[4] Section 50-13-6(2) (3) (a) (b) is couched in permissive language. It says an entrustee "may" give notice of intention to sell and after notice "may" sell. It also specifies what shall be deemed sufficient notice. It in no way indicates that the notice which is specified as being sufficient is the only notice permitted or the exclusive method. We know of no reason for holding that actual notice is not sufficient and dispenses with the notice provided for in the statute and stated to be sufficient.

[5, 6] We conclude that the proof would support a finding that the trustee had actual knowledge of the sale and this issue cannot be resolved by summary judgment. Where there is the slightest doubt as to whether a factual issue exists, summary judgment is not proper. Ginn v. MacAluso, 62 N.M. 375, 310 P.2d 1034; Brown v. King, 66 N.M. 218, 345 P.2d 748.

We have considered appellees' cross-appeal and, in view of what has been said, it is found to be without merit.

The judgment should be reversed with direction to the lower court to proceed in a manner not inconsistent herewith. IT IS SO ORDERED.

CARMODY and MOISE, JJ., concur.

CHAVEZ and NOBLE, JJ., not participating.

373 P.2d 809

CONTINENTAL OIL COMPANY, Amerada Petroleum Corporation, Pan American Petroleum Corporation, Shell Oil Company, The Atlantic Refining Company, Standard Oil Company of Texas, and Humble Oil & Refining Company, Petitioner-Appellants and Cross-Appellees,

v.

OIL CONSERVATION COMMISSION, Respondent-Appellee and Cross-Appellant,

Texas Pacific Coal & Oil Company, a Foreign Corporation, El Paso Natural Gas Company, a Foreign Corporation, Permian Basin Pipeline Company, a Foreign Corporation, and Southern Union Gas Company, a Foreign Corporation, Respondents-Appellees.

No. 6830.

Supreme Court of New Mexico.

May 16, 1962.

Rehearing Denied Aug. 20, 1962.

Proceedings on application for change of gas proration formula. The District Court, Lea County, John R. Brand, D. J., affirmed the commission's order, and an appeal was taken. The Supreme Court, Carmody, J., held that the commission's order lacked basic findings necessary to, and upon which, its jurisdiction depended; that commission should have been permitted to participate in appeal to district court; and that district court should not have admitted additional evidence.

Reversed with directions.

1. Constitutional Law ⇐62

Administrative body may be delegated power to make fact determinations to which law, as set forth by legislative body, is to be applied.

2. Mines and Minerals ⇐92.15

The oil conservation commission is a creature of statute, expressly defined, limited and empowered by laws creating it. 1953 Comp. §§ 65-3-10, 65-3-13(c), 65-3-14(b, f), 65-3-29(h).

3. Mines and Minerals ⇐92.59

Commission, prorating production, must determine, insofar as practicable, (1) amount of recoverable gas under each producer's tract, (2) total amount of recoverable gas in pool, (3) proportion that (1) bears to (2), and (4) what portion of arrived at proportion can be recovered without waste. 1953 Comp. §§ 65-3-10, 65-3-13(c), 65-3-14(b), 65-3-29(h).

4. Mines and Minerals ⇐92.60

"Pure acreage" formula, which commission had originally applied would have to be assumed valid until it was successfully attacked on application for change of proration formula. 1953 Comp. §§ 65-3-2, 65-3-3(c), 65-3-5, 65-3-10, 65-3-13(c), 65-3-14(a, b, f), 65-3-15(c), 65-3-22(b), 65-3-29(h).

5. Mines and Minerals ⇐92.59

Commission's finding, that new proration formula would result in more equitable allocation of gas production than formula in use under prior order, was not equivalent of, or proper substitute for, required finding that present formula did not protect correlative rights. 1953 Comp. §§ 65-3-2, 65-3-3(c), 65-3-5, 65-3-10, 65-3-13(c), 65-3-14(a, b, f), 65-3-15(c), 65-3-22(b), 65-3-29(h).

6. Mines and Minerals ⇐92.60

Commission's finding, that there was general correlation between deliverabilities of gas wells in pool and recoverable gas in place under tracts dedicated to said wells, was not tantamount to finding that new proration formula, based 25 percent upon acreage and 75 percent upon deliverability, was based on amounts of recoverable gas in pool and under tracts, insofar as those amounts could be practically determined and obtained without waste.

7. Mines and Minerals ⇐92.59

A supposedly valid proration order in current use cannot be replaced in absence of findings that present formula does not protect correlative rights and that new formula is based on amounts of recoverable gas in pool and under tracts, insofar as those amounts can be practically determined and obtained without waste. 1953 Comp. §§ 65-3-10, 65-3-13(c), 65-3-14(b, f), 65-3-29(h).

8. Mines and Minerals ⇐92.53

Even after pool is prorated, market demand must be determined since, if allowable

production from pool exceeds market demand, waste will result if allowable is produced; and conversely, production must be limited to allowable even if market demand exceeds that amount, since setting of allowables is necessary in order to prevent waste. 1953 Comp. §§ 65-3-3(e), 65-3-13(c), 65-3-15(e).

9. Mines and Minerals ⇐92.53

Enabling gas purchasers to more nearly meet market demand is not authorized statutory basis upon which change of allowables may be placed, and commission has no authority to require production of greater percentage of allowable, or to see to it that gas purchasers can more nearly meet market demand, unless such results stem from or are made necessary for prevention of waste or protection of correlative rights. 1953 Comp. §§ 65-3-3(e), 65-3-13(c), 65-3-15(e).

10. Administrative Law and Procedure ⇐485, 486
Mines and Minerals ⇐92.59

Formal and elaborate findings are not absolutely necessary, in proration case, but nevertheless basic jurisdictional findings, supported by evidence, are required to show that commission has heeded mandate and standards set out by statute.

11. Administrative Law and Procedure ⇐486

Administrative findings by expert administrative commission should be sufficiently extensive to show not only jurisdiction but basis of commission's order.

12. Administrative Law and Procedure ⇐673

Where public interest is involved, administrative body is proper party to judicial appeal calling in question its exercise of an administrative function.

13. Mines and Minerals ⇐92.49

The two fundamental powers and duties of commission in proration matters are prevention of waste and protection of correlative rights; and prevention of waste is of paramount interest, with protection of correlative rights being interrelated and inseparable from it. 1953 Comp. §§ 65-3-2 et seq., 65-3-10, 65-3-22(b).

14. Mines and Minerals ⇐92.54

Property right of owner of natural gas is not absolute or unconditional and consists of merely (1) opportunity to produce, (2) only insofar as it is practicable to do so, (3) without waste, (4) a proportion, (5) insofar as it can be practically determined and obtained without waste, (6) of gas in pool.

15. Mines and Minerals ⇐92.59, 92.61

Protection of correlative rights depends upon commission's findings as to extent and limitations of property right of each owner, and in making such findings commission acts in an administrative capacity, and not in judicial or quasi-judicial capacity, and therefore commission is entitled to participate in appeal challenging proration order. 1953 Comp. §§ 65-3-2 et seq., 65-3-10, 65-3-22(b).

16. Mines and Minerals ⇐92.59, 92.64

Oil conservation commission cannot perform judicial functions; but neither can court perform administrative one; and net effect of court's admission and consideration of additional evidence, on appeal taken from proration order, was to perform administrative function.

17. Constitutional Law ⇐74
Mines and Minerals ⇐92.4

Insofar as statute purported to allow district court, on appeal from oil conservation commission's proration order, to consider new evidence, to base its decision on preponderance of evidence, or to modify orders of commission, statute was void as unconstitutional delegation of power. 1953 Comp. § 65-3-22(b); Const. art. 3, § 1.

18. Administrative Law and Procedure ⇐305

Administrative bodies, however well intentioned, must comply with law.

Atwood & Malone, Hervey, Dow & Hinkle, Roswell, Kellahin & Fox, Santa Fe, for appellants.

Hilton A. Dickson, Jr., Atty. Gen., Oliver E. Payne, Sp. Asst. Atty. Gen., Santa Fe, for appellee and cross-appellant.

Campbell & Russell, Roswell, for Texas Pacific Coal & Oil Co.

Ray C. Cowan, Hobbs, Hardie, Gramling, Sims & Galatzan, El Paso, Tex., for El Paso Natural Gas Co.

Robert W. Ward, Lovington, for Permian Basin Pipeline Co.

CARMODY, Justice.

Appellants seek to reverse the judgment of the district court, which, on appeal, affirmed a contested order by the appellee commission.

Appellants are seven of the producers of natural gas in the Jalmat Pool, and the appellees, in addition to the Oil Conservation Commission, consist of one of the producers in the same field and three pipeline companies which take gas from the field. The Oil Conservation Commission, as appellee, is also a cross-appellant on a question which will later be discussed.

The law creating the Oil Conservation Commission was originally enacted as Ch. 72, Sess.Laws of 1935, which, as amended, is now § 65-3-2 et seq., N.M.S.A.1953. It is a compliment to the members of the commission and the industry that, throughout the years, this is the first case to reach this court concerning the merits of any controversy determined by the commission. The parties were, however, before us in State ex rel. Oil Conservation Commission v. Brand, 1959, 65 N.M. 384, 338 P.2d 113, wherein the appellees sought, in an original action, to prohibit the trial court from receiving additional evidence other than that which had been considered by the commission. Upon our denial of pro-

hibition, the trial court considered the record before the commission, heard additional evidence, and confirmed the commission's order. The trial court, at the time of the trial, prohibited the appellee—cross-appellant commission from participating as an adverse party, and this is the subject of the cross-appeal.

In 1954, the commission prorated the Jalmat Pool in Lea County, New Mexico. At that time, the natural gas allowables for the individual wells were determined by the use of the "pure acreage" formula. Under such a system, each producer is allowed to produce his portion of the total allowable, based upon the acreage of his tract as compared to the total acreage overlying the pool or gas reservoir. In January 1958, following the application of appellee, Texas Pacific Coal & Oil Company, seeking termination of proration, or, alternatively, a change of the gas proration formula, the commission held a hearing, as a result of which it determined to continue proration but did grant the change of the formula. Order No. R-1092-A was issued by the commission, which directed that the method of computing allowables in the Jalmat Pool should be changed to one based upon 25% acreage and 75% deliverability. Appellants sought a rehearing and, at its conclusion, the commission affirmed Order No. R-1092-A by Order No. R-1092-C. The appeal to the district court and here followed, under the provisions of § 65-3-22(b), N.M.S.A. 1953 Comp.

It should be observed at this time that, although the appeal under the statute must be from the order entered by the commission on rehearing, actually the commission, with one minor change, merely affirmed its original order and declared that the same should remain in full force and effect. Therefore, from a practical standpoint, it is the validity of Order No. R-1092-A that is in issue.

Appellants urge that the order of the commission is unlawful and unreasonable in depriving appellants of their property without due process of law, in that: (1) The order does not rest upon an authorized statutory basis; (2) the order is not supported by substantial evidence; and (3) the order is incomplete, vague and indefinite.

For clarity, we hereinafter quote the statutes, or portions thereof, with which we are concerned on this main appeal:

"65-3-2. Waste prohibited.—The production or handling of crude petroleum oil or natural gas of any type or in any form, or the handling of products thereof, in such manner or under such conditions or in such amounts as to constitute or result in waste is each hereby prohibited.

"65-3-3. Waste—Definitions.—As used in this act the term 'waste,' in addition to its ordinary meaning, shall include:

"* * * * * *

"(c) The production in this state of natural gas from any gas well or wells, or from any gas pool, in excess of the reasonable market demand from such source for natural gas of the type produced or in excess of the capacity of gas transportation facilities for such type of natural gas. The words 'reasonable market demand,' as used herein with respect to natural gas, shall be construed to mean the demand for natural gas for reasonable current requirements, for current consumption and for use within or outside the state, together with the demand for such amounts as are necessary for building up or maintaining reasonable storage reserves of natural gas or products thereof, or both such natural gas and products.

"* * * * * *

"65-3-5. Commission's powers and duties.—The commission shall have, and it is hereby given, jurisdiction and authority over all matters relating to the conservation of oil and gas in this state, and of the enforcement of all the provisions of this act, and of any other law of this state relating to the conservation of oil or gas. It shall have jurisdiction and control of and over all persons or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas.

"* * * * * *

"65-3-10. Power of commission to prevent waste and protect correlative rights.—The commission is hereby empowered, and it is its duty, to prevent the waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the commission is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof.

"* * * * * *

"65-3-13. Allocation of allowable production in field or pool.—* * *

"* * * * * *

"(c) Whenever, to prevent waste, the total allowable natural gas production from gas wells producing from any pool in this state is fixed by the commission in an amount less than that which the pool could produce if no restrictions were imposed, the commission shall allocate the allowable production among the gas wells in the pool delivering to a gas transportation facility upon a reasonable basis and recognizing correlative rights, and shall include

in the proration schedule of such pool any well which it finds is being unreasonably discriminated against through denial of access to a gas transportation facility which is reasonably capable of handling the type of gas produced by such well. In protecting correlative rights the commission may give equitable consideration to acreage, pressure, open flow, porosity, permeability, deliverability and quality of the gas and to such other pertinent factors as may from time to time exist, and in so far as is practicable, shall prevent drainage between producing tracts in a pool which is not equalized by counter-drainage. In allocating production pursuant to the provisions of section 12(c) the commission shall fix proration periods of not less than six [6] months. It shall determine reasonable market demand and make allocations of production during each such period, upon notice and hearing, at least 30 days prior to the beginning of each proration period. In so far as is feasible and practicable, gas wells having an allowable in a pool shall be regularly produced in proportion to their allowables in effect for the current proration period. * * *

"* * * * * *

"65-3-14. Equitable allocation of allowable production—Pooling—Spacing. —(a) The rules, regulations or orders of the commission shall, so far as it is practicable to do so, afford to the owner of each property in a pool the opportunity to produce his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practically determined, and so far as such can be practicably obtained without waste, substantially in the proportion that the quantity of the recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas or both in the pool, and for this purpose to use his just and equitable share of the reservoir energy.

"(b) The commission may establish a proration unit for each pool, such being the area that can be efficiently and economically drained and developed by one [1] well, and in so doing the commission shall consider the economic loss caused by the drilling of unnecessary wells, the protection of correlative rights, including those of royalty owners, the prevention of waste, the avoidance of the augmentation of risks arising from the drilling of an excessive number of wells, and the prevention of reduced recovery which might result from the drilling of too few wells.

"* * * * * *

"(f) After the effective date of any rule, regulation or order fixing the allowable production, no person shall

produce more than the allowable production applicable to him, his wells, leases or properties determined as in this act provided, and the allowable production shall be produced in accordance with the applicable rules, regulations or orders.

"65-3-15. Common purchasers—Discrimination in purchasing prohibited.— * * *

"* * * * * *

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

"* * * * * *

"65-3-29. Definitions of words used in act.— * * *

"* * * * * *

"(h) 'Correlative rights' means the opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practically determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy."

(The similarity of this section and § 65-3-14(a) is to be noted, although not of consequence to this decision.)

(It is also of interest, although not determinative, that the original act (Ch. 72, Laws 1935) was bottomed almost entirely upon the theory of prevention of waste, and it was not until the passage of Ch. 168, Laws 1949, that the legislature saw fit in the various sections, some of which are set out above, to add the language relating to the protection of "correlative rights" and to define the term.)

The order of the commission was based upon certain findings, only the following of which relate to the controversy in issue:

"(5) That the applicant has proved that there is a general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the [recoverable] gas in place under the tracts dedicated to said wells, and that

the inclusion of a deliverability factor in the proration formula for the Jalmat Gas Pool would, therefore, result in a more equitable allocation of the gas production in said pool than under the present gas proration formula." (The word "recoverable" in brackets above is the only change made by the Commission by its affirmatory Order No. R-1092-C.)

"(6) That the inclusion of a deliverability factor in the proration formula for the Jalmat Gas Pool will result in the production of a greater percentage of the pool allowable, and that it will more nearly enable the various gas purchasers in the Jalmat Gas Pool to meet the market demand for gas from said pool.

"(7) That the allowable gas production in the Jalmat Gas Pool should be allocated to the non-marginal wells in said pool in accordance with a proration formula based on seventy-five per cent (75%) acreage times deliverability plus twenty-five per cent (25%) acreage only."

We have not overlooked the commission's Finding No. 3, which is the only one mentioning "waste," but this particular finding related to the commission's refusal to terminate proration in the pool, and, in context, did not apply to the method of computing allowables.

[1] Proceeding to appellants' argument that the order does not rest upon an authorized statutory basis, it should be initially recognized that an administrative body may be delegated the power to make fact determinations to which the law, as set forth by the legislative body, is to be applied. See, Opp Cotton Mills v. Administrator, 1941, 312 U.S. 126, 657, 61 S.Ct. 524, 85 L.Ed. 624, in which it is said:

> "The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."

[2] The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it. The commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, but the basis of its powers is founded on the duty to prevent waste and to protect correlative rights. See, § 65-3-10, supra. Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights.

[3] The commission was here concerned with a formula for computing allowables, which is obviously directly related to correlative rights. In order to protect correlative rights, it is incumbent upon the commission to determine, "so far as it is practical to do so," certain foundationary matters, without which the correlative rights of the various owners cannot be ascertained. Therefore, the commission, by "basic conclusions of fact" (or what might be termed "findings"), must determine, insofar as practicable, (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*. That the extent of the correlative rights must first be determined before the commission can act to protect them is manifest.

The practical necessity for findings such as those mentioned is made evident, under the provisions of § 65-3-14(b) and (f) (pertaining to allocation of allowable production) and § 65-3-29(h) (defining "correlative rights"). Additionally, it should be observed that the commission, "in so far as is practicable, shall prevent drainage between producing tracts in a pool which is not equalized by counter-drainage," under the provisions of § 65-3-13 (c).

The findings and conclusions of the commission, contained in the order complained of, lack any mention of any of the above factors. The commission made no finding as to the amounts of recoverable gas in the pool, or under the various tracts; it made no finding as to the amount of gas that could be practicably obtained without waste; it made no finding concerning drainage; it made no finding that correlative rights were not being protected under the old formula, or at least that they would be better protected under the new formula. There is no indication that the commission attempted to do any of these things, even to the extent of "insofar as is practicable."

All of the above factors were in issue before the commission, and are on appeal because they were all raised in the appellants' application for rehearing.

[4] We will assume that the former "pure acreage" formula is valid until it is successfully attacked. Hester v. Sinclair Oil & Gas Company (Okl.1960), 351 P.2d 751. The attack in the instant case has failed. The commission made no finding, even "insofar as can be practically determined," as to the amounts of recoverable gas in the pool or under the tracts. How, then, can the commission *protect* correlative rights in the absence of such a finding?

> "However, simply stated, plaintiffs are adversely affected by an order which failed to include a finding of the jurisdictional fact upon which its

issuance is conditioned by the legislature, and the issuance of which order plaintiffs opposed in the preceding hearing on the ground that the Commissioner had no power to issue same. For the order is not valid; and in this instance does not negative the 'net drainage' and loss of their 'just and equitable share' of production which plaintiffs claim its issuance will cause them, and which jurisdictional facts were requisites to the validity of the order." Hunter v. Hussey (La.App. 1956), 90 So.2d 429, 441.

[5-7] Referring to the commission's finding No. 5, part of which is to the effect that the new formula will result in a "more equitable allocation of the gas production in said pool than under the present gas proration formula," we do not believe it is a substitute for, nor the equivalent of, a finding that the present gas proration formula does not protect correlative rights. Further, that portion of the same finding that there is a "general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the recoverable gas in place under the tracts dedicated to said wells" is not tantamount to a finding that the new formula is based on the amounts of recoverable gas in the pool and under the tracts, insofar as these amounts can be practically determined and obtained without waste. Lacking such findings, or their equivalents, a supposedly valid order in current use cannot be replaced. Such findings are necessary requisites to the validity of the order, for it is upon them that the very power of the commission to act depends. See, Hunter v. Hussey, supra; and Hester v. Sinclair Oil & Gas Company, supra.

[8, 9] In considering finding No. 6, the record of the commission furnishes us nothing upon which to base an assumption that the finding relates to the prevention of waste, or to the protection of correlative rights. We find no statutory authority vested in the commission to require the production of a greater percentage of the allowable, or to see to it that the gas purchasers can more nearly meet market demand *unless such results stem from or are made necessary by the prevention of waste or the protection of correlative rights.*

When § 65-3-13(c) and § 65-3-15(c) are read together, one salient fact is evident —even after a pool is prorated, the market demand must be determined, since, if the allowable production from the pool exceeds market demand, waste would result if the allowable is produced. See, § 65-3-3(c), supra. Conversely, production must be limited to the allowable even if market demand exceeds that amount, since the setting of allowables was made necessary in order to prevent waste. See, § 65-3-13(c), supra. The reason for the consideration of market requirements in the case of unprorated pools is self-evident,

and needs no discussion. From what has been said, it is obvious that the commission's finding that the enabling of gas purchasers to more nearly meet the market demand is not an authorized statutory basis upon which a change of allowables may be placed. The same is true of the finding as to "the production of a greater percentage of the pool allowable" and for the same reasons.

[10, 11] We therefore find that the order of the commission lacked the basic findings necessary to and upon which jurisdiction depended, and that therefore Order No. R-1092-C and Order No. R-1092-A are invalid and void. We would add that although formal and elaborate findings are not absolutely necessary, nevertheless basic jurisdictional findings, supported by evidence, are required to show that the commission has heeded the mandate and the standards set out by statute. Administrative findings by an expert administrative commission should be sufficiently extensive to show not only the jurisdiction but the basis of the commission's order. See, City of Yonkers v. United States, 1944, 320 U.S. 685, 64 S.Ct. 327, 88 L.Ed. 400, wherein it is stated:

> "The insistence that the Commission make these jurisdictional findings * * * gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject."

We have carefully examined and considered the various authorities cited by the parties, other than those herein specifically discussed, and find them to be either not in point or having been decided under different statutes and constitutional provisions, and, where conflicting, we decline to follow the reasoning thereof. Having reached this conclusion, there is no necessity for any discussion or consideration of the other points raised by appellants.

We have intentionally omitted any mention of the findings and conclusions of the trial court, because of our disposition of the cross-appeal. In so deciding, it is necessary to explain the circumstances in the trial court.

Appellants filed their application for appeal from the commission's orders; the commission filed its response, as did the other appellees, all but one of whom merely adopted the response filed by the commission. Thereafter, two pretrial conferences were held, at which point the appellee commission brought the original prohibition case in this court, seeking to prevent the taking of any additional evidence by the trial court. See, State ex rel. Brand, supra. Our decision, refusing to rule at that time on the propriety of taking additional evidence, returned the case to the trial court. Thereafter, at the commencement of the actual trial, appellants moved that the commission be prohibited from participating as an adverse party,

because the sole question in the case related to the correlative rights of the owners of wells in the pool and that waste was not in issue. The attorney for the commission objected, saying that waste was in issue and that also the commission was an adverse party whenever its decision is appealed. The court sustained appellants' motion, but allowed counsel for the commission to remain in court, somewhat as an observer.

[12] It is this ruling that is the subject of the cross-appeal. However, the disposition of the question raised must of necessity include consideration of the scope of review upon appeal from the Oil Conservation Commission, inasmuch as the function of the commission, i. e., whether administrative or quasi-judicial, is all-important, because, if administrative, the authorities generally hold that, where the public interest is involved, such body is a proper party in the appeal to the court. See, Plummer v. Johnson, 1956, 61 N.M. 423, 301 P.2d 529. In addition, the question of the constitutional division of powers must be considered relative to the admission of testimony in the court, which was not offered before the administrative body. Thus, we must dispose of the question raised in State v. Brand, supra, as allied to the problem on cross-appeal, even though neither of the parties has presented the question, apparently because each opposing party is relying, at least in part, upon the evidence which was introduced in the trial court.

The appeal statute, § 65-3-22(b), N.M. S.A. 1953 Comp., insofar as material, reads as follows:

"Any party to such rehearing proceeding, dissatisfied with the disposition of the application for rehearing, may appeal therefrom to the district court of the county * * *. Provided, however, that the questions reviewed on appeal shall be only questions presented to the commission by the application for rehearing. Notice of such appeal shall be served upon the adverse party or parties and the commission in the manner provided for the service of summons in civil proceedings. The trial upon appeal shall be de novo, without a jury, and the transcript of proceedings before the commission, including the evidence taken in hearings by the commission, shall be received in evidence by the court in whole or in part upon offer by either party, subject to legal objections to evidence, in the same manner as if such evidence was originally offered in the district court. The commission action complained of shall be prima facie valid and the burden shall be upon the party or parties seeking review to establish the invalidity of such action of the commission. The court shall determine the issues of fact and of law and shall, upon a preponderance of the evidence introduced before the court, which may include evidence in addition to the transcript of proceedings before the commission, and the law applicable thereto, enter its order either affirming, modifying, or vacating the order of the commission. In the event the court shall modify or vacate the order or decision of the commission, it shall enter such order in lieu thereof as it may determine to be proper. Appeals may be taken from the judgment or decision of the district court to the Supreme Court in the same manner as provided for appeals from any other final judgment entered by a district court in this state. * * *"

[13] It is apparent from a study of the entire act (§ 65-3-2 et seq., N.M.S.A. 1953 Comp., particularly § 65-3-10, supra) that the two fundamental powers and duties of the commission are prevention of waste and protection of correlative rights. The Supreme Court of Oklahoma had occasion to consider their statute, which is similar though not identical to ours, and in Choctaw Gas Co. v. Corporation Commission, (Okl.1956), 295 P.2d 800, said:

"And these two fundamental purposes of the exercise of the Commission's powers in proration matters are interrelated, for, if the State, through this or some other agency, could not protect such rights, and each owner of a portion of the gas in a natural reservoir was left to protect his own, we would have resort to the wasteful drilling practices and races of the preproration days."

[14-17] Our legislature has explictly defined both "waste" and "correlative rights" and placed upon the commission the duty of preventing one and protecting the other. Inasmuch as there is no express mention of prevention of waste in the commission's findings, insofar as they concern correlative rights, it is obvious that the order must have been principally concerned with protecting correlative rights. However, as we have said, certain basic findings must be made before correlative rights can be effectively protected. From a practical standpoint, the legislature cannot define, in cubic feet, the property right of each owner of natural gas in New Mexico. It must, of necessity, delegate this legislative duty to an administrative body such as the commission. The legislature, however, has stated definitively the elements contained in such right. It is not absolute or unconditional. Summarizing, it consists of merely (1) an opportunity to produce, (2) only insofar as it is practicable to do so, (3) without waste, (4) a proportion, (5) insofar as it can be practically determined and obtained without waste, (6) of the gas in the pool.

The prevention of waste is of paramount interest, and protection of correlative rights is interrelated and inseparable from it. The very definition of "correlative rights" emphasizes the term "without waste." However, the protection of correlative rights is a necessary adjunct to the prevention of waste. Waste will result unless the commission can also act to protect correlative rights. See, Choctaw Gas Co. v. Corporation Commission, supra. Although subservient to the prevention of waste and perhaps to the practicalities of the situation, the protection of correlative rights must depend upon the commission's findings as to the extent and limitations of the right. This the commission is required to do under the legislative mandate. As such, it is acting in an administrative capacity in following legislative directions, and not in a judicial or quasi-judicial capacity. The commission's actions are controlled by adequate legislative standards, and it is performing its functions to conserve a very vital natural resource.

To state the problem in a different way, if the commission had determined, from a practical standpoint, that each owner had a certain amount of gas underlying his acreage; that the pool contained a certain amount of gas; and that a determined amount of gas could be produced and obtained without waste; then the commission would have complied with the mandate of the statute and its actions would have been protecting the public interest, thereby, quite obviously, entitling it to defend, for the public, whatever order it issued. Thus, it should be obvious that the commission is a necessary adverse party, and it was error for the trial court to refuse to allow the commission to participate as such. Plummer v. Johnson, supra; Board of Adjustment of City of Fort Worth v. Stovall, 1949, 147 Tex. 366, 216 S.W.2d 171; and Hasbrouck Heights, etc. v. Division of Tax Appeals, 1958, 48 N.J.Super. 328, 137 A.2d 585. The owners are understandably concerned only with their own interests and cannot be expected to litigate anything except that which concerns them. Therefore, absent the commission, the public would not be represented. If the protection of correlative rights were completely separate from the prevention of waste, then there might be no need in having the commission as a party; but if such were true, it is very probable that the commission would be performing a judicial function, i. e., determining property rights, and grave constitutional problems would arise. For the same reason, it must follow that, just as the commission cannot perform a judicial function, neither can the court perform an administrative one. See, O'Meara v. Union Oil Co. of California, 1948, 212 La. 745, 33 So.2d 506; Fire Department of City v. City of Fort Worth, 1949, 147 Tex. 505, 217 S.W.2d 664; Bartkowiak v. Board of Supervisors, 1954, 341 Mich. 333, 67 N.W.2d 96; and Cicotte v. Damron, 1956, 345 Mich. 528, 77 N.W.2d 139. This is the net effect of the admission and consideration by the trial court of the additional evidence in this case. Such a procedure inevitably leads to the substitution of the court's discretion for that of the expert administrative body. We do not believe that such procedure is valid constitutionally. See, Johnson v. Sanchez, 1960, 67 N.M. 41, 351 P.2d 449, and the cases cited therein. Insofar as § 65-3-22(b), supra, purports to allow the district court, on appeal from the commission, to consider new evidence, to base its decision on the preponderance of the evidence or to modify the orders of the commission, it is void as an unconstitutional delegation of power, contravening art. III, § 1, of the New Mexico Constitution. In Johnson v. Sanchez, supra, we stated:

"It has long been the policy in the state of New Mexico, as shown by the various decisions of this court, that on appeals from administrative bodies the questions to be answered by the court are questions of law and are actually restricted to whether the administrative body acted fraudulently, arbitrarily or capriciously, whether the order was supported by substantial evidence, and, generally, whether the action of the administrative head was within the scope of his authority." (Citing cases.)

See, California Co. v. State Oil & Gas Board, 1946, 200 Miss. 824, 27 So.2d 542, 28 So.2d 120, which struck down a Mississippi statutory provision, insofar as it provided for a "trial de novo." A statement in the specially concurring opinion is especially pertinent:

"The essential nature of such a review is such that it must be of what the Board had before it at the time it made its order. It would be an incongruity as remarkable to permit another and different record to be made up on appeal to the circuit court as it would be to allow another and a different record to be presented to this Court on an appeal to it. The question is, and must be, what did the Oil and Gas Board have before it, and all this the majority opinion has well and sufficiently pointed out."

See, also, City of Meridian v. Davidson, 1951, 211 Miss. 683, 53 So.2d 48; Borreson v. Department of Public Welfare, 1938, 368 Ill. 425, 14 N.E.2d 485; and Household Finance Corp. v. State, 1952, 40 Wash.2d 451, 244 P.2d 260.

In the instant case, it is apparent that the trial court's decision to allow the additional testimony was in an effort to determine whether the commission had exceeded its delegated authority and, in effect, determined ownership of property. Such testimony, outside the record of that received by the commission, was not proper, and ad-

ditionally the over-all effect of allowing the same was to show the practical result of the workings of the formula, which were matters that were within the jurisdiction of the commission and not such as would warrant the court in substituting its judgment for that of the commission. The admission of testimony, relating to the conditions subsequent to the issuance of the order, has the net effect of negativing or minimizing the factual situation as it existed before the commission. Thus, instead of judicially passing upon the action of the commission, the court is also considering facts which did not even exist at the time of the original hearing. In doing so, the court must of necessity substitute its judgment on the merits for that of the commission, and this is not within its province.

[18] The trial court, after hearing the testimony, and examining the testimony before the commission, felt that the new formula was preferable to the old "pure acreage" formula, thereby making a determination that the commission's order was proper. As to this, we express no opinion, because we are bound, as the trial court should have been, to dispose of the case upon the obvious illegality of the commission's order. Administrative bodies, however well intentioned, must comply with the law; and it is necessary that they be required to do so, to prevent any possible abuse.

We are fully cognizant that there is authority from other jurisdictions in conflict with the rule herein announced, particularly the decisions of the Texas courts; however, considering our own decisions and our statutes, we decline to follow the precedents in other jurisdictions, other than those cited.

It is apparent, from what has been said heretofore, that there was error, both on behalf of the commission and by the trial court. Ordinarily, the result would be to remand the case for another hearing before the trial court with the commission as an adverse party and the court merely considering whether the action of the commission was fraudulent, arbitrary or capricious, whether the order was supported by substantial evidence, and whether the action of the administrative body was within the scope of its authority. However, in this particular instance, we can conceive of no benefit which would result from such action, because there can be only one final conclusion based on the record before the commission, and that is that the order of the commission is void.

We are moved to finally dispose of the matter, and do not believe that the commission, as such, is prejudiced, inasmuch as its counsel was present during all of the proceedings in the trial court and participated in the appeal, to the extent at least of signing the briefs of appellees in addition to the brief as cross-appellant. We take the view that the commission and the public have been adequately represented and their view of the case fully presented to the court. Thus, a remand would only amount to an unnecessary act and result in considerable additional delay.

The order of the district court, affirming the order of the Oil Conservation Commission, is reversed, with directions to set the same aside and enter an order sustaining appellants' appeal and declaring the orders of the commission No. R-1092-C and No. R-1092-A as invalid and void. IT IS SO ORDERED.

COMPTON, C. J., and CHAVEZ and NOBLE, JJ., concur.

MOISE, J., having recused himself, not participating.

373 P.2d 820

Robert ESPINOSA, Plaintiff-Appellant,

v.

Gust PETRITIS and Robert Espinosa, as Executors of the Last Will and Testament of Mike Lelekos, Deceased, Defendants-Appellees.

No. 6937.

Supreme Court of New Mexico.

July 30, 1962.

Action to assert claim to ownership, as surviving joint tenant, in decedent's bank account. The District Court, Colfax County, Fred J. Federici, D. J., denied relief, and plaintiff appealed. The Supreme Court, Carmody, J., held that evidence sustained finding that decedent, who had retained passbook, had not made any delivery or contract such as would give donee equal or coextensive right of withdrawal or control.

Affirmed.

1. Gifts ⇐4

Elements of gift are: property subject to gift; competent donor; donative intent, not induced by force or fraud; delivery; acceptance; and present gift fully executed.

2. Gifts ⇐30(1)

Requirement of delivery in inter vivos gift of interest in bank account is fulfilled when donor gives donee equal power to withdraw from account.

3. Gifts ⇐30(1)

Donor's mere intention to make gift of interest in bank account, without effectuating it by delivery, creates no right in donee and no power to withdraw from fund.

4. Gifts ⇐30(3)

Surrender of passbook to donee is not prerequisite to creation of valid inter vivos gift in bank account, but there must be something by which donor creates in donee equal right to possession of book.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

DAVID FASKEN, Petitioner-Appellant, vs. OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent-Appellee.	)	No. 9958

APPEAL FROM THE DISTRICT COURT

OF EDDY COUNTY

ARCHER, JUDGE

RESPONDENT'S ANSWER BRIEF

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POINT I

THE COMMISSION'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

SUBSTANTIAL EVIDENCE QUESTION

The Appellant, David Fasken, states that an "...administrative agency may not disregard and discredit uncontradicted evidence and enter findings contrary to that evidence." (Brief-in-Chief p. 5). In support of this statement Fasken quotes Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964). This case cites with approval Medler v. Henry, 44 N.M. 275, 283, 101 P.2d 398 (1940), which states as follows the rule in this jurisdiction governing the weight a trier of fact should give uncontradicted testimony:

> From the New Mexico cases discussed, we believe the rule in this jurisdiction to be that the testimony of a witness, whether interested or disinterested, cannot arbitrarily be disregarded by the trier of the facts; but it cannot be said that the trier of facts has acted arbitrarily in disregarding such testimony, although not directly contradicted, whenever any of the following matters appear from the record:
>
> > (a) That the witness is impeached by direct evidence of his lack of veracity or of his bad moral character, or by some other legal method of impeachment.
> >
> > (b) That the testimony is equivocal or contains inherent improbabilities.
> >
> > (c) That there are suspicious circumstances surrounding the transaction testified to.
> >
> > (d) That legitimate inferences may be drawn from the facts and circumstances of the case that contradict or cast reasonable doubt upon the truth or accuracy of the oral testimony. (Emphasis added)

Fasken seems to argue that the Commission should have called witnesses and put on testimony to defend the status quo against

the Fasken applications (Brief-in-Chief p. 7). It appears to be Fasken's contention that findings not based on contradictory direct testimony are not supported by substantial evidence. It is important, therefore, to see how "substantial evidence" has been defined in this jurisdiction.

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Ft. Sumner Municipal School Board v. Parsons, 82 N.M. 610, 485 P.2d 366 (1971); Wickersham v. New Mexico State Board of Education, 81 N.M. 188, 464 P.2d 918, Ct. of App. (1970). In deciding whether a finding has substantial support, the Court must view the evidence in the most favorable light to support the finding and will reverse only if convinced that the evidence thus viewed, together with all reasonable inferences to be drawn therefrom, cannot sustain the finding. Any evidence unfavorable to the finding will not be considered, Martinez v. Sears Roebuck & Company, 81 N.M. 371, 467 P.2d 37, Ct. of App. (1970); United Veterans Organization v. New Mexico Property Appraisal Department, 84 N.M. 114, 500 P.2d 199, Ct. of App. (1972).

It is clearly established in New Mexico that the burden of proof before administrative agencies is on the moving party, International Minerals and Chemical Corporation v. New Mexico Public Service Commission, 81 N.M. 280, 283, 466 P.2d 557 (1970), and that orders of the Commission are presumed valid until an applicant establishes their invalidity, Section 65-3-22(b) NMSA, 1953 Comp., as amended. In this case, Fasken cannot overcome its failure properly to show that its application is supported by the evidence by alleging that the Commission should have put on direct testimony contradicting the testimony of its witness. Such a theory is contrary to the role of the Commission for it would no longer

perform its administrative function as defined by this court and reach decisions on the applications before it by applying the evidence presented to precise legislative standards, Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962). Instead the Commission would become a party opponent to all applicants before it.

In view of the language from Medler v. Henry quoted above, it is necessary that all the testimony in this case be reviewed. Fasken briefly summarizes the cross-examination of Mr. James Henry, his expert witness (Brief-in-Chief pp. 6 and 7). His approach is to isolate certain bits of testimony from the cross-examination and dismiss them. The Commission believes, however, that when all the testimony is read together and each argument is seen in its proper context, it becomes readily apparent that some of the Fasken testimony was surrounded by suspicious circumstances, that other testimony contained inherent improbabilities and that legitimate inferences could be drawn from the evidence that cast reasonable doubt upon the accuracy of the oral testimony of Mr. Henry. See, Medler v. Henry, supra.

FINDINGS ON SINGLE SOURCE OF SUPPLY

As noted by Fasken, on June 1, 1969, the Oil Conservation Commission issued Order No. R-3758, which pursuant to its statutory powers to determine the limits of oil and gas pools set out in Section 65-3-11 NMSA, 1953 Comp., as amended, extended the Indian Basin-Morrow Gas Pool to include acreage from the North Indian Hills-Morrow Gas Pool on which Fasken had drilled two wells (Tr. 1, Brief-in-Chief p. 3). The Commission consolidated the pools because it concluded they constituted a common source of supply (Finding 3, Order No. R-3758). No appearance was made by David Fasken in that proceeding, although the pools were consolidated at his request

and he received notice of the hearing.

The Commission again found in the orders challenged in this case that the Morrow formation underlying the Indian Basin-Morrow Gas Pool constitutes a single common source of gas supply (Finding 5, Order No. R-4409-A, Finding 6, Order No. R-4444).

Mr. Henry explained Fasken's primary contention: that the north portion of the Indian Basin-Morrow Gas Pool is a separate and distinct source of gas "...not connected with the pool to the south." (Brief-in-Chief p. 3.) In support of this position, he explained Fasken Exhibit No. 1 (Tr. 103-106, 110-112); a structure map of the Morrow formation which showed the possible presence of a water trough through the Indian Basin-Morrow Gas Pool which could separate the north and south portions of the pool into separate sources of supply. He also presented in support of his hypothesis Exhibit No. 2 (Tr. 106-110); a cross-section of a series of gama ray neutron logs through this portion of the Morrow formation and Exhibit No. 3 (Tr. 112-114); a map showing the thickness of the Indian Hills Sand interval in this area. Based on these exhibits Mr. Henry had prepared Exhibit No. 4, (Tr. 114-123) which was purported to be an expanded vertical view of the Indian Hills Sand cut along a trace portrayed on Exhibit No. 1.

On cross-examination by Daniel S. Nutter, the Commission's Chief Petroleum Engineer, serious questions emerged as to the adequacy of the evidence supporting the water trough concept (Tr. 144).

Not only did Mr. Nutter's cross-examination raise questions as to the sufficiency of the information on which Fasken's conclusions were based, it became apparent that Mr. Henry had concluded that the Indian Hills formation merely sloped to the east until he received information from the Corinne Grace-Indian

Hills Well in Section 8, Township 21 South, Range 24 East (Tr. 144-145).

The cross-examination by Jack Cooley revealed, however, that Fasken relied on information from the Grace well which was incomplete for the file used by Mr. Henry did not contain information filed with the Oil Conservation Commission after May 15, 1972, (Tr. 163-164) and that the information that was filed with the Commission may well have been inaccurate (Tr. 163-166). It also appeared that considerable confusion existed even as to what zone gas was being produced from in the Corinne Grace Well (Tr. 165-166).

If the evidence presented by Fasken is correct, it still fails to establish the existence of a water trough for on cross-examination by Mr. Stamets, Mr. Henry stated that "Different people would draw different maps with the same points." (Tr. 162).

Further doubt was raised as to the existence of a water trough on cross-examination by Mr. Nutter. Mr. Henry was asked if the water trough would appear on Fasken Exhibit No. 4 if the data from the Grace well was not included (Tr. 151):

Q But when you draw a straight line from the Skelly Federal Number 1 to the Ross Federal Number 1, we simply see a dipping generally from the south to the north, and we don't have this tremendous sincline in between the wells, is that correct?

A If you ignore the Corinne Grace Well, but--

Q I said if we went from the Skelly Federal Number 1 to the Ross Federal Number 1, just straight across.

A That's right....

It is apparent, therefore, that without the data from the Grace well, the trough concept would fall and the data from the Grace well was highly unreliable. The Commission, therefore, could not accept it.

Exhibit No. 4 which is purported to be an expanded vertical view of the Indian Hills Sand was offered to support the concept of a water trough (Tr. 114-123). Plotted on this cross-section are various wells. Fasken's Exhibit No. 1, the structure map, has a red line or trace across it. This trace shows where the vertical cut reflected on Fasken's Exhibit No. 4 would lie. If Oil Conservation Commission Exhibit 1 is examined, it reflects the actual line connecting the wells which are plotted on Fasken's Exhibit 4. It is important to examine Fasken's Exhibit No. 1 and especially the wells which lie close to the suggested water trough. First the David Fasken-Skelly Federal Well No. 1 in Section 9, Township 21 South, Range 24 East, which is on the trace on Fasken's Exhibit No. 1 should be noticed. To get to the next well plotted on Fasken's Exhibit 4, it is necessary to move to the west on the structure map more than one-half mile to the Corinne Grace-Indian Hills Well in Section 8 of said Township 21 South, Range 24 East. The next well, the Mobil Federal No. 1 in Section 10, is almost two miles to the east and then we must go more than two miles to the west to the next well which is the David Fasken-Shell Federal Well No. 1 in Section 5, and finally to the east again about a mile to the David Fasken-Ross Federal Well No. 1 in Section 4. It is apparent that Fasken had to resort to a considerable amount of zig-zagging to prepare its Exhibit 4. The transcript further reveals that without this manipulation of the evidence quite a different picture would have been portrayed (Tr. 148-149). It reads as follows:

> Q (By Mr. Nutter) Now, Mr. Henry, if we took your straight line that you have drawn between the Skelly Federal Number 1 and the Ross Federal Number 1, and if we ignored the zig-zagging back and forth, and we connected those two wells on Exhibit Number Four, I believe we would go from this point on the Skelly Federal Number 1 to this point on the Ross Federal Number 1, is that correct?

A (By Mr. Henry) That's correct.

Q And we wouldn't show the big U-tube connecting the two wells?

A Not if you are on the structure map.

Other evidence offered by Fasken to support the trough concept is misleading. Fasken Exhibit No. 4 is a diagram of how he believes the Indian Hills Sand would look if cut along the trace on his Exhibit No. 1 -- assuming his other assumptions about the reservoir to be correct. This exhibit portrays quite a dramatic saddle or trough. If, however, we examine the scale on this exhibit, we see that it reflects a vertical range of only about 500 feet. There is no horizontal scale on Exhibit No. 4 but if we compare this to Exhibit No. 1, we can see that this exhibit covers a distance of about 8 miles. If the diagram was drawn to a scale which accurately pictured the reservoir's dimensions it would show a long line with a very small dip in it. It would not present such a dramatic picture nor would it be misleading.

It should be recalled, that when Fasken appeared before the Commission, the burden was on him as the moving party to establish that a trough ran through this formation which was an effective barrier between the north and south portions of the pool and that Order No. R-3758 was invalid, Section 65-3-22(b) NMSA, 1953 Comp., as amended.

Fasken relied on evidence that, although not directly contraverted, was shown on cross-examination to be incomplete, probably inaccurate, and manipulated. The Commission, therefore, could not conclude that the northern portion of the pool was a separate source of supply for such evidence was equivocal and contained inherent improbabilities. See, Medler v. Henry, supra.

The facts and circumstances of this case are capable of various interpretations and inferences can be drawn from them that cast reasonable doubt upon the accuracy of the testimony offered by Fasken as to the presence of a water trough in this pool. See, Medler v. Henry, supra.

The Commission concluded therefore that Fasken had failed to show that the north and south portions of the Indian Basin-Morrow Gas Pool constituted separate source of supply.

Fasken Exhibits 5 through 9 were offered to show that withdrawing gas from a well in the north of the reservoir affects the pressure and gas migration in the south of the reservoir and vice versa (Tr. 123-134). All this evidence supports the concept that the reservoir is one common source of supply since there is obviously communication throughout the pool. And this is substantial evidence upon which Finding 5 of Order No. R-4409-A and Finding 6 of Order No. R-4444 should be sustained.

FINDINGS ON CORRELATIVE RIGHTS

The Commission orders challenged in this case contain findings which state that either increased allowables for or unrestricted production from the two Fasken wells in the northern portion of the Indian Basin-Morrow Gas Pool would violate the correlative rights of other mineral interest owners in the pool (Finding 6, Order No. R-4409-A, Finding 7, Order No. R-4444). Fasken alleges these findings are not supported by substantial evidence (Brief-in-Chief p. 7).

The Oil Conservation Commission is empowered to protect the correlative rights of all operators in any oil or gas pool by Section 65-3-10 NMSA, 1953 Comp., as amended. "Correlative rights" is defined as follows by Section 65-3-29 H NMSA, 1953 Comp., as

amended:

> "Correlative Rights" means the opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount, so far as can be practicably determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for such purpose to use his just and equitable share of the reservoir energy. (Emphasis added)

Although the wells in the Indian Basin-Morrow Gas Pool are on 640-acre spacing, an exception has been made for the two David Fasken wells in the northern portion of this pool. These wells have over 920 acres in each proration unit (Tr. 80, 153). It should be noted that the allocations of allowables in this pool are on a straight acreage basis (Tr. 153) and therefore Fasken has larger allowables (Tr. 153) and is able to produce considerably more from each of these wells than are other operators in the pool. Ten wells produce from these Indian Hills Morrow Sands (Tr. 151-152). The two Fasken wells in the north constitute, therefore, 20 percent of the wells producing from the Indian Basin-Morrow Gas Pool (Tr. 152) but have produced almost 40 percent of the gas (Tr. 153).

As has been noted earlier in this brief, Fasken is seeking a capacity allowable for the two wells in the northern portion of the Indian Basin-Morrow Gas Pool (Tr. 36, 42, 99, 137-141). The present allowable for each of these is approximately 3,000,000 cubic feet of gas per day (Tr. 170). What Mr. Fasken is attempting to do in this case is increase production from each of these wells to approximately 9,000,000 cubic feet of gas per day and then, eventually, to as much as 11,000,000 cubic feet of gas per day (Tr. 170).

It is apparent from the transcript that the Fasken wells in the northern portion of the pool are producing proportionally more gas than other wells in the pool. Fasken, therefore, has an equal if not greater opportunity to produce his just and equitable share of the gas. The evidence reveals that granting Fasken's application would only increase his opportunity to produce gas from the pool.

Fasken offered six exhibits that demonstrated pressure variations over a period of time in this formation (Fasken Exhibits 5, 5A, 6, 7, 8, 9 Tr. 123-136). These exhibits indicate that originally between what Fasken calls the north and south basins there was a pressure differential of 111 pounds (Tr. 66, 90, 124). The testimony on these exhibits indicated that the pressure had varied and increased between these portions of the pool during the time records had been kept on the wells in the pool and that this increased pressure differential is damaging his correlative rights (Tr. 78, 141). Fasken alleges that granting his application would help alleviate this situation by allowing greater withdrawal from the north (Tr. 78, 141).

Mr. Henry testified that Fasken could increase the allowable and thereby the amount of gas he could produce in the northern portion of the Indian Hills-Morrow Gas Pool by reasonably developing acreage in the north which he has under lease (Tr. 170-171). The transcript reads as follows:

Q (By Mr. Utz) Mr. Stamets asked you about drilling another well up in Section 31. What is the reason you don't want to develop that acreage?

A (By Mr. Henry) Well, to date, my client has not provided the money to do it with, he maintains very strict budgetary control on what I drill and don't drill, and he's not provided the money. We have recommended it and discussed it from time to time, and he does own the lease on that acreage.

Q Do you think it is productive?

A Yes, sir.

Q And that would increase your allowable by almost a third, wouldn't it?

A I would hope so.

When it is recalled that the Commission must afford the owner of each property in a pool an opportunity to produce his fair share of the gas in the pool as far as it is practicable to do so (Section 65-3-29 H. NMSA, 1953 Comp., as amended) it becomes apparent that the Commission cannot grant Fasken the relief he alleges is needed due to any pressure differential. If the pressure differential is being caused or aggravated by the rates of withdrawal from the pool, Mr. Fasken should reasonably develop the acreage which he has under lease and, thereby, increase production from the north. If he would develop this acreage, he could substantially correct the problem of which he complains in this case (Tr. 170-171).

If Fasken's correlative rights are being impaired it is not the result of Commission policy but Fasken's unwillingness to adequately develop his acreage (Tr. 170). If the Commission granted Fasken's applications it would jeopardize the rights of other interest owners in the pool who had gone to the expense of properly developing their leases.

Not only has Fasken failed to properly develop the field, he is, in fact, aggravating the very problem of which he complains. It should be recalled that he alleges that there is migration of gas from the northern reservoir toward the southern reservoir caused by greater pressure in the northern reservoir (Tr. 101, 115-123). He further alleges that this pressure differential is caused by the fact that there is greater production in the south than in

the north (Tr. 101, 115, 117-118, 123, 125-126).

If we assume these alleged facts to be true, it appears that Fasken is practicing imprudent operating procedures for he is contributing to the loss of gas in the north by overproducing a well in the southern portion of the pool (Tr. 154) and at the same time, due to contract problems, he has reduced production on certain wells in the northern portion of the pool (Fasken Exhibit No. 6, Tr. 155).

Fasken states that what is occurring in the Indian Basin-Morrow Gas Pool is "an operating and producing scheme" which is resulting in waste of natural gas (Brief-in-Chief p. 6).

When all the facts set out in the preceding paragraphs are taken together, it appears that the pressure imbalance can be attributed, at least in part, to the fact that Fasken is overproducing wells in areas of lowest pressure in the pool thereby further decreasing the pressure there. He is also underproducing wells in areas of highest pressure increasing thereby the pressure in that part of the pool and ultimately increasing the pressure differential. This appears to the Commission to be the only possible "producing scheme" which appears in record.

In any event, these facts brought out on the cross-examination of Mr. Henry show that there are suspicious circumstances surrounding the figures supplied to the Commission on pressure differentials and under the standard of Medler v. Henry, supra, this evidence is impeached by such circumstances.

The record reveals that Fasken can produce a greater proportion of the gas from the pool from each of his two wells in the north than can be produced from any other well in the pool (Tr. 152-153). His applications seek an order which would increase his advantage over other wells (Tr. 36, 42, 99, 137-141). Although

Fasken alleges his correlative rights are impaired by a pressure differential (Tr. 78, 141), on close examination of the record any pressure differential is being aggravated by the method in which Fasken produces his wells (Tr. 154-155). This evidence supports the Commission's findings that granting Fasken's application would violate the correlative rights of other mineral interest owners in the pool for it would enable Fasken to produce at their expense. To find otherwise, the Commission would have to jeopardize the correlative rights of other mineral interest owners in an effort to protect Fasken from his own imprudent operating procedures.

FINDINGS ON WASTE

The Commission found that denial of the Fasken applications would be in the interest of waste prevention (Finding 7, Order No. R-4409-A, Finding 8, Order No. R-4444). These findings are challenged as not supported by substantial evidence (Brief-in-Chief p. 7).

Section 65-10-2 NMSA, 1953 Comp., as amended, charges the Commission with the duty of preventing waste. "Waste" is defined by Section 65-3-3 NMSA, 1953 Comp., as amended. The portions of this definition relevant to this case read as follows:

> 65-3-3. WASTE--DEFINITIONS.--As used in this act the term "waste," in addition to its ordinary meaning, shall include:
>
> A. "Underground waste" as those words are generally understood in the oil and gas business, and in any event to embrace the inefficient, excessive, or improper, use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating, or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas.

E. The production in this state of natural gas from any gas well or wells, or from any gas pool, in excess of the reasonable market demand from such source for natural gas of the type produced or in excess of the capacity of gas transportation facilities for such type of natural gas. The words "reasonable market demand," as used herein with respect to natural gas, shall be construed to mean the demand for natural gas for reasonable current requirements, for current consumption and for use within or outside the state, together with the demand for such amounts as are necessary for building up or maintaining reasonable storage reserves of natural gas or products thereof, or both such natural gas and products. (Emphasis added)

These statutory provisions are recited again in the Rules and Regulations of the Oil Conservation Commission (pp. A-7- A-9).

In preventing waste the Commission must consider a number of factors set out in this statutory definition. It cannot pick and choose among considerations but must act to prevent waste in a fashion consistent with all such considerations.

Fasken alleges that underground waste is occurring due to underground gas migration (Tr. 77-78, 121-123, 141) and a loss of gas into a water trough (Tr. 77-78, 122) in violation of Sub-section A of the definition quoted above. He alleges that this waste is caused by administering and regulating the pool in accordance with the Rules and Regulations of the New Mexico Oil Conservation Commission which prorate the pool (Tr. 60). A close review of the evidence reveals, however, that:

1. Fasken failed to establish that waste is occurring in this pool,

2. the record clearly shows that waste would result if either of Fasken's applications were granted and

3. if waste is occurring, it is not the result of regulation by the Oil Conservation Commission, but instead is a result of imprudent operating procedures.

It should be recalled that serious questions have been raised as to whether or not a water trough runs through the

Indian Basin-Morrow Gas Pool. If it does not, it is very doubtful that the theories advanced by Fasken on the issue of waste are valid.

Fasken seeks either the creation of a separate gas pool out of acreage presently located in the northern portion of the Indian Basin-Morrow Gas Pool (Tr. 2, 9, 60, 98) or in the alternative, capacity allowables for his two wells in that portion of this pool (Tr. 36, 42, 99, 137-141). Either of these proposed changes would result in the waste of gas as defined in Section 65-3-3 B. NMSA, 1953 Comp., as amended, to the extent it would allow increased production from the Fasken wells which were already capable of producing in excess of reasonable market demand and the capacity of the pipeline for such natural gas from these wells. When cross-examined on this point, Mr. Henry testified (Tr. 166):

Q (By Mr. Cooley) Referring to your testimony on cross-examination, it came out that you have certain gas purchase contract problems with respect to what you describe as the north pool, is that correct?

A We have them with respect to all of the connections in the Indian Basin.

Q The entire pool has a greater capacity to produce than Mr. Fasken is able to pass on to the pipe line company?

A We have an excess capacity to produce, yes.

Q If the present capacity under the present allowable is in excess of your present market, what is to be gained by giving capacity allowables or increasing the allowable for any well in the field or giving the capacity allowable as you suggest?

A (No response)

Q You are already capable of producing more gas than you can sell?

A That's right.

The definition of waste was discussed in Continental Oil Company v. Oil Conservation Commission, supra, where this court

stated:

> "When Section 65-3-13(c) and Section 65-3-15(e) are read together, one salient fact is evident -- even after a pool is prorated, the market demand must be determined, since, if the allowable production from the pool exceeds market demand, waste would result if the allowable is produced."

The paragraph goes on to say that "...the setting of allowables was made necessary in order to prevent waste...."

To grant either Fasken application, the Commission would have had to disregard testimony on market demand and authorize an allowable which would, if produced, cause waste. The granting of either application would have been contrary to the language of Continental and could have been construed as authorization for wasteful operation of the wells in the north of the Indian Basin-Morrow Gas Pool.

The testimony also shows that certain allowables have already been cancelled and reallocated in the pool because of the contract problems Mr. Fasken has had with his purchaser (Tr. 168) and his inability, therefore, to meet his allowable.

Any increases in the production of gas which could be the result of granting either Fasken application would be gas produced in excess of market demand and would, thereby, be waste as defined by statute. This evidence constitutes substantial evidence supporting the Commission's findings on waste.

If waste is occurring, Mr. Fasken could provide his own relief by reasonably developing the northern portion of the Indian Basin-Morrow Gas Pool.

Mr. Fasken points out that the Commission is mandated by Section 65-3-11(4) NMSA, 1953 Comp., as amended, "to prevent watering out of strata which is productive of oil or gas." (Brief-in-Chief p. 6).

In a pool like the Indian Basin-Morrow Gas Pool, water encroaches into the reservoir as the pool is produced. In fact, all wells in this type of pool will water out if it is produced long enough. This gives rise to the question of whether or not the situation raised by Fasken concerning the watering out of wells (Tr. 77-78, 123) is one which the Commission could prevent or if what we have here is just a well located at a structurally low point which is nearing depletion.

The problems Fasken complains of may in no way be related to the administration of this pool under the Rules and Regulations of the Oil Conservation Commission. Fasken admitted that the gas in this pool was originally exposed to the same water zones as existed in the reservoir at the time of the hearing (Tr. 91-92). He also conceded that if there is a spill point in the reservoir, gas could have been passing this spill point under original reservoir characteristics (Tr. 90-91).

Fasken failed to establish the existence of a water trough in this pool. He, furthermore, was unable to show that the watering out of any well was caused by administering the pool under the Rules and Regulations of the Oil Conservation Commission and not just the result of normal reservoir characteristics. In view of this the Commission could not give much weight to Mr. Henry's testimony on the watering out of wells in the southern portion of this pool.

Fasken cites McWood Corporation v. State Corporation Commission, 78 N.M. 319, 431 P.2d 52 (1967). In that case the Supreme Court overturned a decision of the Corporation Commission which contained findings based on "Mere hearsay or rumor and the testimony of competitors...." Id. at 322. That is not the situation in this case for, as shown throughout Point I of this

brief, each finding challenged by Fasken is supported by substantial evidence.

It should also be noted that McWood is an appeal challenging an order of the Corporation Commission. This court found in that case that "...orders of administrative agencies cannot be justified without a basis in evidence having rational and probative force." Id. at 321. The decision of the Corporation Commission was reversed because the moving party before it had failed to show with such evidence that its claim was valid. In the case at bar, Fasken is the moving party and, if the same standard is applicable, must show that his application is supported by "evidence having rational, probative force." A full review of the evidence shows Fasken failed to make such a showing.

Pan American Petroleum Corporation v. Wyoming Oil and Gas Conservation Commission, 446 P.2d 550, 32 O&GR 501 (1968) is quoted by Fasken at length in defense of a straw man it raises. Fasken states that the Commission may think he failed to make a prima facie case (Brief-in-Chief p. 8). The Oil Conservation Commission concedes that Fasken alleged all necessary elements to make a prima facie case. The Commission contends, however, that Fasken failed to carry the burden of proof for the evidence he tendered was not sufficient to permit it to accept as true the matters he alleged. The Pan American decision is not useful in this case for it involves a situation where the Wyoming Oil and Gas Commission denied Pan American the right to drill a well because it felt Pan American had "...not in the first instance, [made] out a prima facie case,...." Id. OG&R at 511. This is not the situation in the proceeding at bar and, therefore, this case is not in point.

POINT II

THE ORDERS OF THE COMMISSION ARE VALID AND CONTAIN ALL FINDINGS REQUIRED BY LAW.

Fasken's Point II (Brief-in-Chief p. 10) reads as follows:

> 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. (Emphasis added)

Initially, it should be noted that this obviously misstates Fasken's own claim. At no time did the Commission make a determination as to whether or not waste was occurring in this pool and no such determination is reflected in any finding in either order challenged. The Commission merely found that denying Fasken's applications would prevent waste (Finding 7, Order No. R-4409-A, Finding 8, Order No. R-4444).

Fasken draws the conclusion that "...the fair interpretation of the commission's order is that the commission believes that waste is not occurring at the present time." (Brief-in-Chief p. 13). He further concludes that this determination was reached either on evidence outside the record or in a discussion among Commission staff members (Brief-in-Chief pp. 13-14). Since the Oil Conservation Commission did not make such a determination, it is hardly appropriate to speculate as to its source.

Furthermore, the question of whether or not waste was occurring in this pool at the time of the Commission hearing is not properly before this court in regard to the challenge to Order No. R-4409-A. Section 65-3-22 NMSA, 1953 Comp., as amended, provides "...that the questions reviewed on appeal shall be only questions presented to the Commission by the application for rehearing." Nothing is raised in the Application for Rehearing of Order No. R-4409-A concerning whether or not waste was occurring

in the pool and hence this point should not be considered in the challenge to this order.

Fasken contends Orders R-4409-A and No. R-4444 are invalid because they contain no findings to explain, support or indicate the reasoning of the Commission in concluding that his applications should be denied in order to prevent waste (Brief-in-Chief p. 10).

In view of this, it is important to determine what findings the Oil Conservation Commission must make in its orders to comply with New Mexico law.

Continental Oil Company v. Oil Conservation Commission, supra, at page 321 reads as follows:

> We would add that although formal and elaborate findings are not absolutely necessary, nevertheless basic jurisdictional findings, supported by evidence, are required to show that the commission has heeded the mandate and the standards set out by statute. Administrative findings by an expert administrative commission should be sufficiently extensive to show not only the jurisdiction but the basis of the commission's order.

This is the standard against which orders of the Commission should be held to see if they comply with the laws of this jurisdiction.

The Commission is empowered to prevent waste and protect correlative rights by Section 65-3-10 NMSA, 1953 Comp., as amended. The jurisdiction of the Commission in the case at bar is predicated upon these powers delegated to it by the legislature. The Continental decision requires that there be a basic jurisdictional finding on these powers and such a finding appears in each of the orders challenged (Finding 7, Order No. R-4409-A, Finding 8, Order No. R-4444). Furthermore, these findings are supported by the evidence as has been previously shown in this brief in our discussion of the findings on correlative rights where it was shown that granting the Fasken application would give him an unfair advantage

over other mineral interest owners in the pool (pp. 8-13) and in our discussion of the findings on waste where it was shown that granting these applications would give Fasken a license to produce in excess of the market demand (pp. 13-18).

These findings and this supporting evidence show that the Commission has heeded its statutory mandate. Any more stringent requirement in terms of findings would be inconsistent with the Continental decision for it would establish a requirement of more formal and elaborate findings. If such a standard were carried to its logical conclusion, it would appear to require that all considerations recited in statute be made findings of fact as a condition precedent to the validity of any Commission order.

Not only do the findings show the jurisdiction of the Commission, they also reflect the basis of the Commission's decision.

Order No. R-4409-A contains findings which show that the Commission found that there was communication throughout the pool (Finding 4); that this pool, therefore, was a single common source of supply (Finding 5); and that granting the Fasken application to divide the pool would result in Fasken being able to produce his wells in the north of the pool at unrestricted rates enabling him to take an undue share of the gas in the pool (Finding 6).

Order No. R-4444 contains findings which show that the northern portion of the pool contains acreage not dedicated to any well (Finding 4); that Fasken could provide his own relief by further development of his acreage in the north (Finding 5); that the Indian Basin-Morrow Gas Pool is a single common source of gas supply (Finding 6) and that granting Fasken's application for increased allowables would enable him to recover an undue share of the gas in the pool.

In Continental at page 324, the following was said about the relationship between the concepts of waste and correlative rights:

> The prevention of waste is of paramount interest, and protection of correlative rights is interrelated and inseparable from it. The very definition of "correlative rights" emphasizes the term "without waste." However, the protection of correlative rights is a necessary adjunct to the prevention of waste. Waste will result unless the commission can also act to protect correlative rights." (Emphasis added)

This court cited in support of this statement Choctaw Gas Co. v. Corporation Commission, 295 P.2d 800, 5 O&GR 1226 (1956). Choctaw involved an order of the Oklahoma Corporation Commission which was challenged for not containing a finding on the prevention of waste. The following is the discussion of this point by the Oklahoma Supreme Court:

> To protect such correlative rights, in addition to preventing waste, is one of the fundamental powers of the Corporation Commission under our proration statutes. (citations omitted.) And these two fundamental purposes of the exercise of the Commission's powers in proration matters are interrelated, for, if the State, through this or some other agency, could not protect such rights, and each owner of a portion of the gas in a natural reservoir was left to protect his own, we would have resort to the wasteful drilling practices and races of the prepro-ration days. (citations omitted.) This explains why there is no merit to Service Corporation's argument that, because Order No. 28838 contained no specific finding that the shutting in of Choctaw's wells was necessary to prevent waste, it is void. (Emphasis added)

In the case at bar, the Oil Conservation Commission acted to protect correlative rights as is reflected in the findings in its orders. The finding that waste would be prevented is not, however, without basis in the Commission's findings for both orders recite that granting Fasken's applications would permit him to recover an undue share of the gas from the pool (Finding 6, Order No. R-4409-A, Finding 7, Order No. R-4444). If the Commission

could not prevent such undue recovery of gas, each operator would have to "protect his own" and this would lead to wasteful practices much like those experienced during the days of the Rule of Capture -- wasteful practices which led to the adoption of New Mexico's conservation statutes.

The findings that waste would be prevented (Finding 7, Order No. R-4409-A, Finding 8, Order No. R-4444) are further supported by the record as discussed in Point I of this brief (pp. 13-18).

As previously noted, Section 65-3-10 NMSA, 1953 Comp., as amended, empowers the Commission to prevent waste and to protect correlative rights. In the case at bar the primary consideration of the Commission was the protection of correlative rights. This is clearly reflected in the findings of the orders as is required by the portion of the Continental decision hereinbefore quoted.

Fasken's Point II centers around the notion that waste and correlative rights are two entirely separate concepts and that a Commission order which is obviously necessary to protect correlative rights may be ineffective because it does not contain a separate and distinct line of reasoning based solely on the concept of waste prevention.

Such a theory is inconsistent with established rules of appellate review. Failure to make a finding will not cause a judgment to be reversed if there are findings on another issue which makes such a finding unnecessary. See, Gibbons & Reed Company v. Bureau of Revenue, 80 N.M. 462, 457 P.2d 710 (1969). In this case, the Commission's decision would have been supported by the findings on correlative rights standing alone -- absent the findings on waste.

If there had been no mention of waste at all in the orders

challenged, they still should not be overturned unless Fasken could show that the absence of such findings would have changed the decision of the Commission. See, Maryland Casualty Company v. Foster, 76 N.M. 310, 314, 414 P.2d 672 (1966) and 5 C.J.S., "Appeal and Error" 1790. This rule of appellate review has been applied to appeals from administrative agencies. See, Choctaw Gas Company v. Corporation Company, supra.

Even though the Commission relied on both the concepts of waste prevention and protection of correlative rights, it should not be required to independently pursue both courses of reasoning in all cases. When the Commission issues an order based on evidence presented to it at a public hearing which shows that a certain application must be denied in order to protect the mineral interest owners in a pool, it should not be barred from carrying out this statutorily mandated duty simply because there is not a separate showing on waste. This is especially true since this court found in Continental that "Waste will result unless the commission can also act to protect correlative rights."

Fasken alleges that the Commission will try to justify its finding on waste by pointing to the fact that unratable take would occur if either application is granted. Once again he is engaged in a battle of straw men for he then proceeds to cite Section 65-3-4(D) NMSA, 1953 Comp., as amended, and knock it down as relating only to oil.

Waste will result from granting either application for the record clearly shows that it would authorize production in excess of market demand. This violates Section 65-3-4(E) NMSA, 1953 Comp., as amended, as the record before the court clearly shows. See, Point I.

Fasken cites City of Roswell v. New Mexico Water Quality

Control Commission, 84 N.M. 561, 505 P.2d 1237 (Ct. App. 1972). The Court of Appeals found in this decision that an administrative agency's findings and reasoning must be reflected in the record. This is in fact a broader standard than the one set forth in Continental for it looks to the entire record, not just the findings of fact. When the entire record is examined in the case before the court, it is apparent that the Oil Conservation Commission's reasoning was that, when there is a single source of gas supply, allowing one producer to withdraw gas at unrestricted rates or greater rates than other producers, violates correlative rights for one producer has an advantage over others in the pool. This is also wasteful because it could lead to production in excess of market demand.

Pan American Petroleum Corporation v. Wyoming Oil and Gas Conservation Commission, supra, is again cited by Fasken. He contends this case is "...very similar to the one presently being presented to the Court." (Brief-in-Chief p. 12). It is dissimilar in one key respect, however, which renders it of little value in this case.

Pan American deals with an order that did not comply with the provisions of the Wyoming Administrative Procedure Act. This act contains a provision which requires "Findings of fact if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." Section 9-276.28 W.S. 1957, 1967 Cum. Supp. The Supreme Court of Wyoming interpreted this section to require specific types of findings in Administrative orders in Wyoming. Pan American, supra at 510. There are no such statutory provisions in New Mexico and hence this case is not in point in the proceeding at bar.

In fact, the New Mexico statutes relating to oil and gas (with an exception for underground storage reservoirs) make no requirement that the Commission make any findings whatever. The United States Supreme Court held in United States et al. v. Louisiana et al., 290 U.S. 70 (1933), that findings were not essential to the validity of an administrative order where an agency was operating under a statute which was indefinite on the question of findings of fact and did not require them.

If Pan American, supra, is applicable, it supports the Commission in this case for it states that the reviewing court should be satisfied that the agency reached its decision based on consideration of the entire record. Id. at 555. When the entire record is considered the Commission's order is well supported by the evidence. See, Point I.

SUMMARY AND CONCLUSION

Fasken claims there is uncontradicted evidence supporting his application and that certain of the Commission's findings are not supported by substantial evidence. As shown in this brief, the evidence offered by Fasken was equivocal, contained inherent improbabilities and, in some instances, was surrounded by suspicious circumstances. Other evidence was capable of legitimate inferences which cast reasonable doubt upon its accuracy. The Commission, therefore, could disregard much of what Fasken presented under the decision of this court in Medler v. Henry, supra.

Examination of the whole record reveals that the evidence offered to support Fasken's theorized water trough was insufficient to overcome the physical fact of communication between the two portions of the pool. The record further revealed that Fasken had produced proportionally more gas from each of his wells in the northern portion of this pool than could be produced by any other well. Approval of either of his applications would have increased his advantage over other operators, thereby, violating their correlative rights. It was also apparent that approval of either Fasken application would have given him a license to produce more than the market demand for gas from his wells and this could constitute waste as defined by New Mexico statute.

The record contains in support of each challenged finding "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Ft. Sumner Municipal School Board v. Parsons, supra. Each Commission finding, therefore, is supported by substantial evidence.

When Fasken appeared before the Commission with the original applications in this case, the burden of proof was on him, as the moving party, to show that what he was seeking was in fact supported by the evidence. This he failed to do. Having failed to carry the burden of proof, he cannot shift it to the Commission and allege that the agency's orders are not supported by substantial evidence merely because the agency did not put on conflicting direct testimony upon which to base its findings.

Fasken seems to allege that the Commission should become a party opponent to all who appear before it. This would be inconsistent with the role of the Commission which is to take the facts presented to it, compare them to the precise legislative standards of the oil and gas conservation statutes and reach determinations based thereon. See, Continental v. Oil Conservation Commission, supra. This is the standard followed by the Commission in the case before the court.

Careful review shows that the orders challenged contain all findings required by law in New Mexico.

The challenged orders contain basic jurisdictional findings supported by evidence which shows the Commission heeded its statutory mandate and complied with legislative standards. The findings also reflect the reasoning of the Commission in reaching its decision. The mandate of Continental, supra., therefore, is met.

Fasken apparently misinterprets this decision. He appears to believe that the Commission is required to support orders which stand on their own as necessary and proper exercises of its duty to protect correlative rights with additional and separate lines of reasoning on the question of waste prevention. This notion would impose a more rigorous standard on the Commission than

exists under present law and would require more formal and elaborate findings. It, furthermore, is inconsistent with either logic or long established principles of appellate review.

Since the findings in the orders challenged reflect the Commission's reasoning that the denial of each of Fasken's applications would protect correlative rights, the findings by necessary implication also show that the denials would prevent waste. This is especially true since this court stated in Continental, supra, that: "Waste will result unless the Commission can also act to protect correlative rights."

It is the opinion of the Oil Conservation Commission that the arguments advanced by David Fasken are without merit and that the orders of the Commission should be upheld.

Respectfully submitted,

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