IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

DAVID FASKEN,

Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

NO. 9958

Respondent-Appellee.

CERTIFICATE OF SERVICE

This will certify that on this date I served a true copy of Reply Brief by mailing such copy to:

William F. Carr, Esquire
Attorney at Law
P. O. Box 2088
Santa Fe, N. M. 87501

by first class mail with postage thereon fully prepaid.

Dated at Santa Fe, New Mexico, this 11th day of July, 1974.

ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

By: Lupe R. Valdez
Deputy Clerk

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Respondent-Appellee,	)	

APPEAL FROM THE DISTRICT COURT

OF EDDY COUNTY

ARCHER, JUDGE

APPELLANT'S REPLY BRIEF

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Cases and Statutes

* * * * *

POINT I

FINDINGS OF FACT RELIED UPON BY THE COMMISSION ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Commission apparently concedes appellant presented a prima facie case that the northern portion of the Indian Basin-Morrow Gas Pool was a separate and distinct source of supply from the southern portion of the same designated pool. (Ans. Br. 18)

The Answer Brief also admits that the appellant's testimony, through Mr. Henry, as to the existence of a water-filled trough or saddle between the north and south portions of the pool was not directly contradicted. (Ans. Br. 7) The Commission further goes on to state in their brief that the appellant's evidence was "incomplete, probably inaccurate, and manipulated." (Ans. Br. 7) If this is the case, and if the testimony contained inherent improbabilities or there was suspicious circumstances or if legitimate inferences can be drawn from other facts and circumstances that cast doubt upon the testimony, what then were these doubting circumstances that permitted the Commission to blatantly disregard appellant's testimony?

The Commission cites Mr. Staments' cross-examination. Mr. Staments asked essentially if when connecting two datum points with a contour line different people could draw different maps with the same points. (Tr. 162) Of course, Mr. Henry admitted that this could be the case. Appellant submits that it is patently obvious that geological interpretation of the shape of a formation using limited control points could be made in many, many ways. Probably the number of interpretations that can be made is limited only by one's imagination. But the fact remains in this hearing and in this case that Mr. Staments did not offer to draw the contour marks in any different fashion than that

presented by Mr. Henry.

Next, there was the cross-examination by Mr. Cooley. Mr. Cooley questioned the accuracy of some of the information gathered from Oil Conservation Commission well files. (Tr. 163-166) This information dealt with the so-called Corine Grace well and becomes important because the Grace well was a primary control in determining the existence of the water trough. (Tr. 151) Mr. Cooley did not demonstrate that in fact the information was inaccurate or in what respect the information was inaccurate or to what degree it was inaccurate but merely that it might be inaccurate. Again, we fully concede that using official state records, that could be inaccurate, but if they are, it was incumbent either upon Mr. Cooley on behalf of Corine Grace or upon the Commission to demonstrate that inaccuracy.

The other so-called suspicious circumstance was revealed during the cross-examination by Mr. Nutter. Mr. Nutter questioned Mr. Henry's analysis as to the water trough by ignoring the trace put on plaintiff's Exhibit No. 1 and redrawing the trace using a zigzag line across Exhibit 1. We submit that this signifies nothing and ignores the reality of geological interpretation. Mr. Henry was attempting to construct a cross-section using all available well information. Mr. Nutter insisted on a different interpretation but in the process ignored some wells. (Tr. 151) We submit it is not the appellant manipulating the geological information but the Commission's staff picking and choosing the evidence that suited their purposes rather than view all of the evidence as a whole.

The Commission states that their findings as to impairment of correlative rights are supported by substantial evidence. Of course, the correlative rights issue turns upon whether the

water-filled trough existed. If the water trough existed, and there is no evidence to the contrary, then Fasken was the only active operator in the northern portion of the pool and there were no correlative rights to be impaired.

The evidence presented by the appellant conclusively showed that waste was occurring by the seepage of gas out of the formation as well as into the water trough. Much to-do is made about the fact that there was supposedly no market demand for the production capacity of the northern wells and that the production in excess of market demand would be waste. (Tr. 166) The quoted testimony in the Answer Brief at page 15 ignores the complete testimony contained in the record. On page 167 of the transcript it shows that the contract with the pipeline company that purchases the gas provides that if waste is occurring appellant can force the transmission company to take additional gas or the producer is free to sell the gas elsewhere.

If there were doubtful circumstances surrounding the testimony of Mr. Henry so that it was not entitled to belief as outlined in Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964) and Medler v. Henry, 44 N.M. 275, 101 P.2d 398 (1940) they were certainly not made to appear upon a close scrutiny of the cross-examination of Mr. Henry. The cross-examination was apparently designed to make it appear that some of the information might be inaccurate, but its inaccuracy was never demonstrated. If this type of shallow cross-examination is considered by this Court sufficient to cast doubt upon evidence presented to an administrative agency or a district court then appellant believes that the concept of substantial evidence has been lost. At any hearing an agency member or cross-examiner need only ask the witness if his information could be wrong or if any given

interpretation of information might be different or if circumstances could be altered and the conclusion changed; and to such questions any candid expert witness would have to answer in the affirmative. The agency action from that point forward would be essentially unreviewable by an appellate court.

POINT II

THE COMMISSION'S ORDERS ARE INVALID BECAUSE THEY DO NOT CONTAIN ANY FINDING TO SHOW THE REASONING BEHIND THE DETERMINATION THAT WASTE WAS NOT OCCURRING.

A simple reading of Order R-4409-A and Order R-4444 (Tr. 6 and 39) will reveal what appellant complains about under this point. The magic jurisdictional findings, the prevention of waste and the protection of correlative rights, as required by § 65-3-10 NMSA 1953 and further mandate by this Court in Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962) are present. But the further requirement as expressed by this Court that the findings be sufficiently extensive to show the basis of the decision of the Commission has been ignored. Continental Oil Co. v. Oil Conservation Comm'n, supra. The review of both orders shows the Commission made findings as to contentions, possibilities and alternatives but no findings based upon hard evidence to support the order. The reason for the lack of these findings is obvious when one realizes the Commission did not put on any direct testimony.

The Commission should be required by this Court to heed the instructions of the Continental Oil Co. case, supra, and the matter should be remanded to the district court and to the Commission for the entry of proper findings. The findings that are made should also be supported by the evidence and to do this the Commission will have to put on witnesses to directly contradict the testimony of appellant or in the alternative to point out specifically and concretely where appellant's testimony is in error.

CONCLUSION

What is at issue here is whether administrative agencies may follow procedures and forms in the entry of their orders and ignore substance. By making its jurisdictional findings the Commission has been a slave to form but the findings are without substance. What sketchy findings were made on the merits of the case are not supported by substantial evidence.

Administrative hearings, because of their technical and often scientific formats, are often informal with the rules of evidence taking a backseat. This is as it should be. This does not mean however that an administrative hearing should be conducted and concluded in such a fashion that an applicant does not know what has happened to him in the denial of his application. If an agency is to deny a request by an applicant, then at least the applicant should know the real reason for the denial. Those reasons are not demonstrated in any way in this case.

Respectfully submitted,

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