want to file some exhibits. Let them file their application and follow through with notice of hearing. They have a right to file an application and come in and present their exhibits and testimony, and this is squarely upon them. I don't think they can meet it, but certainly it would be highly irregular to proceed further in this hearing.

MR. PORTER: Mr. Kellahin, do you desire your five minutes?

MR. KELLAHIN: I would just like to make this observation. The argument that has been presented is directed to the order granting the rehearing, and it's based on a lack of due process for the reason it was entered without a hearing on the petition for rehearing. Now that reaches the point of absurdity, to say that they don't have their day in court,because they are being heard on whether they will have a rehearing right now. Due process has been fully accorded.

MR. STOCKMAR: If the Commission please, it may be my last breakfast with Mr. Everett. I referred to a rather artistic

drawing made by Mr. Trueblood. I think you recall the cube that received so much attention. In jest, I may have indicated that that was more likely a cartoon than an exhibit. I think if Mr. Everett will read the record, he will find that we did not dignify that explanatory thing by making it an exhibit. Thank you.

MR. EVERETT: If you please, you may strike any reference that I made to the cartoon business. I certainly didn't mean to be out of line. I enjoyed your remark very much indeed, because I thought it was so true. Just strike that from the record.

MR. PORTER: We'll take a ten minute recess at this time.

(Whereupon, a short recess was taken.)

MR. PORTER: The hearing will come to order, please. The Commission has decided to deny the objections to granting of the order for rehearing and the Motion to Vacate, and we will take up next the Motions to Quash the Subpoenas. We have three Motions, one from El Paso, one from Pubco Petroleum Corporation, and one from George Eaton with Pan American. At this time I would like to ask if there is any objection to consolidating the arguments on these Motions to Quash?

MR. EVERETT: Before you reach that question, may the record show the exception of Marathon to your action in overruling or denying its Motion to Vacate?

MR. PORTER: Let the record show Marathon's exception.

MR. KELEHER: Pubco offers no objection to that procedure.

MR. VERITY: Southwest Production Company would object to

consolidating our position, in that I feel quite sure our Motion to Quash the Subpoena will be on an entirely different basis than any others and should be heard separately.

MR. PORTER: Mr. Malone.

MR. MALONE: If the Commission please, George Eaton is in a somewhat different position than Pubco or El Paso. Pan American, by whom he was employed, was not an active participant in the previous case, has not entered an appearance in this case, and has not participated in this case. The subpoena that was served on him was served on him individually. We feel that under those circumstances, we are in a somewhat different position.

It may or may not develop in the course of the hearing that Consolidated, who issued the subpoena, will wish to insist on the production of the information called for by it. If they do not insist on it, why,there would be no occasion to deal with the questions that are presented by the subpoena served on Mr. Eaton.

On the other hand, if the Commission feels in the orderly handling of the matter that they would like to hear everyone on this issue at once, we would certainly present our position in whatever time the Commission directs.

MR. FEDERICI: We have no objection to the consolidation, but I would like to call the Commission's attention to the fact that there has been a Motion to Quash on behalf of Mr. Rainey, himself, personally.

MR. PORTER: Mr. Swanson.

MR. SWANSON: I would like to move, on behalf of Aztec Oil and Gas, at whatever time is appropriate, to quash the subpoenas that have been served on two of its representatives. We feel that it could be properly consolidated for hearing. With respect to the first subpoena served, we would like the record to show that the second one will be in substitution of the original one, and that the counsel will agree that the Motion to Quash will be okay with him. For that reason, we would like for the first subpoena to be separated.

MR. PORTER: Mr. Kellahin.

MR. KELLAHIN: Consolidated has no objection to hearing the argument on these Motions to Quash the Subpoenas. I might ask if Mr. Keleher has a copy of his Motion he could give us. I assume it's a written Motion; we were not furnished with one. The rest of them -- El Paso filed its Motion, of which we have copies, and Pan American filed one.

MR. MALONE: Mr. Eaton.

MR. KELLAHIN: Mr. Eaton. As to Aztec, we originally subpoenaed Joe Salmon. They requested that they be permitted to substitute L. M. Stevens, to which we agreed, on the assumption that he, if required to do so, is the right man to testify in this case.

MR. SWANSON: That's right.

MR. KELLAHIN: On that basis, we will not call for Mr. Salmon, although a return of service is in the file. For Southwest Production Company, we subpoenaed Mr. Smith. By telephone

we were advised that Mr. Smith's wife was ill, and thereupon they asked to substitute Leon Wiedeikehr. We obtained service from Mr. Wiedeikehr, and a service is in the file on Mr. Wiedeikehr and Carl Smith. This again is on the assumption that, if required to do so, that Mr. Wiedeikehr is the proper man to testify.

MR. VERITY: That's correct.

MR. KELLAHIN: On that basis, then, we will not call for the appearance of Carl Smith. In addition, if the Commission please, we have no objection to the consolidation of the argument and response on these subpoenas; however, for the sake of the record, we would request that a separate ruling be made on each of the witnesses subpoenaed.

MR. PORTER: The Commission has decided to hear the arguments on the Motions separately. I would like to get your ideas as to how long it will take you to argue each Motion. How much time would you like?

MR. KELEHER: Pubco, five minutes.

MR. FEDERICI: El Paso Natural, it will take me twenty to twenty-five minutes.

MR. MALONE: I think for George W. Eaton I would request fifteen minutes.

MR. SWANSON: For Aztec Oil and Gas Company, approximately ten to fifteen minutes.

MR. VERITY: Since the appearance of Mr.Smith is not now required, Southwest will have no argument.

MR. PORTER: The Commission has decided to allot fifteen minutes to each side on each Motion. We will consider the Motion by George Eaton first.

MR. MALONE: If the Commission please, we are perfectly prepared to proceed. In the discussions that we had had, it had been anticipated that El Paso Natural would proceed, and I think maybe we were going to try not to duplicate what we are saying. It might be more orderly if El Paso proceeded, unless the Commission prefers; we're glad to proceed for Mr. Eaton if you do.

MR. FEDERICI: That's satisfactory with us.

MR. PORTER: Then the Commission will proceed with hearing the argument from El Paso.

MR. MALONE: Thank you.

MR. FEDERICI: If the Commission please, the Commission allotted us two motions. The first one is directed to the subpoena which was served upon Dave Rainey personally. The other was the Motion on behalf of El Paso Natural Gas. If I do run a little overtime, it is because I have two Motions to argue.

MR. PORTER: The time will be granted, Mr. Federici.

MR. FEDERICI: With reference to the subpoena that was issued upon Dave Rainey, I represent Dave Rainey here personally and in his own personal capacity for the object of arguing this particular Motion. Now Consolidated Gas Company apparently requested of the Commission that it issue a subpoena duces tecum, or however you want to pronounce it, it's spelled the same. That means,

of course, that the witness is directed not only to bring himself, but certain records, books, and papers with him. This subpoena was served upon Dave Rainey, who is an employee of El Paso Natural Gas Company in the capacity of Administrative Assistant. He is not an officer of the corporation, and the subpoena did not name El Paso Natural Gas Company. Rainey has filed with this Commission a notice to modify this subpoena insofar as paragraph 3 of the subpoena is concerned. There are three paragraphs in the subpoena in the request for production. The first two paragraphs relate to certain data which had been previously submitted in the hearing, and there has been no objection filed to those two paragraphs, but paragraph 3 is objected to.

That paragraph reads as follows: "To bring with him any reports, determinations, or tabulations of initial and subsequent reserve calculations made by,or in the possession of,El Paso Natural Gas Company concerning the recoverable gas reserves in the Basin Dakota Gas Pool not included in the eight data sheets subpoenaed above."

Well, that's just a shotgun request. It's a request to go on a fishing expedition, and in the first place, Dave Rainey is not an officer of the corporation, he does not have custody of these documents. He has no control over them. He has no possession over them, and he has no authority to deliver them if he wanted to. If the Commission please, these files which are requested, many of them contain confidential matters or privileged matters which Mr.

Rainey would not be at liberty to produce if he could do so. I believe the answer to the question is fairly obvious, since he cannot produce them, since the records are not in his possession or control, he cannot possibly submit them at this time.

Let's take a brief look at the law just for a moment here. With reference to subpoena duces tecum, the rule is set forth in 97 C.J.S., Witnesses, Section 25, and 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."

Let's go to the Federal cases. You might ask, why do I go to the Federal cases? Sometimes you don't have a local State case applicable, and we go to the Federal cases because the Federal Rules of Procedure are quite applicable to the situation, because the State rules are quite similar or substantially the same as the Federal rules. In Moore's Federal Practice, Volume 5, at Section 45.05, the author states the rule as follows: "A subpoena duces tecum should be quashed and set aside 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."

Now if the Commission please, we do not contend that the Commission does not have the right to issue the subpoenas or subpoenas duces tecum. The Statute gives the Commission that right; but the exercise of that power by the Commission is governed by the general law applicable to subpoenas. There's one further practical matter that I think might be discussed at this time,

although it relates to the Motion by El Paso Natural Gas Company.

Suppose that Rainey is ordered to bring these records; what do they consist of? You would have five filing cabinets weighing 500 pounds or more, with documents in each of the files, some of which may be confidential, some pertaining to third persons who are not party to this proceeding, and what would happen would be this, and this is the way the rule is set forth in the cases when this subject comes up. These documents would be brought up here and not delivered to the opposite parties. The Commission would have to go through documents to determine whether there are any confidential matters which the Commission will not let the other party see. The Commission would have to go through those files to determine whether the matters contained therein are material and whether they're relevant to the hearing, and this Commission would spend all of its time checking files instead of proceeding on with cases.

With reference to Mr. Rainey's subpoena, the main argument, of course, is that he doesn't have the custody and control and possession of the records; therefore, he just can't bring them with him.

If the Commission please, with reference to the Motion filed by El Paso Natural Gas Company, although El Paso is not named as a party, I think these matters should be brought to the attention of the Commission. Their reasons for objecting to the subpoena are set forth in their Motion to Quash, and I think I'll read

them because they are pertinent to this discussion.

Paragraph III states: "The reports, determinations and tabulations called for in said subpoena duces tecum have been accumulated over a period of several years and constitute 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."

Paragraph 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."

Paragraph V: "Said subpoena duces tecum is oppressive and unreasonable and should be quashed."

Paragraph 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."

That's what I was talking about a while ago. If the

party does not specify with some certainty what they want out of those files, we would have to bring those files to this Commission, and this Commission would have to go through the files to determine, are certain portions of it confidential and therefore not subject to inspection, is the material in the first place, and then is it relevant to the hearing? Just how long that would take the Commission, I don't know, but as I say, there are five cabinets of files involved.

Now with reference to the law on the subject, insofar as what a party should specify and in general what is required with reference to subpoenas duces tecum, there are cases which support this, and I think this is true without too much doubt.

"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," citing U. S. v. Woerth, 130 F. Supp. 930, 231 F.2d 822. That case was affirmed in a Federal Second and also another citation, 2 American Jurisprudence 2d, Administrative Law, Section 264, page 95.

Now we go back again to Moore's Federal Practice. As I stated before, we do that because the rules are simpler, and this is a text written by a well-known professor, and it collects the cases and gives you the views expressed in those cases without going through the cases individually. Section 45.02, the author

states the rule to be 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 relate with reasonable particularity..."

Now I was talking to the Commission about this procedure that follows if the subpoena is complied with and you bring the documents up. Here is a case that sets forth fairly well what's involved here, Hermann v. Civil Aeronautics Board, 237 F.2d 359. In the course of its decision the Court said: "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." What happens there is the burden is put on the Commission to go through these documents. The Commission doesn't have the time to do that.

There are other methods that the parties can use. They can ask for inspection of them, we can object to the inspection of them. There are methods by way of written interrogatories. They don't have to come in and give a shotgun request that would bring everything. They are not entitled to that. They are not entitled to go on a fishing expedition, and I don't think this Commission should give them a license to fish in our files.

MR. PORTER: Mr. Kellahin.

MR. KELLAHIN: If the Commission please, I would like to preface my remarks with some background on just why Consolidated took the route it did in connection with this case before getting into legal arguments which are involved here, because I feel that our position is material to the validity of our request for issuance of subpoenas duces tecum.

As the Commission well knows, subsequent to the original hearing, the Supreme Court of New Mexico issued its decision in the Jalmat case. On the basis of that decision, the Commission, accepting the ruling of the Supreme Court, held that there was insufficient evidence of reserve information in the record in Consolidated's case upon which to base a change in the proration formula. Basically, the information required under the ruling of the Jalmat case is the information set forth in the Statute, and that is, the Commission must determine, insofar as it may be practicably done, the reserves under the pool, the reserves under the individual tracts in the pool, the relation between the two, and the portion that can be produced without waste and with the protection of correlative rights; and the real basis of the Jalmat case on that particular point was that without knowing what the reserves were, the Commission was powerless to protect correlative rights.

For that reason, Consolidated has, insofar as it may practicably do so, prepared its information on reserves; but we felt

it incumbent on us to go a step further and make every possible effort to get the reserve figures in the Basin Dakota Pool before this Commission.

Now the operators in the pool have reserve figures, admittedly. They are apparently extremely reluctant to produce them. If the Commission rules on their objection, they do not have to produce these reserve figures, I don't believe that they can later be heard to complain on the lack of reserve information in the record in this case.

Now El Paso's Motion to Quash, I don't have much quarrel with most of Mr. Federici's legal arguments. Basically, the Motion to Quash is directed to the discussion that the Commission, if the Commission finds that our subpoena duces tecum is burdensome, then under the law it shall be quashed; and so far as paragraph 3 is concerned, and apparently that is the only paragraph subject to attack, paragraph 3 calls for "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 eight data sheets being the eight data sheets which were utilized by Mr. Rainey as a witness for El Paso in the original hearing in this case. Apparently they do not object to reproducing the eight data sheets.

Now it has been asserted that in regard to the subpoena directed to Dave Rainey the reason that it should be quashed is that

he has no control over the documents. That may well be, but it is strange indeed that he was able to obtain all this information from his company in the original hearing, and now says he cannot obtain it. Perhaps he doesn't have custody of the documents; they haven't told us who does. In any event, whoever does have custody, I assume is not present in this hearing room. If they are we would like to know it. We would indeed like to know it. I will ask that question, if that be the case.

MR. HOWELL: I'll answer that, that there is no one from the Reservoir Department of the company present in the hearing room today, and these are in the custody of the Reservoir Department.

MR. KELLAHIN: They are not officers of the corporation, either. They are, presumably, then, in El Paso within the State of Texas, which is beyond the subpoena power of this Commission. If we can't secure it by a subpoena within the State of New Mexico, then of course we can't obtain the data we need.

There's also the argument that the information contained in these files is confidential. They don't cite any law in support of withholding any information being confidential. I don't believe they have got any law on that.

This is from American Jurisprudence, Volume 58, Section 31, regarding the production of papers. "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."

Certainly there is no basis to say that this information is confidential and that is grounds upon which the subpoena should be quashed.

Now they accuse us of "shotgunning" in connection with this, and yet they can identify with great precision just what records we are calling for, and they say they weigh five hundred pounds. I think there's some confusion there, and I think they well know that our subpoena, in calling for reports, determinations or tabulations of initial and subsequent reserve calculations, does not include everything in five filing cabinets. Certainly they presented the same identical information at the previous case, and we are calling for the same thing as to the wells not covered in the previous case. It was no burden for them to go forward on it on their own. They cannot say that it is a burden to go forward with the same information on the wells not covered in the original hearing.

Mr. Federici said we had a right to inspect documents and

identify these instruments that we want, and call for them in that fashion, and we can take interrogatories. I think Mr. Federici is under some illusion that the Oil Conservation Commission of New Mexico has adopted Rules of Civil Procedure, and the rule of practice before the Commission, that is not the case, but it is with other agencies within the State of New Mexico. I think that's the basis of his statement that we do have the right of inspection. I submit we do not have the right of inspection except by a witness brought before this Commission and placed on the witness stand.

Now they talk about the bulk of the exhibits that we have called for, and the fact that they are used in the daily operations of El Paso Natural Gas Company, and it's unduly burdensome to be called upon to produce these documents. 58 American Jurisprudence, Section 26, it says that "A person served with a subpoena duces tecum is bound to produce the document or documents called for unless he has a reasonable excuse for withholding it or them. The sufficiency of the excuse is a matter for determination by the court. A witness cannot excuse disobedience to the writ on the ground that the evidence called for is irrelevant, or, it has been held, that it would be inconvenient to produce the documents and compliance would entail great expense."

In other words, there's no basis for El Paso to refuse to produce these documents on the grounds they're confidential. There's no reason for El Paso to refuse to produce these documents

on the ground that it is inconvenient and expensive; and those, basically, are the only two arguments they have advanced other than the fact that they say our subpoena duces tecum is so broad they don't know what to bring, all they know is that it's all in five filing cabinets.

It has just been called to my attention that Mr. Rainey has brought some material to this hearing. If the Commission sees fit to quash this subpoena, it should be only partial and as to paragraph 3 to which the Motions have been directed, and we certainly would expect a production of the other material. Any order quashing the subpoena in part should be limited in order to insure the production of the matters and the material which Mr. Rainey has brought to the hearing.

MR. PORTER: Mr. Federici.

MR. FEDERICI: Do I have some time left?

MR. PORTER: Yes.

MR. FEDERICI: I would like to answer Mr. Kellahin just briefly on the first last, and the last first.

Mr. Kellahin mentioned we didn't cite any authority on the matter of confidential documents and private papers. I'll be glad to accommodate you,however, at this point, Mr. Kellahin. Cases hold that the privacy of third persons should not be invaded by the use of subpoena duces tecum directed to a party having in his possession confidential material. Hermann v. Civil Aeronautics Board, 237 F.2d 359, 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." 4 Moore's Federal Practice, Section 34.15.

Mr. Kellahin mentioned this Jalmat case. Well, the Jalmat case just put the burden directly on Consolidated Gas Company. They had it and they've still got it. They're still limited to the proper methods of obtaining this information. In other words, they still have to follow the rules which are applicable.

We haven't questioned too strongly what the reserves figures are so far as may be on certain data sheets here, but what we have objected to is they call for everything, "Bring all your reports, bring all your records, bring all your files and let us look through them." That's what we object to and that's why we have come to the Commission for some relief.

We might point out at this time that the company may file a motion in the event that, say, its Reservoir Department is served with a subpoena. I think that in all fairness we should be raising the issue now so at least the Commission can tell us, "Well, what can you ask for and what are we going to give you," if that happens. I didn't want to be caught here by surprise and have the Commission feel that I was going around the bushes now. The Commission might know it now, that we will object unless they follow the proper procedures there, also.

MR. PORTER: The Commission will not rule on any of the

Motions until we have heard arguments on all Motions. At this time we will hear the arguments on Pubco's Motion.

MR. KELLAHIN: We still have not been furnished a copy of Mr. Keleher's Motion.

MR. KELEHER: I don't have one for you, Mr. Kellahin. I'm more or less doing the same thing inadvertently that Consolidated did to me. It was two weeks before I got a copy of the order granting a Motion for Rehearing in this case. I had to make a special request to get a copy of the Motion for Rehearing, but I will send you a copy. It's very brief and to the point, and we're deadly serious about it.

First I would like to comment very briefly on these Exhibits 1, 2, and 3 admitted by Mr. Hume Everett on behalf of Marathon. It seems a shocking thing, it's the first time in my experience in practicing before administrative boards, while litigation was in process and the Commission was considering these matters and things, that a memorandum has been distributed to participants in which it apparently discloses an entire lack of good faith on the part of Consolidated.

"We are confident," reading from one exhibit, "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."

If that isn't playing fast and loose with this Commission, and overwhelming evidence that the Consolidated is not in good faith in connection with this matter, it is indeed strange.

The Commission will recall that day after day we sat here waiting for Consolidated to prove its case. How did it prove its case? It attempted to prove its case on cross examination of the witnesses produced by El Paso, by Pubco, by the other defendants in the case. That was the technique they used then. It was certainly an inexpensive and a very economical technique and procedure, but I was dismayed at that because it was contrary to every undertaking I had ever seen before any administrative body. Now they're using the same technique here. They come in here, and Mr. Kellahin let the cat out of the bag a minute ago by confessing to the Commission that they were confronted with a dilemma, "What are we going to do in the face of the decision of the Commission based," as he says, "on the Jalmat decision of the Supreme Court of New Mexico?" "What are we going to do?" "Are we going to the expense of hiring DeGaullier or Naughton or some other nationally known concern, which will cost us a great deal of money, which will make

an examination of the Basin and bring in their returns and take it to the Commission, or are we going to ask the Commission to resort to its statutory power of issuing subpoenas duces tecum and get every oil company that we can to come in and lay the cards on the table and see everything that they have, and let's try to prove our case by that back door method?"

I'm only saying to this Commission that that isn't within the jurisdiction of this Commission. This Commission is not going to lend itself and be a party to that sort of a procedure. Based on that, we have filed very briefly here a Motion to Quash Subpoena Duces Tecum. When I dictated that to my stenographer, "What do you mean, 'quash'? Don't you think that word should be 'squash'?", and I think perhaps we should say "Motion to Squash."

We respectfully show to the Commission in our Motion:

"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." That is correct. They had their day in court. They examined and they examined and they cross examined and re-cross examined and I thought the Commission was extraordinarily lenient in allowing and extending the scope of the examination and the cross examination so as to get all the facts before the Commission.

"2. That all reports have been filed with the Commission

and are available and have been available to Consolidated since the time of filing." All of these exhibits, all those reports are here. All they need to do is to study them. We gave them copies of most of them.

"3. That the subpoena is general in terms and not specific, and in substance and effect is nothing more than a 'fishing expedition'." That's a trade mark of lawyers when they can't think of anything else to say, they say that a demur is like a Mother Hubbard, it covers everything and touches nothing, or that it is a fishing expedition. That's what this is. They are casting a line into the water to see if they can catch something, and if we will produce before them our confidential reports and all our data that we've gathered together at great cost and expense, and which is our property, we think it manifestly unfair that this Commission should say we should bring in everything. It's impossible for us to do it.

Now this very same question is up before a sub-committee of the United States Senate now, in which they are attempting to get the steel companies to produce their cost records. Well, manifestly that's an extraordinary request being made by that sub-committee. If the steel companies disclose their costs of making steel, producing steel in the United States, that will be telegraphed and telephoned and cabled all over the world. Our German competitors or English competitors, our competitors in Japan will know the cost of producing steel. So, rightly I think, the steel

companies have said, "Gentlemen, that's hitting below the belt; you can't do it." We are in somewhat a similar situation. We have our own idea of estimates in the San Juan Basin on the wells in which we are interested, but supposing that some one of those well owners, with us joint owners, has got a sale on right now for the well or their interest in it, based on some idea of estimated reserves; and the deal is proceeding and we come before this Commission and say, "No, that isn't right, that guy is way off, here's what it really is, here is our estimate of it," we are in for a lawsuit. While I love to be employed by Pubco in lawsuits, I don't particularly fancy defending in that kind of a case.

"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 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." If they had proven their case in the first instance, if they could prove it, they wouldn't be here today. What they're trying to do is to come within the decision in the Jalmat case and try to impress upon this Commission that they've done that job, and they want to do it at our expense, not at their own expense, and we don't think that the Commission will tolerate it.

MR. STOCKMAR: If the Commission please.

MR. PORTER: Mr. Stockmar.

MR. STOCKMAR: I would like to make it clear that the letter Mr. Keleher referred to, which is Ohio Exhibit No. 1 in this rehearing, entitled Memorandum to Participants, was not directed as such to the participants at the prior hearing. The participants to whom this went are those who are participants in wells which Consolidated operates. I didn't want any confusion to arise there.

You will also recall the testimony of Mr. Trueblood, who repeated many times that the reason that Consolidated precipitated the prior hearing, and I started to say that again the reason is the same, was for the benefit of and the protection of these participants. It does not seem unusual to me, then, that they would be keeping these people advised, and I really don't know what Mr. Keleher meant by "flagrant thing", but it does not seem to me to be flagrant to send out a report to your partners that are helping you pay the cost of operation.

I also would like to note that the letter was written by Mr. Ladd of Consolidated, who is not a lawyer. If it should contain his construction of the Jalmat case, it certainly ought to be viewed as that, even among lawyers, there seems to be reasonable differences of opinion as to what the case may mean.

In his statement that"while we may not be able to generate approval for our proposed new formula, we will succeed in invalidating the original formula," I'm sure this arose out of discussions about the Jalmat case which casts -- well, it's not even serious

doubt to me, the Jalmat case is clear that the existing proration order for the Basin Dakota Pool is subject to attack as being founded on improper findings, and that it can be attacked and can be set aside. This may be what Mr. Ladd meant.

When he said that the net effect of this would be no proration at all, and said that this would be good since we will then go under our contracts, I don't think it can be a construction on his part that this situation would last forever. I think we can all agree that legal and practical chaos would result if there was not a good and valid order issued by this Commission to allocate production in the field. The point is that if the existing order is invalidated and we have certainly attacked it in our petition for rehearing, and intend to attack it -- if it is invalidated or found void or if it is void, which it may be under one construction of the Jalmat case, with the eminent chaos of having no proration and no order, then this Commission will be compelled to find the right answer, the best answer.

I hate to bring up Goliath and David again here, but that situation still obtains. Our efforts made at the last hearing were not inexpensive to Consolidated. The efforts that we hope to make here are not inexpensive to it, and for its size relatively, they are quite expensive. We don't consider it a back door approach to try to present to you the best and most available data so that you have it and can make up your minds and produce the best order possible.

Now as far as these particular subpoenas are concerned, we are not asking the Commission to do something unlawful, to bring a man forward illegally to capture documents and papers that you are not entitled to have. We are simply asking you, and we do so request and we hope your rulings on this, that insofar as it is lawful for these people to be brought here to testify, to bring reserve data and calculations, that that be done; and certainly to the extent that they have it here, that that be made available. I hope that if something is unlawful that it would also be under the law of New Mexico impracticable to obtain. That is the test that we are seeking to meet. If it can be lawfully brought forward, we are making lawful efforts to obtain it. If it's unlawful, then they need not be compelled to bring it forward. Thank you.

MR. PORTER: At this time we'll hear arguments on Aztec's Motion. Mr. Swanson.

MR. SWANSON: Assuming the Commission is satisfied with the agreement reached between Consolidated and Aztec as to the production of Mr. Joe Salmon at this time, we have no further comments on that subpoena.

Aztec's primary concern in this matter is that the subpoena served on L. M. Stevens was in three parts. It required the production of, in substance, all available information dealing with the reserves in the Dakota Basin Pool in Aztec's possession with respect to wells which it owned or operated. The second portion

was a list of some thirty wells that they specifically wanted this information on. The third part was the shotgun category that's been discussed before.

We object primarily to the production of expert opinion as it relates to Aztec's reserve studies. This information has been gathered over a period of years at considerable expense. We have a trained staff that that's their primary purpose -- to develop reserves of the company. We feel it would be a serious handicap to us to have any party interested in an area where we have reserves be able to come before this body and compel us to produce those reserve studies. For one thing, they point to other adjoining areas of interest. It would be a good way to decide what your exploratory program might be in that area. We feel that this would be a real burden on us.

Rule 1212 of the Conservation Commission's Rules and Regulations provides that the rules of evidence to be followed in hearings before it shall essentially be those that prevail at the trial before a court without a jury. Of course, these rules can be relaxed at the Commission's discretion. These rules that apply in New Mexico are patterned after the Federal rules. There are several that are very important here. Rule 33 deals with the interrogatories, which of course are written questions propounded to an opponent for his answers. The case of Bugen v. Friedman holds that "Interrogatories as to opinions, conclusions, and legal contentions are improper."

Rule 34 deals with the production of documents for an opposing party's examination in the hope that he can obtain information that he would use as his evidence in the trial of a case. Colonial Airlines v. Janas says: "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." Rule 43 deals with evidence at the trial itself. Under this Rule, the case of Miller v. Sun Chemical Corporation holds that a party will not be required to compile information from his records.

Back again to Rule 33, dealing with interrogatories, the case of Zenith Radio Corporation v. Radio Corporation of America, 106 Federal Supplement 561, states that: "Interrogatories need not be answered where the information sought is otherwise available to interrogating party."

Attached to a letter Aztec received from Consolidated was the schedule that I believe Mr. Keleher referred to and that Mr. Everett also pointed out. I think we're all familiar, basically, with what it required. We examined that schedule; of course, that is the same schedule that was attached to their application for rehearing. All the matters that they asked for, with the exception of reserve calculations, are available to Consolidated from other easily accessible sources. Aztec has released its logs to the Well Reproducing Service, and it would be possible for Consolidated to order them if they desire to.

The information with regard to pressures and initial

deliverabilities, present deliverabilities, all the other items on that list are available from several sources. With respect to Federal wells, they are a part of the public record of the Geological Survey. I'm confident that most of that information is a part of the public record of the Commission itself.

There's possibly one category that's not covered. That's average permeability data. That's only available from an analysis of a core. If Consolidated should feel that their study essentially must include this information, I don't think Aztec would have any serious objection to furnishing the information they have with respect to the wells that have been cored.

In substance, it's our feeling that Consolidated rather has elected not to make an independent study of their own of the reserves in this area, and is hopeful of establishing it in evidence by requiring us to come forward. We resist very strenuously their attempt to have us testify as to what our reserve calculations are. With respect to some of our wells, we don't own them one hundred percent and we do not feel that we are at liberty to deliver any of this information without the permission of the parties who do own an interest.

One other case I would like to call the Commission's attention to, this was under Rule 33, and in my opinion it sums up this whole situation. This is the case of Drake v. Pycope, Inc., 96 Fed.Supp. 331. It says simply, "A party may not require his

opponent to prepare his case for him."

MR. PORTER: Mr. McGrath.

MR. McGRATH: I just want to correct Mr. Swanson's statement. Our records are not public. They are confidential. Our well files and logs are confidential, they're not public.

MR. KELEHER: Are they subject to subpoena by this Commission?

MR. McGRATH: I don't know, I'm not a lawyer. You'll have to go to Washington.

MR. PORTER: Mr. Kellahin.

MR. KELLAHIN: If the Commission please, much of what has been said by Mr. Swanson, I think the argument that we made in response to the other arguments covers it. We keep coming back to this confidential and private information. I would like to call the attention of the Commission further to 58 American Jurisprudence, Section 32, under the subject of Witnesses, where it says that: "It is a general rule that a witness possessing knowledge of facts material to the vindication of the rights of another may be compelled by judicial process to appear and give evidence in behalf of that other party, notwithstanding the evidence thus coerced may uncover the witness's private business."

We are talking about vindicating the rights of Consolidated under the contention that under the present formula our correlative rights are not being protected.

"This rule is also generally held applicable when the

information sought is contained in books and papers. Accordingly, it has been held that it is no ground for the refusal of a witness to produce books and papers, when required by lawful authority, that they are private. The duty of witnesses to disclose the details of their private business for the benefit of third persons, when required in the administration of justice, is one devolving on them as members of a civilized community."

I think Mr. Stockmar stated that we are legally entitled to this information; we want it. If we are not legally entitled to it, that is the determination that must be made by the Commission. If we are not legally entitled to it, we don't need it. We are prepared to go forward with testimony in this case despite the observations that have been made that we're trying to get somebody else to build our case. It is our position that we must make every possible effort, every lawful effort to get before this Commission the reserve information upon which it must make its finding. If that information is not lawfully obtainable, then we have discharged our duty in attempting to bring everything to the attention of the Commission insofar as it may practicably be done, and it certainly is impractical to do it if it's unlawful.

Mr. Swanson seems to confuse the subpoena with the letters that were sent out by Consolidated asking for some voluntary information. The subpoena doesn't go into the question as to core analysis or any of that other information. They keep talking about what we asked for. We asked for reports, determinations or

tabulations of initial and subsequent reserve calculations. That doesn't include the well file. It doesn't include the core analysis, it doesn't include any of those things that they are talking about as being secret and confidential information. The only thing we asked for was their reserve calculations.

MR. SWANSON: Have I another moment?

MR. PORTER: Yes, you have, Mr. Swanson.

MR. SWANSON: Mr. Kellahin related that the list of information I referred to that was attached to the application for rehearing and the letter that Aztec got was not requested in their subpoena. I neglected to take a copy of our subpoena with us when I moved to that position.

Item 1 of the subpoena lists the specific items that are set in that schedule. I will read that into the record if that's necessary, I don't believe it is. Each of the headings are specifically asked for in item 1 of Aztec's subpoena. The only other comment I think appropriate is that Mr. Kellahin has suggested that we are inferring the big objection is that they expect us to prepare their case for them. The point there to be considered, I think, is that it's completely within their prerogative to advance whatever evidence they choose in this hearing. It may be necessary if they put into evidence figures with regard to Aztec's reserves, or any other party's, we'd feel compelled to rebut them with testimony of our own. We do not feel it is appropriate at this time for us to produce whatever testimony we might wish to make at a later

date.

MR. PORTER: We have one more Motion to consider which we will immediately after the recess. The hearing is now recessed until 1:00 P.M.

(Whereupon, the hearing was recessed at 12:00 o'clock.)

AFTERNOON SESSION

(Whereupon, the hearing was resumed at 1:00 o'clock P.M.)

MR. PORTER: The hearing will come to order. At this time we will hear argument on the Motion on behalf of Mr. Eaton. Mr. Malone.

MR. MALONE: May it please the Commission, Ross Malone, Atwood and Malone, Post Office Box 700, Roswell, New Mexico, appearing on behalf of George Eaton, to whom a subpoena duces tecum was directed; and during the noon hour I was requested also to enter an appearance on behalf of Frank Renard of British American Oil Producing Company, who is an engineer in the Farmington Office of that company, to whom a subpoena duces tecum was likewise directed, and to say on his behalf that he adopts the Motion to Quash filed on behalf of George Eaton in support of his position.

If it please the Commission, there are two preliminary matters I would like to mention first. It's apparent from the argument we have heard already that there are a great many matters of fact which will enter into the Commission's determination which up to now and now, attorneys have been testifying to, not under oath. Should this question become of sufficient importance, it, of

course, would be necessary for these facts that have been stated by counsel to appear in the record through a sworn witness. I assume, if we should ever reach that point, the Commission would afford us an opportunity to put a witness on the stand to substantiate the statements which I would make.

We would like to just know that that could be done if it should ever be necessary.

MR. PORTER: Mr.Malone, if there is any question of facts which the Commission feels it should consider, then we'll take sworn testimony.

MR. MALONE: I don't expect to make any further statements than the other counsel who have argued, but I do think we should have that in the record.

Secondly, I would request the Commission to modify my Motion to show that service was made on Mr. Eaton on September 11, which is disclosed by the return on file with the Commission, rather than September 10th which was the date on which I thought service was made at the time the Motion was filed.

Finally, I would say that Pan American and its employees, as well as British American and its employees, are in somewhat a different position here than the employees of the El Paso Natural and the Pubco and the other companies that actively participated in the prior hearing and presented evidence, and intend to present evidence in this case. Pan American entered an appearance solely for the purpose of making a statement at the conclusion of the last

hearing and has entered no appearance in this rehearing. In other words, we are somewhat more in the position of an innocent bystander than the actual protagonists who were involved in the controversy actively and putting on testimony from their records.

As we view it, the question here is not, does the Commission have the power to reach the type of information these subpoenas duces tecum attempt to reach. As far as Pan American is concerned, we recognize that the Commission has that power. There is required for the exercise of it valid action on the part of the parties who seek to initiate the use of the Commission's power, and the questions before the Commission here, as we view it, are (1), has valid action been taken by Consolidated to exercise the power of the Commission in this respect, and (2), as agreed by counsel in its statement, shall the Commission exercise its discretion in this situation to require the production of this material.

Now the first ground stated in our Motion is directed to the fact that examination of the subpoena duces tecum served on these two men, and the file of the Commission, indicates that these subpoenas were issued by the Commission at the request of Consolidated in blank, that is to say, at the time they went out of the possession of the Commission, they were blank subpoenas, not directed to anybody and not specifying any material which was to be produced. Those portions of the subpoenas appear to have been and I believe were filled in by counsel for Consolidated after the subpoenas had left the possession of the Commission. We believe that under the

law this does not constitute a valid exercise of the subpoena power of the Commission, and that for that reason the subpoenas are void.

The Statute, 65-3-7, which gives this Commission power to issue subpoenas, says: "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." The Commission, or any member, shall issue a subpoena to any person, but at the time these subpoenas were signed at the request of counsel and delivered out of the possession of the Commission, they were perfectly blank. They were not a subpoena directed to anybody, and the subsequent completion of them by counsel cannot, as we view it, make them a valid exercise of the authority of the Commission.

We rely for that proposition on the fact that there is a specific rule of the District Courts of New Mexico specifically authorizing the Clerk to issue a blank subpoena. Mr. Kellahin agreed in argument that those rules are not applicable to this Commission. The Federal Rules of Civil Procedure, Rule 81 (e), from which this rule is copied, has an express provision as follows:-- To what proceedings these rules are applicable, and the Federal Rules say in 81 (e), "These rules apply, (1), to proceedings to compel the giving of testimony or the production of documents in accordance with a subpoena issued by an officer or agency of the

United States."

There is no provision in the New Mexico Statute saying these rules shall be applicable to action by any administrative agency of the State of New Mexico. The Legislature gave this power to the Commission. They did not give counsel the power to issue a subpoena duces tecum. At the time this subpoena left the Commission it was blank and void. The subsequent filling in of it by counsel does not constitute the issuance by the Commission of a subpoena. As we view it, for that reason the subpoena is void and should be quashed.

Secondly, we have alleged that the subpoena is unreasonable in that Mr. Eaton, and I believe I'm correct in saying Mr. Renard also were allowed forty-eight hours from the time the subpoena was served in Farmington within which to comply with the blanket shotgun provisions of this subpoena and to present themselves in Santa Fe to deliver the material. Now even if they had had it in their custody and been able to do it, which they did not, this would not have constituted a reasonable exercise of the subpoena power. The law in that connection at 97 C.J.S., page 369, is stated as follows: "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 nonattendance will be excused on comparatively slight

grounds, although the shortness of the notice is not per se an excuse."

We respectfully submit, with the Commission's knowledge of the material that was included in the shotgun subpoena that was served on the witnesses, that forty-eight hours in which to assemble and present that in Santa Fe is an unreasonable exercise of the subpoena power and runs afoul of the constitutional prohibition against unreasonable searches and seizure.

The third ground which we assert is that the subpoena itself does not meet the requirements of, the established legal requirements of a subpoena duces tecum. That exercise of the authority of a court or Commission is for the purpose of requiring the production of specific documents, it is required that there be a description of the documents to be produced in order that when the person comes in, it can be determined with certainty that he has or he has not complied with the subpoena.

I respectfully suggest that it's impossible to read these subpoenas and ever determine whether a man has complied with it, because of their broad shotgun character. Whether the subpoenas are reasonable or unreasonable in this respect is to be established in the light of some well-established standards to which I would like to refer briefly.

In 97 C.J.S. 377 this statement appears: "...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 determining 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 381, "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 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."

We respectfully submit that you cannot read the three paragraphs of this subpoena without determining that it does not specify any particular documents and is just a shotgun demand that you go out and collect up anything that might be in this general area and present it all to the Commission.

It says at page 382 of the same authority, "A subpoena duces tecum may not be used for the purposes of discovery....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 seems pretty apparent that that's exactly what Consolidated is doing. They want all this material brought in here so they

can look at it and see whether something of value may not show up therefrom.

Finally, a requirement which is recognized in all cases that I have read is that a subpoena duces tecum must be for a limited time. In other words, you can't just go in and say,"Well, produce everything you ever owned on a certain subject," because it is oppressive and unreasonable. It's impossible to determine whether the subpoena has been complied with. There's no limitation on the time of these subpoenas. These companies or these individuals, if they had it in their possession, are required to produce anything that they ever had dealing with these questions that are outlined on the subpoena.

On that subject, it has been said, "The limitation with respect to time in a subpoena duces tecum is sufficient if, where it specifies documents, a reasonable period of time is specified and it states with reasonable particularity the subjects to which the documents relate". I believe I gave you that citation, it is from 97 C.J.S. at page 396.

Referring to the East Sixty-fifth Street Corporation v. Ford Motor Company, 27 Fed. Supp. 37, "Some time limitation is usually required to prevent a subpoena duces tecum from being too broad in respect to the period covered."

I respectfully suggest to the Commission that this subpoena is fatally defective in that additional respect.

My time is almost up, and without reading additional

authorities which I have, I would like to point out only two additional things. The first is that I did not include in the return of Mr. Eaton, or in Mr. Renard's oral return the statement that these documents are not in his possession. I had assumed that would be a subject of testimony whenever the witness was called, but I will state and am prepared to prove that these documents specified are not and were not at the time the subpoena was served in the custody of either of these men, both of whom are engineers employed in the offices of their companies at Farmington. Each has access to these for the performance of his duties with the company. He does not have the custody of them or the responsibility for them.

Under the authorities read by Mr. Federici, the subpoena duces tecum must be directed to the person who has the responsibility for the records and the power to deliver them.

Finally, I would say that I'd like to suggest to the Commission that this is an extremely important decision that is to be made on these applications. I've heard some of the counsel in the case say, and I know it's true, that this is the first time the power of this Commission to issue a subpoena duces tecum has ever been exercised. Certainly it is the first time on the scale it is here sought to be used. The decision as to how that power is to be exercised is going to establish some precedents that are going to be awfully important to the industry and to the Commission.

The Commission knows and every man that's employed by an oil company who is in this room, I believe, would get on the witness stand and testify that the stock in trade of an oil company, the most important information that they use, once discovery has been obtained, is the reserve calculations, because on those they determine whether to buy or sell properties, whether to develop or not to develop properties; they make the decisions which are crucial to the existence of the companies. Because of that, these reserve figures are the most highly confidential information that is in the possession of the Engineering and Production Departments of every oil company.

In the case of Pan American, that information cannot be disclosed to anyone other than an employee of the company requiring them for the performance of his duties without the consent of the Vice President in charge of the West Texas-New Mexico Division. That's how secret these reserve figures are.

For the Commission to here establish a precedent in a situation of this kind requiring the production of this information would invite every person who has any desire to enter into a financial transaction with an oil company on some acreage to file a motion on the proration formula to establish a new formula, and immediately issue a subpoena such as has been issued here, and get all the information that all the companies have in that area on that highly secret question.

Finally, that information, as has been pointed out by

some of the other companies, is information that belongs not alone to us, but to us jointly with our partners in a great many wells. We are under strict limitation as to what we can do with it as far as our partners are concerned. They have not been subpoenaed in here to have a word in saying what should be done.

I would say to the Commission that power to issue the subpoena is not the important question here, but whether under all of the circumstances that I have suggested, the exercise of this power on a broad shotgun subpoena like this in circumstances like this constitutes a reasonable search and seizure, because certainly it is a search and a seizure if these subpoenas are enforced.

Thank the Commission very much.

MR. PORTER: Mr. Kellahin.

MR. KELLAHIN: If the Commission please, it would seem that Pan American is in for one purpose and out for another, but I don't think that's material here. We're really not talking about Pan American's records but whether George Eaton has them and is willing to produce them.

The attack having been made on the subpoena power of the Commission, the section of the Statute referred to by counsel and quoted in that connection, this is substantially the same power to issue subpoenas which is vested in District Courts in the State of New Mexico to subpoena witnesses and compel their attendance and production of evidence; the same power that is

vested in the other administrative agencies of the State and the lower courts as well. In the exercise of that power, there is a statute governing, I mean something more than just a rule of court governing the issuing of subpoenas in blank, which statute is called to the attention of the Commission, and the Assistant Attorney General, who was present at the time before the subpoenas were issued.

Admittedly, two of the subpoenas bore the names and the information requested at the time they were executed by the Commission. The remainder were issued in blank, simply for the reason that there was no way of knowing on whom we could get service within the State of New Mexico; and for that reason we had to make inquiry and get them served.

Now this question of sufficient time in which to prepare the material required may or may not be a valid argument. It is, in fact, one of the arguments that Mr. Malone has advanced at this stage. I don't think it's necessary to inquire into it, but in regard to the defense and certainty of the subpoena itself, I think we should first remember that we're not dealing with lay persons in this field. Every person we have subpoenaed is an expert. He knows exactly the meaning of every item specified in the subpoena duces tecum. This is particularly true in the case of the subpoena served on George Eaton, in that in addition to the reports, data sheets, and other information that was required, all of which he knows and can identify, we also

require any reports, determinations and tabulations on reserve calculations for specified wells. The reason for specifying those wells, as will come out later in the hearing, is to supplement evidence which is already in the record.

We have been accused of going on a fishing expedition constantly in the argument on these subpoenas. That is, of course, a normal argument on the subpoena duces tecum. What we have done here, what we have consistently tried to present to this Commission is, the subpoenas were issued for the sole purpose of getting before this Commission the information that New Mexico Statutes require the Commission to have in order to make a valid proration order prorating gas in the Basin Dakota Pool. That's the reason for the subpoenas and that's the basis for, the sole approach to this rehearing. We have taken this approach as a means of getting all of the valid information that we can get for the benefit of the Commission.

Now if the Commission is going to give way to the arguments that it will not require this information because of its secret and confidential nature, certainly that must be done on the basis that it is immaterial for the Commission to get this information before it for consideration in prorating gas in the pool.

MR. PORTER: That concludes the arguments on the Motions before the Commission. We are going to take a thirty-minute recess.

(Whereupon,a recess was taken.)

MR. PORTER: The hearing will come to order, please. I hope you will excuse us for taking a little longer than thirty minutes. The Commission has been in session and present with our legal counsel. We realize the importance of the Motions that have been made here today, Motions that the Commission has never had an opportunity to consider prior to this time, at least since I have been a member. We would, therefore, like some time to make a ruling on the Motions to Quash, but we'd also like to have the full participation, that is, the participation of the full membership of the Commission in rendering a decision so we can make a ruling on it. So I have a statement to read, which is the Commission's ruling at this time.

The Commission has considered the arguments of counsel present concerning the Motions, and feels that the importance of its decision precludes a ruling at this time. The Commission feels that it therefore should take this matter under advisement and continue the case to the regular November hearing. The Commission will permit all interested parties to file Memorandum Briefs within the next fifteen days. A formal ruling on the Motion will be made by the Commission as soon hereafter as is possible, and a copy of the same will be mailed to all interested parties.

The briefs are to be filed within the next fifteen days from this date. If nothing else to come before the Commission, the hearing is adjourned.

(Whereupon, the hearing was adjourned.)

STATE OF NEW MEXICO)
) ss
COUNTY OF BERNALILLO)

I, ADA DEARNLEY, Notary Public in and for the County of Bernalillo, State of New Mexico, do hereby certify that the foregoing and attached Transcript of Hearing was reported by me, and that the same is a true and correct record of said proceedings, to the best of my knowledge, skill and ability.

WITNESS my Hand and Notarial Seal this 27th day of September, 1962, in the City of Albuquerque, County of Bernalillo, State of New Mexico.

Ada Dearnley

NOTARY PUBLIC

My Commission Expires:

June 19, 1963.