OIL CONSERVATION COMMISSION
P. O. BOX 2088
SANTA FE, NEW MEXICO 87501

June 28, 1974

COPY

Mrs. Rose Marie Alderete
Clerk of the Supreme
Court of the State of
New Mexico
Supreme Court Building
Santa Fe, New Mexico 87501

Re: David Fasken v. Oil
Conservation Commission
Cause No. 9958

Dear Mrs. Alderete:

Please serve a copy of the attached Respondent's Answer Brief on Sumner G. Buell, Esq., P. O. Box 2307, Santa Fe, New Mexico.

Very truly yours,

WILLIAM F. CARR
Special Assistant Attorney General

WFC/dr

FASKEN V. UCC Supreme Court Brief - p.1

p.1 I. STATEMENT OF THE CASE

p.2 II. STATEMENT OF PROCEEDINGS

p.3 III. POINT I - FINDINGS OF FACT - NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. (TP-1) - 2 Fasken wells - originally in North Indian Basin Morrow Gas Pool — in June 1967 - redesignated and included in IB-MGP.

B. (TP-2) - Mr. Henry testified that northern portion of IB-MGP was a separate distinct source of supply.

C. (TP-3) - Henry pointed out:
1. trough
2. water in trough = block between two pools
3. this effectively separated the two pools.

p.4 D. (TP-4) - 1. Original gas-water contacts and pressures (original pressure differences 111 pounds)
2. production 1st in south = decline of pressure there,
3. caused H_2O to migrate to south
4. premature watering out of wells resulted.

E. (TP-5) gas being trapped in the water = WASTE.

F. (TP-6) pressure differential has increased with passage of time (So. pool - produced at faster rate)

G. (TP-7) - Henry proposed capacity production in No.

p.5 H. (TP-8) - new well in the north = not enough help (would add 1m cubic feet per day - where 9 million is needed)

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I. (TP-9) OCC – put on no testimony
FASKEN evidence – uncontradicted

J. (TP-10) Admin. agency may not disregard uncontradicted evidence.

K. (TP-11) FREDRICK V. YOUNGER Quote

L. (TP-12) 1. OCC – has duty to prevent waste 65-3-10

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2. OCC – must prevent watering out of strata 65-3-11(4)

3. uncontradicted testimony shows 35% of gas in the H_2O is unrecoverable (waste)

4. productive wells being watered out.

"AN OPERATING AND PRODUCING SCHEME"

M. (TP-13) OCC ignored evidence of water migration

N. (TP-14) CROSS EXAMINATION BY STAMETS + NUTTER et. al.

1. Stamets – structure map could be drawn in a different manner.

2. Cooley – questioned accuracy of certain evidence

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3. Utz – 3rd well could alleviate the problem to some extent.

4. Nutter – controls used by Fasken – not complete – other conclusion could be reached.

O. (TP-15) – OCC offered no evidence under oath.

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P. (TP-16) – Burden on Fasken — carried burden – OCC order must be based on evidence having a rational, probative force.

Q. (TP-17) – Prima facie case made –

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– "with all the scientific and engineering data it would appear" directed to show . . .

p.10 II POINT II – OCC ORDERS DO NOT CONTAIN FINDINGS TO SHOW THE REASONING BEHIND THE DETERMINATION THAT WASTE WAS NOT OCCURING.

A. (TP-18) – FINDING 7 (4409-A) + FINDING 8 (4444) – waste
< no supporting finding to show OCC reasoning >

B. (TP-19) – findings must appear to show that the OCC was acting w/in scope of statutory authority

C. (TP 20) – CONTINENTAL – instructs the OCC on what must be in its orders:
1. no formal and elaborate findings
2. basic jurisdictional findings
3. supported by evidence
p.11 4. show basis of commission orders.

D. (TP-21) – findings do not show OCC reasoning – are directed to o/t not waste.

E. (TP-22+23) – summary of findings

F. (TP-24) – no basic findings to support ultimate finding on Question of waste

p.12 G. (TP-25) – must have basic findings (DAVIS)
1. or can't have judicial review
2. prevents judicial usurpation of agency function.
3. guards v. arbitrary and capricious agency action.

H. (TP-26) – ROSWELL V. WQCC – record must indicate reasoning of Commission

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p.12 I. (TP-27) - PAN AM. V. WYO. O+G COMM.

p.13 findings required on basic issues

J. (TP-28) - basic findings required

K. (TP-29) - OCC order - determines waste is not occurring

1. OCC went outside the record OR

2. made decision by staff experts

p.14 L. (TP 30) - OCC was attempt to justify order on grounds that it prevent unratable take.

M. (TP-31) - unratable take relies on "market demand" and "transportation facilities" — no findings on either of these.

N. (TP-32) - 65-3-15(c) - ratable take must involve a common source of supply,

- nothing in evidence supports findings that wells in No. and So. are drilled to a single common source of supply.

- jurisdictional finding is absent here (?)

p.15 V. CONCLUSION:

A. OCC - did not put on an opposing case

B. entered orders which foreclose judicial review

C. with findings which are not supported by the record.

✓ Medler v. Henry – not distinguished

what counter interpretation of the evidence remains in record.

Fasken v. O.C.C. – Reply Brief:

p.1. I. O.C.C. admits:

A. prima facie case alleged (TP. 1)

B. no direct contradiction of Henry (TP. 2)

C. What are the "doubting circumstances" etc. which allowed O.C.C. to disregard testimony. (TP. 2)

II. "Doubting Circumstances" (TP. 3)

A. Stamets – different maps could be drawn from same points <STAMETS OFFERED NO COUNTER PROPOSAL> (TP. 3)

p. 2. B Cooley – Accuracy of information in OCC files <FAILED TO SHOW DATA INCORRECT>

C. Nutter – redraw the lines w/o Grace well <Nutter ignored some wells>

OCC STAFF – PICKING + CHOOSING AMONG EVIDENCE

III C/R ISSUE <TP. 6>

p. 3 A. Turns on whether or not a water trough exists < no contrary evidence >

II. WASTE Q^U (TP. 7)

A. evidence showed seepage into trough

B. O.C.C. make much to-do about fact that there is "supposedly no market demand"

C. (ANSWER BRIEF p. 15) – ignores complete testimony in the record –

K w/ purchaser provides – IF WASTE OCCURING, FASKEN CAN FORCE PURCHASER TO BUY MORE OR SELL GAS ELSEWHERE

Haskew v. O.C.C. — Reply Brief

p.3 V. Concept of <u>substantial evidence</u> would be lost if all an agency had to do to disregard testimony was to ask the witness if the evidence was capable of multiple interpretation. (P. 8)

p.4 Orders based on this type of record would be <u>unreviewable on appeal.</u>

This Copy Contains my notes

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

DAVID FASKEN,

Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

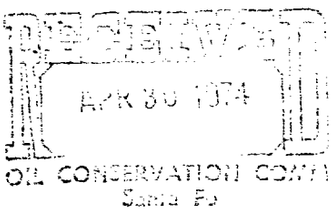
NO. 9958

Respondent-Appellee.

CERTIFICATE OF SERVICE

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

William F. Carr, Esquire
Special Assistant Attorney General
P. O. Box 2088
Santa Fe, N. M. 87501



by first class mail with postage thereon fully prepaid.

Dated at Santa Fe, New Mexico, this 29th day of April, 1974.

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

By: Lupe R. Valdez
Deputy Clerk

IN THE SUPREME COURT OF NEW MEXICO

DAVID FASKEN,

Petitioner-Appellant,

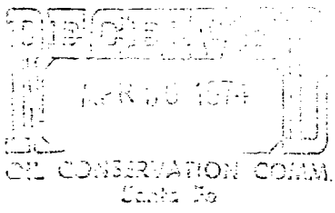
-vs- No. 9 9 5 8

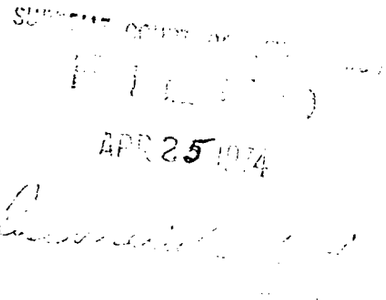
OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

Respondent-Appellee,

APPEAL FROM THE DISTRICT COURT
Of Eddy County
Archer, Judge

APPELLANT'S BRIEF IN CHIEF





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Attorneys for Petitioner-
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I N D E X

TABLE OF CASES

STATEMENT OF THE CASE

This appeal is from two summary judgments entered by the District Court of Eddy County, after argument, which affirmed two orders of the Oil Conservation Commission of the State of New Mexico. The District Court's judgments also denied two motions for summary judgment filed by appellant and this action is also appealed.

no findings and conclusions were adopted though they were proposed.

Bill was never settled a bill of exceptions

STATEMENT OF PROCEEDINGS

Appellant filed two applications with the Commission. One application sought to establish certain lands as being a gas pool separate from the Indian Basin-Morrow Gas Pool with special pool rules for production.(Tr. 8). As an alternative, appellant also filed an application that would exempt its wells from proration and establish special production allowables. (Tr. 41). After a hearing before an examiner, both applications were denied by the commission (Tr. 6, 39). Application was then made to the full commission for a hearing on the application. The hearing was held and again the two applications were denied. (Tr. 6, 39). As required by §65-3-22(a) N.M.S.A. (1953), applicant then moved for a rehearing, and action not having been taken for ten days, the motion was deemed denied and the commission action final. (Tr. 8, 41).

Appellant next sought to have the orders of the commission reviewed by the District Court of Eddy County as required by §65-3-22(b), N.M.S.A. (1953). (Tr. 1, 35). A de novo hearing was held with the court considering only the record made before the commission. Both appellant and the commission filed motions for summary judgment. Of course, appellant's motions urged that the commission's orders be set aside and that the commission be required to enter appropriate orders as requested. (Tr. 18, 51). The commission, of course, filed motions for summary judgment asking that the orders denying the application be affirmed. (Tr. 20, 53).

Summary judgments were entered in the commission's favor on November 29, 1973. (Tr. 28, 55). Findings of fact and conclusions of law were not filed by the District Court. The notice of appeal for both cases was filed December 14, 1973. (Tr. 30).

POINT I

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

Appellant controls oil and gas leases covering Sections 4 and 5 of Township 21 South, Range 24 East, Eddy County, New Mexico. In Section 4, appellant has drilled its Ross Federal Well No. 1, and in Section 5, its Shell Federal Well No. 1. Both wells produce from the Morrow formation.(Tr. 1). At the time the wells were drilled and completed they were designated as being in the North Indian Basin-Morrow Gas Pool. (Tr. 1). In June, 1969, however, the Commission re-designated the two sections containing the wells placing them in the Indian Basin-Morrow Gas Pool. (Tr. 1).

At the hearing before the examiner and again before the full commission, appellant sought to demonstrate that the two wells were in fact in a separate pool from other wells located to the south. To this end, appellant presented Mr. James Henry, an admittedly qualified expert, as its sole witness before the commission. (Tr. 103). Mr. Henry was of the opinion that the northern portion of the designated Indian Basin-Morrow Gas Pool was a separate and distinct source of gas and not connected with the pool to the south.

To support his testimony, Mr. Henry pointed out that between the northern area and the south was a saddle or trough in the Morrow sand. (Tr. 104). The bottom or lower portion of this trough was filled with water and this effectively formed a plug or block that separated the north and south pools. (Tr. 116). This effective separation of the two pools was further evidenced by geological and engineering data.

The original gas-water contact in the north pool was a minus 5,873 feet. (Tr. 114). The gas-water contact in the south was a minus 5,700 feet. (Tr. 114). The original pressure in the north pool was 3,902 PSIA while in the south it was 3,791 PSIA, or a difference of 111 PSIA. (Tr. 116). The southern reservoir was developed and produced sometime before the northern pool, which resulted in a sharp decline of the pressure in the south. With this pressure decline, the water plug in the saddle, following the path of least resistance, began to migrate toward the south pool. The migration of the plug has caused the premature watering out of wells on the north flank of the south pool. (Tr. 118, 120).

In addition to the water plug moving south, gas from the north pool was being trapped in the water and that gas would not be recoverable and consequently would be wasted. (Tr. 121).

The situation has been aggravated with the passage of time. Production from the south pool in August, 1972 has totaled 9.35 billion cubic feet of gas. The north had produced only 5.5 billion cubic feet of gas. (Tr. 130). The pressure differential between the two pools which originally was 111 PSIA, had increased to 964 PSIA because the south pool was being produced at a faster rate. (Tr. 125).

Mr. Henry's solution to the problem of wasting gas and the watering out of wells to the south was a proposal that the northern pool be produced at a capacity to reduce pressure and end the migration of the water plug to the south. The cycle could be stabilized or reversed if capacity production were allowed for approximately four years. (Tr. 135).

There was also some testimony by Mr. Henry that an additional well drilled in the north might be productive. With the additional production, the pressure situation would be slightly alleviated. But a third well would theoretically only permit the production of an additional one million cubic feet of gas per day over the present production of three million cubic feet per day. To correct the pressure imbalance between the north and south pools over nine million cubic feet of gas had to be produced each day. (Tr. 170.)

The commission did not put on any testimony.

In the face of uncontradicted evidence, the commission found there was a single common source of supply and that granting the application would violate correlative rights and that denial of it was necessary to prevent waste. (Findings 5, 6 & 7, Order R-4409-A, Tr. 6 - Findings 6, 7 & 8, Order R-4444, Tr. 39). Those findings are not supported by substantial evidence and indeed fly in the face of uncontradicted direct testimony.

This Court has long held that a trial court or administrative agency may not disregard and discredit uncontradicted evidence and enter findings contrary to that evidence. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968); Board of Education of the Village of Jemez Springs v. State Board of Education 79 N.M. 332, 443, P.2d 502 (1968); Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964).

In the Frederick v. Younger Van Lines, supra, this Court said:

> We think it clear, however, that evidence which is unimpeached and uncontradicted, either by direct testimony, contradictory testimony, suspicious circumstances, or adverse inferences may not be unceremoniously cast aside and disregarded, and findings diametrically opposed thereto lack support.

The commission is charged with the duty of preventing waste. §65-3-10 N.M.S.A. (1953). The commission is mandated by statute

redefine Waste — give full picture (don't pick and choose among duties)

to issue necessary orders to prevent watering out of strata which is productive of oil or gas. §65-3-11(4) N.M.S.A. (1953). The uncontradicted testimony showed that 35% of the gas escaping into the water plug would be unrecoverable and wasted. (Tr.122). The uncontradicted testimony also showed that water was moving into the southern pool displacing the gas in place and watering out productive wells. (Tr. 123). [What is occuring in the Indian Basin-Morrow Gas Pool is "an operating and producing scheme" which is reducing the total quantity of gas that can be ultimately recovered and this is waste. §65-3-3(A) N.M.S.A. (1953).] ?

The testimony showed unequivocally that the water plug was moving toward the southern pool and in the process was watering out the well in the northern edge of the south pool. (Tr. 120). Consequently, the producing life of the wells being watered out will end prematurely. The commission ignored this and by entry of their order violated their statutory charges.

The only testimony available which could be considered in any way as contradictory testimony was the cross-examination of applicant's expert by staff members of the commission. Mr. Staments asked if drawing the structure map and drawing the contour lines on it could be done in a different manner. Mr. Henry readily admited that when connecting datum points on the map, different people might draw different lines. (Tr. 162). We submit that this is most obvious, but Mr. Staments did not even hint that he would draw the map any differently than Mr. Henry. Cross-examination by Mr. Cooly, representing Michael P. Grace questioned the accuracy of some of the well information. Mr. Cooley, throughout his cross-examination asked Mr. Henry if he were aware of various facts, the net result of which was merely to explain and amplify

same lines = different conclusion

c- one alternative = no thought

explain in brief the true picture on cross examination

answers already given. (Tr. 163). Mr. Utz, staff geologist for the commission, merely brought out that a third well probably could be drilled north of Sections 4 and 5 in a productive zone and this would somewhat alleviate the problem by reducing pressure in the north pool. (Tr. 169). Mr. Nutter, the staff engineer, questioned Mr. Henry concerning the controls which he had used in preparing the exhibits. Mr. Henry fully admitted that the controls were not as complete as they would have been had there been a greater density of wells. He also went on to admit that the preparation of the exhibits required some extrapolation. (Tr. 144). But, the extrapolation needed was well within the established limits of reservoir engineering and geological concepts. (Tr. 145). Generally, Mr. Nutter followed the approach that different interpretation could be made, but Mr. Nutter did not at any time indicate that he would have prepared the exhibits which demonstrated the geology and engineering of the area in any different manner than did Mr. Henry. The only direct testimony put on by the commission was a line connecting the various control point lines on the exhibit without any direct testimony what the line meant or what information could be gathered from it. (Tr. 171).

At no time did the commission or Mr. Michael P. Grace offer any witnesses for examination. At no time was any witness offered to show that the two pools were a single common source of gas supply. (Finding 5, Order R-4409-A, Finding 6, Order R-4444). At no time did the commission offer evidence, under oath, that the use of increase allowables or unrestricted production would violate any correlative rights. (Finding 6, Order R-4409-A, Finding 7, Order R-4444). At no time did the commission offer any evidence that waste was not occurring. (Finding 7, Order R-4409-A, Finding 8, Order R-4444).

We are fully aware that under the statutes of the State of New Mexico, the orders of the Oil Conservation Commission are prima facie valid and that the burden is on the appellant to establish the invalidity of any such order. §65-3-22(b) N.M.S.A. (1953). We believe that we have established waste with uncontradicted testimony concerning geology and formation characteristics of the Indian Basin-Morrow Gas Pools. The commission has not proved through their questioning of Mr. Henry that our interpretation of the data was wrong, but only that it possibly could be interpreted in several ways. This is not substantial evidence to support the orders. McWood Corporation v. State Corporation Commission 78 N.M. 31 431 P.2d 53 (1967) states:

> "Orders of an administrative agency cannot be justified without a basis in evidence having rational, probative force."

Perhaps the commission and trial court felt that appellant had not made a prima facie case to overcome the statutory presumption of validity of the commission's action. In that regard, a most appropriate and instructive case is Pan American Petroleum Corporation v. Wyoming Oil and Gas Conservation Commission 446 P.2d 550,556(Wyo.1968). In that appeal the Wyoming Supreme Court observed:

> "With respect to the matter of burden of proof, no mention of it is made in the Wyoming Administrative Procedure Act. We held in substance, however, in Glenn v. Board of County Commissioners, Sheridan County, Wyoming, 440 P.2d 1, 4, which was a contested agency proceeding subject to such Act, that the concept of burden of proof had its place in such a proceeding. The term, however, is used in a dual sense and may mean the burden of establishing the case as a whole or the burden on a party to make out a prima facie case in his favor at a certain stage during the hearing. The sense in which the term was used here is not entirely clear, but if the conclusion of the commission was predicated upon the view that Pan American did not, in the first instance, make out a prima facie case, which it seems to be, we think such a conclusion was in error." (Citations omitted)
>
> * * * * *

> "While we do not profess to be skilled in such scientific matters, and absent technical guidance by the commission by way of adequate findings or otherwise, it would appear that the witness was qualified by training and experience to present the evidence submitted; that for purposes of his study he utilized all of the information available on the field; that such data was that ordinarily utilized for purposes of determining whether or not migration was taking place in the "pool", particularly in that portion here involved; that the method used to calculate the extent, if any, of such migration to Marathon's Wiley lease was well recognized as a "tool of the trade"; and that such evidence was substantial evidence, sufficient in the first instance to make out a prima facie case." Id at 557.

Appellant, with all the scientific and engineering data it could muster attempted to show the commission the conditions existing in the Indian Basin-Morrow Gas Pool. At no time has the commission shown that our information and interpretation was wrong. The findings made by the commission are without support in the record.

POINT II

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

Finding No. 7, Order R-4409-A determines that to prevent waste a separate pool not be created as requested by applicant. A similar finding regarding waste is contained in Order R-4444 and is No. 8. There are absolutely no findings which indicate the reasoning of the commission in making the determination that the denial of the application would prevent waste.

Of course, §65-3-10, N.M.S.A., (1953)charges the commission with preventing waste. This Court has held that the prevention of waste of our petroleum resources is the primary duty of the commission. The commission's jurisdiction is predicated upon the prevention of waste and the protection of correlative rights. The prevention of waste includes within its concept, and subordinate to it, the protection of correlative rights. Continental Oil Company v. Oil Conservation Commission 70 N.M. 310,373 P.2d 809 (1962). But, this is not enough. Findings must appear in the order to show that the commission was acting within the scope of its statutory authority. (cite)

The Oil Conservation Commission has received from this Court instructions in what must be contained in its orders. This was clearly spelled out in Continental Oil Company v. Oil Conservation Commission, supra, when this Court said:

> " 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."

The commission's findings are not sufficient to show the basis or reason for its decision. Indeed, none of the findings made in either order go to the question of waste, but merely address themselves to correlative rights.

In Order R-4409-A (Tr. 6) Finding No. 1 deals with public notice; Finding No. 2 states what is sought by applicant; Finding No. 3 recites that applicant is given hearing de novo; Finding No. 4 determines communication between the north and south pools; Finding No. 5 says that the two pools constitute a common reservoir; Finding No. 6 recites that the granting of the application would violate correlative rights by allowing unratable take; and, finally, Finding No. 7 is the jurisdictional finding that denial of the application would protect correlative rights and prevent waste.

In Order R-4444, (Tr. 39) Finding No. 1 concerns public notice; Finding No. 2 recites what applicant seeks; Finding No. 3 is a recitation of applicant's contentions; Finding No. 4 determines there is a substantial amount of acreage in the north pool undedicated to any well; Finding No. 5 states that applicant could drill additional wells; Finding No. 6 concludes that the north and south pools are a common source of supply; No. 7 is a recitation of the violation of correlative rights if the application is granted; and, again, Finding No. 8 is the jurisdictional finding that the approval should be denied to protect correlative rights and prevent waste.

In neither order is there any finding, basic finding, as to the facts; those that show support to the ultimate finding of the prevention of waste.

Not only has the Supreme Court said that the commission must make necessary findings to show its reasoning and its basis. The requirement for findings and the necessity for them is discussed in 2. Davis Administrative Law Treatise, §16.05. Without the basic findings there could not be judicial review of the administrative action. Having basic findings available also prevents judicial usurpation of administration action. And, of course, having the findings in the records guards against arbitrary and capricious action by the agency.

The necessity for findings sufficient to show the reasoning of an administrative agency was recently reaffirmed in the case of City of Roswell v. New Mexico Water Quality Control Commission, 84 N.M. 561, 505 P.2d 1237 (Ct.Ap., 1972). The New Mexico Court of Appeals setting aside water quality regulations noted:

> This record reveals only the notice of public hearing, the testimony of the various experts and others, some exhibits and the regulations. We have no indication of what the Commission relied upon as a basis for adopting the regulations. As was stated in McClary v. Wagoner, 16 Mich.App. 326, 167 N.W.2d 800 (1969), 'We need to know the path the board has taken through the conflicting evidence. The appeal board should indicate the testimony adopted, the standard followed and the reasoning it used in reaching its conclusion.' These regulations are conclusions without reasons.
>
> * * * * * *
>
> We do not hold that formal findings are required. We do hold the record must indicate the reasoning of the Commission and the basis on which it adopted the regulations. The regulations were not adopted in accordance with law. Accordingly, the regulations are set aside.

A very similar appeal from administrative action is reported in Pan American Petroleum Corporation v. Wyoming Oil and Gas Conservation Commission, 446 P.2d 550,556 (Wyo.1968). The case is very similar to the one presently being submitted to this Court. The Oil and Gas Conservation Commission of Wyoming had denied an

application for an unorthodox drilling location. The Administrative Procedure Act of Wyoming required the agency to include within its decision findings of fact on basic issues. The commission had not done so. The Court, in proceeding to reverse the District Court and remanding the matter to the commission observed:

> Ultimate facts can only 'be reached by a process of legal reasoning based on the legal significance to be afforded primary evidentiary facts,' Braun v. Ribicoff, 3 Cir., 292 F.2d 354,357; and it is the duty of the reviewing court to satisfy itself that an agency determination has been reached 'upon consideration of the whole record or such portion thereof as may be cited by any party, as required by §8(a) of the Act (§ 9-276.26 (a), supra) on a 'reasonable basis in law.' Braun v. Ribicoff, supra. In other words, orderly review requires that the primary basic facts must be settled before it can be determined that ultimate facts found by an agency conform to law. Failure of an agency to meet its responsibilities in the premises makes its determination susceptible to the charge that the order entered is contrary to law." Id at 555.

Thus, necessity for including basic findings of fact to support jurisdictional facts is well recognized. Not only does it allow judicial review, it requires those facts to show the intellectual processes of the agency and prevents arbitrary and capricious action. This is particularly so, when an agency such as the Oil Conservation Commission deals with material and information which can only be analyzed and interpreted by qualified experts.

All the evidence presented to the Commission and all the evidence of record clearly shows that waste is occurring and the granting of the application would prevent that waste. Yet, the fair interpretation of the commission's order is that the commission believes that waste is not occurring at the present time. What evidence exists to support this? The evidence is not contained in this record. Therefore, one must believe that the commission in its deliberations went outside the record for its evidence. Or was it a discussion among the staff experts?

If the commission went outside the record for evidence, or if the staff experts provided them other information, or conferred with one another, why was this expert testimony not presented at the hearing so it could be cross-examined, analyzed and exposed to the light of day? 18 A.L.R.2d 552. Information used by the agency to determine jurisdictional findings on waste should appear in the basic finding of the order and this in turn should reflect in the evidence. None of these administrative requirements is present.

The commission will undoubtedly attempt to justify its jurisdictional finding that waste will occur if the application is granted by pointing to the finding in each order that granting the application would result in unratable takes of gas from the wells in the pools and that this is waste as defined in §65-3-4(D N.M.S.A. (1953). The answer is twofold.

First, §65-3-4(D), supra, deals only with oil and not gas. Gas is handled in §65-3-4(E), supra, and waste of gas is defined as being production in excess of reasonable market demand or in excess of the capacity of the gas transportation facilities. There are no findings in either order dealing with market demand or transportation facilities.

Second, §65-3-15(e), N.M.S.A. (1953) requires a gas common purchaser to take gas ratably from the wells producing from a common source of supply. Finding No. 3 in Order R-4409-A, and Finding No. 6 in Order R-4444 (Tr. 6, 40) purport to determine that the wells in Sections 4 and 5, the north pool, are drilled into a common source of supply with the wells in the south pool. Yet, there is not a single shred of evidence to support that finding as demonstrated in Point I. Again, the jurisdictional finding concerning waste is without basic facts for support.

CONCLUSION

The Oil Conservation Commission is one of the more highly regarded administrative agencies in New Mexico. Its members and its staff are respected throughout the industry that it regulates. The subject matter with which it deals is complex and often speculative. Obviously, geologic and reservoir data may often be interpreted in several possible ways. Normally, when an applicant seeks some relief before the commission or one of its examiners and the application is opposed all the assorted information and its interpretation is brought out. The conflicts are in the record. But, when an application is unopposed, except by the commission staff, a different situation can exist. The applicant is forced to meet and explain data and its interpretation without being aware of its content. There were two hearings before the commission. The first hearing was before an examiner. At that time the staff was well aware of appellant's engineering interpretation of the Indian Basin-Morrow Gas Pool. If the staff did not agree with the interpretation presented, they had ample opportunity to prepare and present a contra interpretation when the hearing was held a second time before the full commission. This was not done. Instead, orders were entered that effectively foreclosed judicial review. The reasoning of the commission behind its jurisdictional finding that waste was not occurring does not appear in the record. The only findings of any substance such as common source of supply and interconnection of the north and south pools are without support in the record.

The matter should be remanded to the District Court of Eddy County to set aside the summary judgments and an order entered remanding the matter to the Oil Conservation Commission for

further hearings.

Respectfully submitted,

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