IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Cases to be Submitted

Monday
July 15, 1974
9:00 A.M.

NO. 9901

City of Albuquerque, Appellant	Frank Horan, City Attorney Cornelius J. Finnen, Asst City Attorney Rodey, Dickason, Sloan, Akin & Robb Duane C. Gilkey William S. Dixon
vs.	
Henry V. Campos, et al., Appellees	Branch, Dickson, Dubois & Wilson Frank P. Dickson, Jr.

NO. 9940

State of New Mexico, Appellee	David L. Norvell, Attorney General Ira S. Robinson, Special Asst Atty Gen
vs.	
John Stance Rushing, Appellant	Chester H. Walter, Jr., Chief Public Defender Bruce L. Herr, Appellate Defender Don Klein, Jr., Asst. Appellate Defender

THE CALL OF THE DOCKET FOR THE FOLLOWING CASES WILL BE AT 1:30 O'CLOCK P.M. AND COUNSEL NEED NOT BE PRESENT UNTIL THAT TIME:

NO. 9907

Rutter & Wilbanks Corporation, Appellant	Kellahin & Fox
vs.	
Oil Conservation Commission, Appellee	William F. Carr, Sp Asst Atty Gen
Black River Corporation, Intervenor-Appellee	Hinkle, Bondurant, Cox & Eaton Harold L. Hensley, Jr. Clarence E. Hinkle

NO. 9929

Gordon M. Cone, et ux, Appellants	Montgomery, Federici, Andrews, Hannahs & Buell
Jewel McFarland, Involuntary Plaintiff-Appellant	Heidel, Samberson, Gallini & Williams Ward & Humphrey
vs.	
Amoco Production Co., et al., Appellees	Atwood, Malone, Mann & Cooter

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Cases to be Submitted

Tuesday
July 16, 1974
9:00 A. M.

NO.9931

State Farm General Insurance Company, Appellee	Klecan & Roach
vs.	
Doris M. Clifton, Appellant	Gallagher & Ruud

NO. 9850

Procopio F. Angel, et al., Plaintiffs-in-Error	Tapia & Campos
vs.	
Floye Jean Widle, Defendant-in-Error	Pat Sheehan

NO. 9947

Gilbert Trujillo, Appellant	Marchiondo & Berry Mary C. Walters
vs.	
Glen Falls Insurance Company, et al., Appellees	Modrall, Sperling, Roehl, Harris & Sisk Bruce D. Black

THE CALL OF THE DOCKET FOR THE FOLLOWING CASE WILL BE AT 1:30 O'CLOCK P.M. AND COUNSEL NEED NOT BE PRESENT UNTIL THAT TIME:

NO. 9938

Otis Engineering Corp., Appellee	A. D. Solsbery Joseph D. Beaty
vs.	
Michael Grace and Corinne Grace, Appellants	Lon P. Watkins F. B. Howden

RUTTER & WILBANKS vs. OIL CONSERVATION COMMISSION

OIL CONSERVATION COMMISSION

CASES 4764 and 4765

ORDER R-4354 and R-4354-A

DISTRICT COURT

COUNTY OF EDDY

CASE 28478

APPEAL BY RUTTER & WILBANKS

Subject of Case:

Compulsory Pooling and
Creation of Non-Standard
Proration Unit

Other Parties:

Michael P. Grace
Corinne Grace

Opposing Counsel:

Jason Kellahin (Rutter & Wilbanks)
William J. Cooley (Grace) - w/drawn
Robert A. Spear (Rutter & Wilbanks)

Other Counsel of Record:

Clarence Hinkle (Black River Corporation)

Judgment for OCC - Sept. 14, 1973

Appealed - Oct. 11, 1973

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner,

vs.

No. 28477
28478
(Consolidated)

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

Respondent,

BLACK RIVER CORPORATION,

Intervenor.

ORDER SETTLING BILL OF EXCEPTIONS

THIS MATTER coming regularly before the Court on Petitioner's application and waiver of notice of the attorneys for the respective parties, and the Court having examined the reporter's transcript and supplemental transcript of the proceedings on the trial of said cause, as duly filed in the office of the Clerk of the Court, finds that the same are a true and accurate record of all proceedings had upon the trial of the subject cause, including all of the record certified to this court by the Oil Conservation Commission of New Mexico, objections, motions, rulings of the Court, exceptions and the original exhibits offered before the Oil Conservation Commission of New Mexico and certified to this court on Petitioner's petition for review, and that the same should be signed sealed and settled as the Bill of Exceptions herein.

WHEREFORE, it is ORDERED that the transcript certified by the Court Reporter and the Clerk of the District Court and filed in the office of the clerk of this Court be, and the same is hereby, signed, sealed and settled as the Bill of Exceptions herein.

DISTRICT JUDGE

Approved as to form:

ATTORNEY FOR PETITIONER

William L. Falk

ATTORNEY FOR RESPONDENT

ATTORNEY FOR INTERVENOR

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION
a Texas Corporation,

Petitioner,

vs. No. 28477
28478
(Consolidated)

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

Respondent,

and

BLACK RIVER CORPORATION,

Intervenor.

WAIVER OF NOTICE

COMES NOW the attorney for the Respondent in the above entitled cause, and waives notice of the time and place of the settling of the Bill of Exceptions herein, and does hereby consent that without any further notice the Honorable D. D. Archer may sign and settle said Bill of Exceptions.

William F. Carr

WILLIAM F. CARR, Special Assistant
Attorney General

ATTORNEY FOR RESPONDENT OIL CONSERVATION
COMMISSION OF NEW MEXICO

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner,

vs. No. _____

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,

Respondent,

and

BLACK RIVER CORPORATION,

Intervenor.

STIPULATION

WHEREAS, Petitioner has heretofore filed its notice of appeal from the judgment entered in Causes Nos. 28477 and 28478 (Consolidated), on the docket of the District Court for the Fifth Judicial District sitting in and for Eddy County, New Mexico, and

WHEREAS, the said causes were separate appeals taken from orders of the Oil Conservation Commission of New Mexico, entered after hearing on a consolidated record, and

WHEREAS, said causes were consolidated for trial in the District Court, heard on a common record, and a consolidated judgment entered therein, and

WHEREAS, said causes present identical questions for review in the Supreme Court, and

WHEREAS, in preparation of the record on appeal in said causes, the Clerk of the District Court has certified to the Supreme Court a separate packet of exhibits, being the original exhibits certified to the District Court by the Oil Conservation Commission as a part of the record of the hearings before the Oil Conservation Commission and considered as such by the District Court,

NOW, THEREFORE, the undersigned attorneys of record for the respective parties hereto hereby stipulate and agree that subject to approval of the Supreme Court said cases on appeal may be consolidated for all purposes, and that said appeals by petitioner may be heard and determined upon a single transcript and record, and

IT IS FURTHER stipulated and agreed that upon approval of the Supreme Court of New Mexico, the originals only of the exhibits certified by the Clerk of the District Court may be received for all purposes in this appeal.

JASON W. KELLAHIN
Kellahin & Fox
P. O. Box 1769
Santa Fe, New Mexico 87501

ATTORNEY FOR PETITIONER

William F. Carr

WILLIAM F. CARR
Special Assistant Attorney General

Attorney for Respondent

CLARENCE H. HINKLE
Hinkle, Bondurant, Cox & Eaton
P. O. Box 10
Roswell, New Mexico 88201

Attorney for Intervenor

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner,

vs. No. _____

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

Respondent,

and

BLACK RIVER CORPORATION,

Intervenor.

O R D E R

THIS MATTER coming on regularly to be heard on the stipulation of the parties for consolidation of the appeals and preparation and acceptance of the record herein, and it appearing to the Court:

1. That the above styled cause was filed in the District Court for the Fifth Judicial District Sitting in and for Eddy County, New Mexico as two causes, being Causes Nos. 28477 and 28478 (Consolidated), on the docket of said court.

2. That said causes were separate appeals taken from orders of the Oil Conservation Commission of New Mexico, entered after hearing on a consolidated record before the Commission.

3. That said causes were consolidated for trial by the District Court under the style and designation of "Rutter & Wilbanks Corporation, Petitioner, vs. Oil Conservation Commission

of New Mexico, Respondent, No. 28477, No. 28478 (Consolidated)", were heard on a consolidated record, and a consolidated judgment was entered therein.

4. It further appearing that the parties hereto have stipulated that the original exhibits offered in the hearing before the Oil Conservation Commission and certified to the District Court by said Commission be considered as if the same had been included in the transcript, bill of exceptions and record as prepared and certified by the Clerk of the Court in this appeal.

And the Court being fully advised in the premises and good Cause appearing therefor.

It is, therefore, ORDERED, that the action of the District Court of the Fifth Judicial District in and for Eddy County, New Mexico, consolidating Causes Nos. 28477 and 28478 on the docket of that court for all purposes be, and the same hereby is ratified and confirmed, and said causes be, and they hereby are consolidated for all purposes in this Court.

It is FURTHER ORDERED, that the original only of the exhibits offered in the hearing before the Oil Conservation Commission of New Mexico, and certified to the District Court for review in this cause be and the same are hereby received in this Court for all intents and purposes as if the same had been included in the transcript and bill of exceptions certified to the Court by the aforesaid District Court in its transcript and bill of exceptions.

_____

CHIEF JUSTICE

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner,

-vs-

No. 28477
No. 28478
(Consolidated)

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,

Respondent,

and

BLACK RIVER CORPORATION,

Intervenor.

PETITIONER'S TRIAL BRIEF

Statement of the Case

Cases No. 28477 and 28478 are statutory appeals from orders of the New Mexico Oil Conservation Commission approving two non-standard gas proration units in the Washington Ranch-Morrow Gas Pool, Eddy County, New Mexico, and pooling all of the mineral interests in the Washington Ranch-Morrow Gas Pool underlying the non-standard units. The cases were brought before the Commission on the application of Black River Corporation, and were opposed, both as to the creation of the non-standard units and the compulsory pooling by Petitioner as an owner of overriding royalty interests, and three other overriding royalty interest owners (Tr. Case No. 4763, p. 25).

Since the lands and units involved are adjacent to each other, lying in the same section, and substantially the same questions of law and fact are involved, and the same parties are involved insofar as this proceeding is concerned, the cases may be properly consolidated for purposes of hearing.

These proceedings for judicial review are brought under the provisions of Section 65-3-22 (b), New Mexico Statutes Annotated, 1953 Compilation, as amended.

The actions of the Commission involved here are two orders entered on the application of Black River Corporation after a hearing before one of the Commission's examiners, wherein Black River sought, and obtained, the approval of two non-standard gas proration units consisting of the East half, and the West half of Section 3, Township 26 South, Range 24 East, N.M.P.M., Eddy County, New Mexico. Section 3 is considerably over-sized, containing some 816.42 acres according to the governmental survey. (Black River Exhibit No. 5, Consolidated Hearing November 21, 1972, Cases 4763, 4764, 4765).

Order No. R-4353, entered in Case No. 4763 on the Commission's docket, pooled the entire east half of Section 3 to form a 409.22-acre non-standard gas unit to be dedicated to Black River's Cities "3" Federal Well No. 2, for production from the Washington Ranch-Morrow Gas Pool.

Order No. R-4354, was entered in two cases, which were consolidated because two applicants were seeking to be designated as operator of the same unit. As a result of these cases, No. 4764 and 4765 on the Commission's docket, the Commission pooled the west half of Section 3 to form another non-standard gas proration unit of 407.20 acres, to be dedicated to Black River's Cities "3" Federal Well No. 1, also for production from the Washington Ranch-Morrow Gas Pool.

Petitioner filed a timely application for a hearing de novo as provided by Section 65-3-11.1, N.M.S.A., 1953 Comp. After a hearing de novo, in which the cases were consolidated, the

Commission entered its Order No. R-4353-A reaffirming its order No. R-4353, and entered its order R-4354-A reaffirming its Order No. R-4354.

Petitioner filed a timely application for rehearing in both cases, as provided by Sec. 65-3-22 (a), N.M.S.A., 1953 Comp. The applications for rehearing being denied by the Commission's failure to act upon them within ten days after filing, these appeals to the District Court for judicial review were filed.

Petitioner's Grounds for Relief

Petitioner asserts that the Commission's orders, reaffirmed on hearing de novo, are unlawful, unreasonable, arbitrary and void for a number of reasons, all of which are fully stated in petitioner's application for rehearing filed with the Commission, and in the petition for review filed with the Court. That all of these contentions are not argued fully in the brief or asserted in oral argument before the Court should not be taken as a waiver of these contentions.

Petitioner's attack on these orders is threefold:

1. The Commission has not complied with the New Mexico Statutes and its own rules and regulations in creating the disputed non-standard proration units.

2. The Commission has not complied with New Mexico statutes in entering an order of compulsory pooling as to the two units.

3. The orders are arbitrary and capricious in that they do not protect the correlative rights of petitioner and other owners of interests in the unit; as required by law they deprive petitioner of his property without due process of law contrary to the provisions of the Constitutions of the United States of

America and the State of New Mexico, and they are not supported by substantial evidence.

Statutory Provisions Regarding Proration Units

The Commission has not complied with New Mexico statutes governing the creation of proration units, nor has it followed its own rules and regulations in entering the disputed orders.

Petitioner asserts, in its application for rehearing, numerous grounds to show the invalidity of the Commission's orders in these two cases, including the grounds just stated. Matters stated in the application for rehearing are the subject of this review by the Court. Sec. 65-3-22 (b), N.M.S.A., 1953 Comp., Pubco Petroleum Corp. v. Oil Conservation Commission, 75 N.M. 36, 399 P.2d 932.

The Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it. Continental Oil Company vs. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809.

In these cases the Commission has purported to enter orders creating "non-standard" proration units. It should be pointed out in the first place the Commission has never prorated gas production from the Washington Ranch-Morrow Gas Pool, and the term "proration unit" is at least misleading. The units should more properly have been called "spacing units."

The authority of the Commission to create proration units is found in Sec. 65-3-14, N.M.S.A., 1953 Comp. which provides:

> "(b) The Commission may establish a proration unit for each pool, such being the area that can be efficiently; and economically drained and devoloped 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." (Emphasis added)

The Commission has never entered any order creating proration units for the Washington Ranch-Morrow Gas Pool pursuant to this statutory provisions, which is its sole authority for the creation of such units. Instead it has, by the adoption of an emendment to its Rule 104, B, I (a) and Rule 104 C, II (a) established a drilling tract of 320 acres for all wells projected to a geological formation of Pennsylvanian age or older.

This is not the equivalent of adoption of a proration unit for a pool pursuant to the provisions of Sec. 65-3-14 quoted above.

At best the Commission has done nothing more than adopt a spacing rule requiring that 320 acres be available before a well can be drilled to formation of Pennsylvanian age or older. Presumably this was done pursuant to the provisions of Sec. 65-3-11 (10), N.M.S.A., 1953 Comp.

Thus in the absence of prorationing, and having never created a standard proration unit pursuant to statutory authority, it is difficult to see how the Commission has found authority to create two non-standard proration units, both nearly one-third larger than the standard spacing unit called for by its Rule 104, which is the only rule we have been able to find covering the situation.

Assuming the Commission has in fact established some sort of unit to which it can grant an exception, we find no

authority in the statutes for the granting of exceptions to the Commission's rules and regulations. Admittedly some exceptions are essential to adjust unit boundaries to governmental surveys, situations created by prior drilling and dedication of acreage to wells, and other contingencies. In the absence of a standard laid down by the legislature to govern the Commission's exercise of its discretion, the courts will infer that the standard of reasonableness is to be applied. 1 Am. Jur.2d, Administrative Law § 116.

The Commission has, by its rules, adopted no standard that would fit this situation. The only rule pertinent is its Rule 104 D II, which provides that the secretary-director of the Commission may approve a non-standard unit where the unorthodox size or shape of the unit is necessitated by a variation in the legal subdivision of the Public Land Surveys. Apparently the Commission did not feel this provision was applicable since it set the case for hearing on the assumption it could only make change in the units after hearing.

So, we are confronted with the question of whether the Commission's action in approving the units is reasonable. In a pool presumably spaced in 320-acre units, the Commission has approved two units of 409.22 acres, and 407.20 acres, respectively. That amounts to an excess of 89.22 acres in one instance and 87.20 acres in the other, or an increase in acreage dedication of between 27 and 28 per cent. Other wells in the pool are located on and producing from 320-acre units.

The units under consideration here are composed of divided interests, which are not common throughout the units, (Tr. Case 4763, July 12, 1972, pp. 14, 23, 25). They are located in a

pool the production from which is not prorated so there is no possibility to adjust allowables to the individual wells to adjust for the discrepancy in the acreage allotted here (Tr. Cases 4763, 4764, 4765, Nov. 21, 1973, p. 22). The wells located on the units will thus be permitted to produce at capacity, as will all the other wells located in the pool, regardless of how much acreage is attributed to them. The Commission has taken no steps to protect the correlative rights of the owners of the mineral interests underlying these tracts. Production from the smaller, 320-acre units, has not been curtailed by the Commission. The Commission cannot, in the absence of prorationing, grant any increase to the wells on these larger units. They are already permitted to produce all of the gas they are capable of producing.

Correlative Rights

As we have shown, the Commission is required to protect the correlative rights of owners, including those of royalty owners, by the provisions of Section 65-3-14, N.M.S.A., (b), 1953 Comp.

The Commission is further enjoined to protect correlative rights by the provisions of Section 65-3-10, N.M.S.A., 1953 Comp., which provided:

> "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 whereof."

Further, Section 65-3-14 (a), N.M.S.A., 1953 Comp., provides:

> "(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 can be practicably obtained without waste, substantially in proportion that the quantity of the recoverable oil or gas, or both, in the pool, and for this purpose to use his just and equitable share of the reservoir energy." (Emphasis added)

This section paraphrases the definition of correlative rights found in Section 65-3-29, N.M.S.A., 1953 Comp.:

> "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 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)

The correlative rights of royalty owners must be considered along with those of other interest owners. Sec. 65-4-14 (b), supra. Compare Sims v. Mechem, 72 N.M. 186, 382 P.2d 183. The duty of the Commission to protect correlative rights is coupled with the duty to prevent waste. In Continental Oil Company v. Oil Conservation Commission, supra, the court pointed out (p. 318):

> "The Oil Conservation Commission is a creature 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."

In an effort to comply with this duty, the commission has made findings in each of the orders to the effect that correlative

rights will be protected. In its finding No. 10 in each of the orders the commission made a finding to the effect:

> "* * * to protect correlative rights, and to afford the owner of each interest in said non-standard unit the opportunity to recover and receive, without unnecessary expense his just and fair share of the gas in said pool, all mineral interest * * * should be pooled to form a 409.22 (407.20) acre non-standard gas proration unit. * * *."

We submit that the record in these cases is wholly devoid of any evidence to support such a finding. If we assume this pool is spaced on 320-acre proration units, such units could have been created only on a finding that units of that size would protect correlative rights in the Washington Ranch-Morrow Gas Pool. Sec. 65-3-14 (b), supra. There is no finding in the commission's order that correlative rights were not being protected by the 320-acre spacing in existing in the pool, and there is no order changing the spacing in the pool as a whole.

As we have shown the pool is not prorated, and the finding of the Commission to the effect that formation of the non-standard proration units would protect correlative rights was directly counter to the testimony of Mr. Aycock, expert witness for Black River Corporation. Mr. Aycock, on the question of the necessity for prorationing to protect correlative rights in a situation of this kind, tesitfied (Tr. Case 4764, 4765, July 12, 1972, p. 37-38):

> MR. STAMETS: You responded to several questions that Mr. Kellahin asked concerning the protection of royalty interests in the South half of Section 3. I'm not quite clear as to whether you feel this pool will have to be prorated or needs to be prorated in order to protect the royalty interests of the operators in the South half of Section 3 if these large units we are discussing here are approved.

THE WITNESS: In my opinion, this Commission will have to take that into account, take into account the size of the proration units, yes.

The New Mexico Supreme Court passed on these statutes regarding correlative rights in the case of Continental Oil Company v. Oil Conservation Commission, supra. There the court had this to say (p. 319):

> * * * 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. (Emphasis by Court). 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) * * * 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 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.'"

This ruling of the Court was followed in El Paso Natural Gas Company v. Oil Conservation Commission, 76 N.M. 268, 414 P.2d 496.

While both the Continental and the El Paso cases dealt

with the effect of a proration formula for the allocation of gas production from a pool, the size of a unit to be dedicated to a well has an equal effect upon the opportunity afforded an owner to produce his just and equitable share of the gas in the pool, when we are dealing with an unprorated pool as is the case here. The same questions as tothe protection of correlative rights exist in either case.

While making a finding that correlative rights will be protected, thereby giving lip service to the statutes and the mandate of the Supreme Court, the Commission made no findings as to recoverable reserves in the pool, or recoverable reserves underlying the two tracts involved, or underlying any other tracts in the pool. It made no finding concerning drainage. It made no finding as to what amount of gas could be recovered without waste. As stated in the Continental case there is no indication that the commission attempted to do any of these things, event to the extent of "insofar as is practicable."

The commission of course, could not make such findings for there is no testimony or evidence in the record to support them.

There is no testimony whatever as to recoverable reserves in the pool. There was no information offered, such as pressures, production figures, pressure declines, nor any of the basic information from which reserve figures could be calculated. Likewise there were no reserve figures given on the two non-standard units involved. On the contrary, the witness for Black River Corporation, applicant in both cases, testified as follows (Tr. Cases 4763, 4764, 4765, Nov. 21, 1973, p. 23):

Q. Have you made any calculations of the reserves underlying Section 3?

A. I have made no calculations with regard to specific

areas. I have made some reserve estimates based on relative deliverability and assuming drainage areas to be of various sizes. I do not represent them to be accurate at this stage because it was done before the wells in Section 3 were drilled, and at that time I did work them out there were no Upper Morrow completions. So the calculations I have -- I have done some, but they are obsolete.

Q. On the basis of what you have done, would you say reserves of ten billion underlying Section 3 would be a reasonable or an unreasonable estimate?

A. I would say for both zones, eight to ten billion would be accurate, but I'm not prepared to testify to that because the whole thing might not be productive. I would preface that by saying that if the whole thing is productive and if the log information we have available to us is representative of that area, then I think that the number you quoted, plus or minus, would be okay. But that would be with those qualifications, and if any of those conditions are not met, I don't have any idea of what it would be, and the only way I could find out would be to study the pressures and the productive history of the wells. (Emphasis added)

Q. And that has not been done?

A. No, sir. In my opinion, it would take one to two years to make reserve estimates that I would have any confidence in.

With that testimony the matter of recoverable gas under the pool and under the various tracts was dropped. That is all the testimony there is as to reserves. It is obvious on the basis of this record the Commission could not have considered correlative rights or acted to protect them, as directed by the statutes and the Continental and the El Paso cases. In the absence of the basic information required the Commission could not possibly make the basic findings regarding correlative rights called for the statutes and the cases.

Question of Drainage.

On the question of drainage, the situation was much the same. The Commission, in its orders, made a finding that one well would adequately drain and develop the non-standard proration units. This finding was apparently based on some broad

general assertions, unsupported by any facts, that one well would drain each of the proposed over-size units. The testimony on this won't support the conclusion. For example, Black River's witness testified (Tr. Case 4763, July 12, 1973, p. 18):

> Q. Has the well on the East half (of Section 3) been produced at all as yet?
>
> A. Not as yet -- not other than to take a C-122 test and submit it.
>
> Q. You actually have no production experience or have not run any tests to determine what areas the well would drain in this particular pool?
>
> A. There hasn't been enough production withdrawn to affect pressure to the degree that we could detect that adequately at the present time. (Emphasis added).
>
> Q. So the only thing you have to establish a drainage pattern are the permeability figures?
>
> A. Yes.

As to the accuracy of these permeability figures, the same witness testified in the same case (Tr. p. 13):

> "* * * you can't calculate permeability from logs, but taking the C-122 test and examining the data, I think very few technical people would disagree with the fact that each test shows a great degree of stability. In other words, the tests are true tests and really indicative of deliverability. I estimate the permeability to run from one and a half to fifteen millidarcies for an average of about 7.2 millidarcies," (Emphasis added).

Thus we have the expert witness for Black River stating that his estimates of drainage are based solely on permeability figures, after having testified that he had no permeability figures and was utilizing an estimate.

This cannot be considered substantial evidence to support the findings of the Commission regarding drainage.

Two witnesses appearing for Michael P. and Corinne Grace testified to the same effect, on the question of drainage.

Charles P. Miller, a geologist, testified as follows (Tr. Cases 4764, 4765, July 12, 1972, p. 57, 58):

> Q. Do you feel that this acreage could be drained by the existing well in the West half of Section 3?
>
> A. I have doubts about that.
>
> Q. Have you examined the permeability and porosity of these wells?
>
> A. From samples or on what basis?
>
> Q. Any basis available to you.
>
> A. I have examined the logs, yes.
>
> Q. What gives you your doubt with respect to this?
>
> A. Well, my general experience with the Pennsylvanian section leads me to question how far the drainage will reach out.

Mr. Richard Steinhorst, Jr., an engineer, testifying in the same case stated (Tr. p. 62):

> Q. (By Mr. Cooley) Do you have an opinion as to the question that was previously put to Mr. Miller as to the capability of this particular well to drain the entire West half of Section 3?
>
> A. I think it is questionable.
>
> Q. Do you feel that subsequent production history should be obtained before the ordering of drilling or the preventing of drilling of any additional well?
>
> A. I definitely do. In other words, the information that has been given by the expert testimony prior to this is not substantial enough to make a determination as to the advisability of another well at this time. (Emphasis added)

Correlative Rights of Petitioner

In the face of this situation, petitioner offered testimony to show the effect of the proposed units would have on him and his associates -- his correlative rights. On the basis of the only accurate information presented at the hearing, acreage, the correlative rights of petitioner were not being protected.

In the original hearings petitioner's witness, A. W. Rutter,

testified (Tr. Case 4763, July 12, 1973, p. 26):

> Q. Did you decline to join in the unit?
>
> A. Yes, sir.
>
> Q. For what reason?
>
> A. The east half of the section contains 407 acres and portions of Lots 1, 2, 7, 8, and in the North half of the Southwest quarter contain 322.15 acres. This exceeds the standard proration unit, and to add additional acreage is in effect diluting our royalty interests without any offsetting increase in reserves or current production. So, therefore, it would be damaging to our correlative rights.

And at the hearing on the combined cases 4764 and 4765, the same witness testified (Tr. Cases 4764, 4765, July 12, 1973, p. 39):

> Q. You heard the testimony in connection with the forced pooling of the West half of Section 3, and the Commission has agreed to incorporate your testimony in the preceding case into this case. Are there any basic differences in the forced pooling of the West half as opposed to the East half?
>
> A. The big difference is the acreage which we have. This area is within three percent of being a proration unit, and Lots 3, 4, and 5 in the North half of the Southwest quarter constitute one basic fee ownership by the United States Government, common overriding royalty ownership, common working interest ownership, and it comes within three percent of being a standard proration unit.
>
> Q. What would the acreage be?
>
> A. Taking 407.20 acres and subtracting 49.64 acres and 47.12 acres it comes to 310.43 acres. If the South half of the South (sic) quarter is included in the proration unit, from what I understand, it will dilute the royalty interests, in the remaining acreage. It is approximately twenty-three and a half percent. I could get a slide rule and actually make the calculation, but it is on the order of twenty-three to twenty-five percent.

In addition to the simple question of dilution of petitioner's interest by the additional acreage; in which he owns no interest, there is a further dilution of his interests by the addition of dry acreage to the well in each half of Section 3.

The Commission has made a finding that all of the two tracts may reasonably be presumed to be productive of gas from

the Morrow formation. In this connection it should be borne in mind that there are two main producing zones, commonly referred to as the Upper Morrow and the Lower Morrow (Tr. Cases 4763, 4764, 4765, Nov. 21, 1973, p. 19).

There are numerous opinions expressed by Black Riber's witness in the three hearings to the effect that the entire area of Section 3 may reasonably be presumed to be productive of gas from the Morrow formation.

Black River's Exhibits clearly show that the Lower Morrow zone is not productive throughout the section, and there is considerable doubt as to the productivity of the upper zone.

The applicant's Exhibit No. 2, offered at the consolidated hearing on November 21, 1972, is a plat contoured on the bottom of the Lower Morrow. On this exhibit, the 3300 foot contour passes across the section, slightly over halfway down the section.

Exhibits 3 and 4 are log cross sections, showing the perforated intervals in the vaious wells. An examination of these exhibits will show that ~~as to the Upper Morrow, no well is producing below 3291 feet, and~~ as to the Lower Morrow, there is no production below 3300 feet. In fact the lowest Morrow producer is the Black River Cities 1-E Federal well in Section 35 to the North of the subject units/ producing from 3291 feet. Clearly the Lower Morrow productive zone does not extend to the South half of the South half of Section 3, and it is doubtful that the Upper Morrow producing area will extend that far to the South. This was pretty much conceded by Black River's witness (Tr. Cases 4763, 4764, 4765, Nov. 21, 1972, p. 18):

Q. So the North half of Section 10 (Immediately South of Section 3) is non-productive?

A. Our data would indicate it probably would be.

Q. And part of the South half of Section 3 would be non-productive, possibly?

A. It possibly would be if you are talking about the extreme corner, the extreme southwest corner.

This is the same witness who testified that the entire section was productive from the Morrow formation.

The Commission has thus included in the units, and diluted petitioner's royalty interest with acreage which the testimony shows will not be productive in the Lower Morrow, and is of questionable productivity in the Upper Morrow. The result is he is sharing his royalty interest with owners of property that is non-productive.

Compulsory Pooling

The Commission, in creating the over-sized units, has also force pooled all of the mineral interests underlying them insofar as the Washington Ranch-Morrow Gas Pool is concerned.

The action of the Commission was based on the provisions of Section 65-3-14 (c), N.M.S.A., 1953 Comp., which provides:

> (c) When two (2) or more separately owned tracts of land are embraced within a spacing or proration unit, or where there are owners of royalty interests or undivided interests in oil and gas minerals which are separately owned or any combination thereof, embraced within such spacing or proration unit, the owner or owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owner or owners have not agreed to pool their interest, and where one such separate owner, or owners, who has the right to drill has drilled or proposes to drill a well on said unit to a common source of supply, the commission, to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste, shall pool all or any part of such lands or interests or both in the spacing or proration unit as a unit. (Emphasis added)

We are concerned here, of course, with a spacing unit, as we have discussed above. No proration units have been created for this pool pursuant to the statutes.

The history of compulsory pooling lies in the problem created by the ownership of small tracts lying within established spacing or proration units. The owner of such a tract was denied the right to drill and develop his property under such orders, and for many years the state of Texas, as a matter of constitutional right, permitted the drilling of wells on small tracts. Kulp, Oil and Gas Rights, § 10:99, p. 732, 733 (American Law of Property).

The concept of pooling arose out of this necessity to protect the owner of the small tract, smaller than a standard spacing or proration unit, and compulsory pooling arose out of the necessity to bring about some uniformity in the development of the oil or gas pool. Sullivan, Handbook of Oil and Gas Law, 1955, discuss the problem thus (Sec. 162, p. 308):

> "Under a system of minimum acreage spacing or specified drilling units the small tract that cannot meet the requirements of the spacing rule is denied a well. In order to prevent confiscation of the recoverable oil beneath such tracts and to give each owner the opportunity to produce his fair share thereof, spacing statutes and regulations provide for pooling. Pooling is the uniting of separately owned, small, or irregularly shaped tracts for the purpose of integrating the minimum acreage necessary for a drilling unit. * * *"

The problem originally arose where city lots were involved, and it became mandatory that some action be taken to prevent the drilling of numerous wells within municipalities. 6 Williams and Myers, Oil & Gas Law, § 905.1, p. 14.

It should be noted that almost uniformily the compulsory pooling statutes of the various states presuppose the existence of an established drilling or spacing unit. Williams and Myers,

supra, § 905.2, p. 28.6. This is the case with the New Mexico statute, which refers to "spacing or proration unit."

Being designed to solve the problem of the owner of a small tract of less than the size of a standard spacing or proration unit, under our statute compulsory pooling cannot be expanded to include a unit larger than an established spacing or proration unit.

Hence practically all of the compulsory pooling statutes read as our does: "when two or more separately owned tracts of land are embraced within a spacing or proration unit * * *" they may be pooled either voluntarily or by order of the Commission.

Our legislature has seen fit to make this abundantly clear by the use of the double term "embraced within." In no way could this be read to include acreage outside of the established spacing or proration unit for the pool.

"Embraced" has been defined by the Random House Unabridged Dictionary as meaning: 6. to encircle; surround; enclose; 7. to include or contain.

"Within", the Random House Dictionary defines as meaning (4) inside an enclosed place, area, room, etc.; (6) in or into the interior of or the parts or space enclosed; (7) inside of, in; (8) in the compass or limits of, not beyond; (12) not transgressing; (14) the inside of a place, space or building.

Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them. State v. Martinez, 48 N.M. 232, 149 P.2d 124, 155 A.L.R. 811; State v. Thompson, 57 N.M.

459, 260 P.2d 370; State ex rel. State Highway Commission v. Marquez, 67 N.M. 353, 355 P.2d 287.

"Embrace within" can mean nothing other than to contain within the spacing or proration unit, the acreage sought to be pooled. To expand the statute beyond its plain meaning does violence to the concept of pooling, and particularly to the concept of compulsory pooling.

Here we have a pool for which the Commission has established 320-acre spacing units. The Commission, by its orders, has gone outside of those spaing units and included in one unit which they denominate a "proration unit" acreage totaling in excess of 409 acres in one instance and 407 acres in another. We submit this does violence to the plain, unambiguous meaning of the compulsory pooling statute.

C O N C L U S I O N

Petitioner respectfully submits that the record in these cases will not sustain the findings upon which the orders in question is predicated. There is no substantial evidence that one well will drain the oversize units involved. There is no substantial evidence as to the reserves underlying the pool or under the two units involved, or any other units in the pool. There is no substantial evidence that waste will occur if the oversize units are not approved. The orders permit the dedication of non-productive acreage to the wells, to the detriment of Petitioner, with the creation of oversize units, correlative rights cannot be protected unless the pool is prorated, which has not been done.

The order does not contain the basic statutory requirements concerning the protection of correlative rights, nor would the

record and evidence sustain such findings, had they been made. The commission cannot lawfully evade its statutory duty to protect correlative rights, nor can it act to protect such rights unless it first determines what those rights are. Continental Oil Company v. Oil Conservation Commission, supra.

In summary, the Commission has not followed the New Mexico statutes in the creation of proration units for the Washington Ranch-Morrow Gas Pool; it has not made any determination as to what correlative rights in the pool are, nor has it acted to protect them; it has exceeded its statutory duty in creation of units far in excess of the standard spacing unit established for Morrow pools generally.

Orders R-4353, reaffirmed by R-4353-A, and R-4354, reaffirmed by R-4354-A should be vacated and set aside by the Court.

Respectfully submitted:

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ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RUTTER AND WILBANKS CORPORATION, a Texas corporation,	)	
Petitioner-Appellant,	)	
vs.	)	
OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,	)	
Respondent-Appellee,	)	No. 9907
and	)	
BLACK RIVER CORPORATION,	)	
Intervenor.	)	

RESPONDENT AND INTERVENOR'S ANSWER BRIEF

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The cases before the Oil Conservation Commission which gave rise to this appeal involved applications for compulsory pooling. The question before this Court, however, is narrower in scope for during the de novo hearing before the Commission, the Appellant, Rutter and Wilbanks Corporation, stated it did not object to compulsory pooling but merely to the size of the units involved as this affected its correlative rights (Tr. 174, 186).

The District Court failed to adopt any Findings of Fact or Conclusions of Law although such findings and conclusions were suggested by both the Petitioner-Appellant and by the Respondent-Appellee and Intervenor. Since there are no findings and conclusions, the review in this Court must necessarily be the same as the review in the District Court, Otero v. New Mexico State Police Board, 83 N.M. 594, 595, 495 P. 2d 374 (1972).

The scope of review in this proceeding is limited since this is an appeal from orders issued pursuant to administrative hearings before the Oil Conservation Commission. The Court may only look at the record made in the administrative hearings and may not consider additional evidence, Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 325, 373 P. 2d 809 (1962).

The questions before the Court involve the effect of the Commission's orders compulsory pooling certain non-standard units. The Commission's system of prorationing is relevant to these questions only as it relates to the issues of compulsory pooling and correlative rights and this is not a proper proceeding in which to attack the entire system of prorationing in New Mexico.

It should be noted that in this case there is a conflict in

the technical evidence. The questions before the Court are limited, however, to whether or not there is substantial evidence supporting the orders of the Commission and whether or not the Commission acted consistently with its statutory responsibilities.

ARGUMENT

The argument presented by Petitioner-Appellant's Brief in Chief (hereinafter referred to as Appellant) is headed as follows:

> NEW MEXICO OIL CONSERVATION COMMISSION ORDER NO. R-4353, REAFFIRMED BY ORDER NO. R-4353-A, AND ORDER NO. R-4354, REAFFIRMED BY ORDER NO. R-4354-A, ARE UNLAWFUL, UNREASONABLE, ARBITRARY AND CAPRICIOUS AND SHOULD HAVE BEEN SET ASIDE BY THE TRIAL COURT.

We deny the foregoing and, as will more particularly appear in discussing the points raised by Appellant, we take the position that said orders are not unlawful, unreasonable, arbitrary or capricious and that the orders of the Commission should be affirmed.

The controversy in these consolidated cases is largely brought about by the fact that a considerable portion of Section 3, Township 26 South, Range 24 East, NMPM, Eddy County, New Mexico, is federal land. (Ex. A) By reference to Exhibit "A" which is attached to Appellant's Brief in Chief, it will be noted that there is contained in the West half of said Section 3, 310.43 acres of federal land and in the East half 279.77 acres of federal land. The overriding royalty interests which amount to 4.7 percent being claimed by Appellant is carved out of the working interest in the federal lease which covers the above mentioned federal land and in which the United States has a 12 1/2 percent royalty interest. (Tr. 69, 70). There were two other owners of overriding royalty interests under the federal lease who objected along with Rutter and Wilbanks to the non-standard spacing unit at the original hearings before the Oil Conservation Commission examiner. Altogether, these royalty owners owned a 5 percent overriding royalty. The overriding royalty interest owners elected to abide by the orders of the Commission, with the exception of Rutter and Wilbanks, and the largest royalty owner, namely the United States,

has not interposed any objection whatsoever to the orders of the Commission (Tr. 70).

All of the working interest owners in both the East half and West half of Section 3 agreed to the non-standard units (Tr. 68, 69, 77, 229) and all participated in the cost of the respective wells which are now producing from the East and West halves (Tr. 71, 229), except at the time of the Oil Conservation Commission examiner hearings on Cases 4764 and 4765, Michael P. Grace was claiming the lease rights in and to the Southeast quarter of the Southwest quarter of Section 3 adverse to that of Black River Corporation and it was not certain at that time who would be responsible for the portion of the costs of the well in the West half of Section 3 to be allocated to this acreage (Tr. 100, 102).

A. The first point raised by Appellant in its Brief in Chief is:

> THE COMMISSION HAS NOT COMPLIED WITH NEW MEXICO STATUTES IN CREATING THE NON-STANDARD PRORATION UNITS.

This point is raised even though the Appellant during the de novo hearing before the Commission stated through counsel: "We are not having a hearing for the establishment of proration units." (Tr. 238)

Appellant's whole case seems to revolve around the contention that you can't have a spacing unit without making a determination that the spacing unit also qualifies as a proration unit. Appellant points out that production from the Washington Ranch-Morrow Gas Pool has never been and is not now prorated and that there has never been any necessity to create proration units. This is a correct statement but in the face of the same, Appellant takes the position that it will be necessary for the Commission to go through the formality of establishing a proration unit for the Washington Ranch-Morrow Gas Pool even though the pool has never

been prorated and none is presently contemplated, so far as known (Brief in Chief p. 8).

Section 65-3-11 NMSA, 1953 Comp., enumerates the powers of the Commission. The second paragraph of this section provides as follows:

> Apart from any authority, express or implied, elsewhere given to or existing in the Commission by virtue of this act or the statutes of this state, the Commission is hereby authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated herein, viz.: ...(10) To fix the spacing of wells;

Several sections of the statutes relating to the Oil Conservation Commission refer to "spacing or proration units". This is true of subsection (c) of 65-3-14 NMSA, 1953 Comp., which relates to force pooling and subsection (a) of 65-3-14.5 NMSA, 1953 Comp., which relates to cases of "spacing or proration units with divided mineral ownership."

It would seem to be clear from that portion of Section 65-3-11 NMSA, 1953 Comp., quoted above that the Commission is authorized by statute to make rules, regulations and orders with respect to fixing or providing for the spacing of wells. The Commission has provided for well spacing in a very comprehensive way by the adoption of Rule 104, which is a part of the official regulations of the Commission. Rule 104, subsection (a) deals with wildcat wells and development wells and subsection (d) deals with well locations for wildcat gas wells in Lea, Chaves, Eddy and Roosevelt Counties. Under Article II of Rule 104 provision is made for spacing units to be dedicated to a well to be drilled in a defined gas pool of less than Pennsylvanian age which shall consist of 160 surface contiguous acres, more or less, substantially in the form of a square which is a quarter section being a legal

subdivision of the U. S. Public Land Surveys.

The second paragraph of Article II of Rule 104 provides that each development well for a defined gas pool of Pennsylvanian age or older which was created and defined by the Commission after June 1, 1964 "...shall be located on a designated drilling tract consisting of 320 surface contiguous acres, more or less, comprising any two contiguous quarter sections of a single governmental section, being a legal subdivision of the U. S. Public Land Surveys."

We are unable to find any provision in any of the conservation statutes which would require the Commission in creating spacing units to comply with the provisions of 65-3-14(b) NMSA, 1953 Comp., which are required in setting up or establishing proration units as contended by Appellant. Subsection (b) of 65-3-14 NMSA, 1953 Comp., provides that the Commission "may" establish a proration unit for each pool. This is clearly not mandatory. Many pools in New Mexico are developed on the spacing pattern provided for under Rule 104 and proration units are never established unless it is necessary to prorate the pool.

It is stated in Appellant's Brief in Chief that although Section 65-3-11(10) NMSA, 1953 Comp., gives authority to the Commission to fix the spacing of wells, there is no authority to create spacing units (Brief in Chief p. 9). In this connection, reference is made to 65-3-10 NMSA, 1953 Comp., which empowers the Commission to prevent waste and protect correlative rights. The last sentence of this section provides:

> 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. (Emphasis added)

The provisions of Section 65-3-11 NMSA, 1953 Comp., quoted above which authorize the Commission to make rules and regulations relative to the "spacing of wells" clearly, by implication if not directly, authorize the Commission to provide for spacing units.

Rutter and Wilbanks further makes the point that the provisions of Article II (a) of Rule 104 which provide that a well projected to a formation of Pennsylvanian age or older shall be located on a designated drilling tract of 320 acres comprising any two contiguous quarter sections of a single governmental quarter section, are not the equivalent of the creation of a proration unit, as provided by Section 65-3-14(b) NMSA, 1953 Comp., (Brief in Chief p. 9). As we have already pointed out, the statutes do not require the creation of a "proration unit" in connection with rules of the Commission providing for spacing units except where prorationing is in effect or is to be inaugurated.

In view of the foregoing, we respectfully submit that Appellant's contentions with respect to point A are without merit.

B. Appellant states its point (B) as follows:

> THE ORDERS OF THE COMMISSION ARE ARBITRARY AND CAPRICIOUS IN THAT THEY DO NOT PROTECT THE CORRELATIVE RIGHTS OF PETITIONER AND OTHER OWNERS OF INTERESTS IN THE UNITS, AS REQUIRED BY LAW.

As we believe will clearly appear from the following, the Orders of the Commission were not arbitrary and capricious and they were in the interest of the protection of the correlative rights of Appellant and other owners of interests in the unit.

We believe that the Appellant has again confused the issue by taking the position that the Commission failed to create proration units, which we have already covered in the discussion of point A above.

The applications which were before the Commission in these cases were applications to force pool the owners of mineral interests who had not previously agreed to pooling within the East half and West half of Section 3 and to create non-standard units. (Tr. 80, 135)

During the de novo hearing before the full Commission (Tr. 183 et seq.) Appellant introduced as its Exhibit 1 a structural map prepared by William J. LeMay, geologist (Tr. 210). This exhibit shows the wells which had previously been drilled in the Washington Ranch Gas Pool in the township to the north of Section 3. This exhibit also shows that Section 2, which is contiguous to Section 3 on the east and Section 4, which is contiguous to Section 3 on the west, are both irregular sections, containing more than 640 acres.

The respective wells drilled by Black River Corporation, which is the principal operator in the Washington Ranch Gas Pool, (Tr. 204) in the East and West halves of Section 3, respectively, were drilled as southward extensions of the main gas pool which included wells in Sections 27, 28, 33, 34 and 35 of the township immediately to the north of Section 3.

The wells in Section 3 were clearly development wells of the Washington Ranch Pool and therefore came squarely within the provisions of the second paragraph of Rule 104 of the Commission which provides as follows:

> Unless otherwise provided in the special pool rules, each development well for a defined gas pool of Pennsylvanian age or older which was created and defined by the Commission after June 1, 1964, shall be located on a designated drilling tract consisting of 320 surface contiguous acres, more or less, comprising any two contiguous quarter sections of a single governmental section, being a legal subdivision of the U. S. Public Land Surveys.

Subsection (c) of Section 65-3-14 NMSA, 1953 Comp., covers force pooling and provides as follows:

> (c) When two or more separately owned tracts of land are embraced within a spacing or proration unit, or where there are owners of royalty interests or undivided interests in oil and gas minerals which are separately owned or any combination thereof, embraced within such spacing or proration unit, the owner or owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owner or owners have not agreed to pool their interests, and where one such separate owner, or owners, who has the right to drill has drilled or proposes to drill a well on said unit to a common source of supply, the Commission, to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste, shall pool all or any part of such lands or interests or both in the spacing or proration unit as a unit.
>
> All orders effecting such pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner or owners of each tract or interest in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil or gas, or both. Each order shall describe the lands included in the unit designated thereby, identify the pool or pools to which it applies and designate an operator for the unit. All operations for the pooled oil or gas, or both, which are conducted on any portion of the unit shall be deemed for all purposes to have been conducted upon each tract within the unit by the owner or owners of such tract. For the purpose of determining the portions of production owned by the persons owning interests in the pooled oil or gas, or both, such production shall be allocated to the respective tracts within the unit in the proportion that the number of surface acres included within each tract bears to the number of surface acres included in the entire unit.... (Emphasis added)

It will be noted from the foregoing that the statute sets out certain factors which the Commission must consider in force pooling; namely, (1) the drilling of unnecessary wells, (2) the protection of correlative rights, and (3) the prevention of waste. Furthermore, it is specifically provided that the production is to be allocated to the respective tracts within the unit in the proportion that the number of surface acres included within each

tract bears to the number of surface acres included in the entire unit. This obviously is an entirely different situation than the prorationing of an entire pool or fixing a proration unit.

Appellant cites the case of Continental Oil Company, et al v. Oil Conservation Commission 70 N.M. 310, 319, 373 P. 2d 809 (1962) as authority for the proposition that in protecting correlative rights the Commission 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, and (3) the proportion that (1) bears to (2); (4) what portion of the arrived at proportion can be recovered without waste. The Continental Oil Company case primarily involved a new prorationing formula for the Jalmat Pool, which is an entirely different situation from that which we have here, and in our opinion is not authority for the proposition in connection with a force pooling case that it is necessary for the Commission to determine the amount of producible gas under the respective tracts within the spacing unit and the entire pool. All that is necessary for the Commission to determine in a force pooling case and in approving a non-standard spacing unit, therefore, is that all of the lands within the spacing unit are reasonably productive of gas; that the non-standard spacing unit will prevent the drilling of unnecessary wells; and the allocation of production to the respective tracts within the spacing unit on an acreage basis will protect correlative rights and prevent waste.

Reference to Appellant's Exhibit 1 (Tr. 210) which is the structural map referred to above, will clearly show that all of Section 3 is estimated to be commercially productive of gas (Tr. 215, 216). This is also true of the West half of Section 2,

which is contiguous to Section 3 on the east, and the East half of Section 4, which is contiguous to Section 3 on the west. The exhibit also shows that there are producing gas wells in the West half of Section 2 and the East half of Section 4 and these are also located upon non-standard spacing units (Tr. 195, 196).

The evidence presented by Black River Corporation clearly shows that the wells located in the East half of Section 3 and in the West half of Section 3 would effectively and efficiently drain these half sections. (Tr. 75, 115, 116, 193, 206)

On cross examination of A. W. Rutter, Jr. he was asked whether or not he disputed the testimony of Mr. Aycock (witness for Black River) that these wells would effectively and efficiently drain all of the gas in Section 3. Mr. Rutter replied: "If he would have testified that one well would have drained the reservoir I wouldn't have objected." (Tr. 224)

In Sims v. Mechem et al., 72 N.M. 186, 382 P. 2d 183 (1963) the New Mexico Supreme Court held that the Commission has authority to require pooling of property when pooling has not been agreed upon. Appellant alleges that there is no finding in the Commission orders that the pooling will prevent waste, as required by that decision. It is important, therefore, to look at these orders. Finding (8) of Order No. R-4353-A, which force pooled the East half of Section 3 reads as follows:

> That Commission Order No. R-4353 provides protection for the correlative rights of all mineral interest owners in the E/2 of Section 3, when considered as a whole, and will result in the prevention of waste.

Finding (8) of Order No. R-4354-A which force pooled the West half of Section 3 contains the same wording about the prevention of waste.

Rutter and Wilbanks challenge the sufficiency of the findings on waste for not stating "the type of waste contemplated" by the Commission (Brief in Chief p. 17).

If the Appellant's reasoning that there must be findings as to the type of waste contemplated by the Commission in force pooling orders is carried to its logical conclusion, it would appear that the Appellant should insist that all considerations on the issue of waste that were raised during the hearing be made findings of fact as a condition precedent to the validity of any Commission order. Such a requirement would be absurd.

It should further be observed that the New Mexico statutes relating to oil and gas (with an exception for underground storage reservoirs) makes no requirement that the Commission make any findings whatever. In entering the orders challenged in this proceeding, the Commission made general findings as to the question of waste which effectively showed that the Commission concluded that the force pooling of the East and West halves of Section 3 would prevent waste and would protect the correlative rights of the interest owners in this pool as far as it is practicable to do so.

In Ferguson-Steere Motor Co. v. State Corporation Commission, 60 N.M. 114, 288 P. 2d 440 (1955) the New Mexico Supreme Court cited with approval Railroad Commission v. Great Southern Co., 185 Ala. 354, 64 So. 15 (1913), where it stated that the Court accepts the making of an order by the Commission as a finding by the Commission that the circumstances are such as to justify the order. When we consider this decision, it appears that the findings on waste as recited in the orders force pooling the acreage in question show that the Commission considered the circumstances

as such to justify the findings that waste would be prevented by granting the forced pooling applications.

Appellant discusses the concept of compulsory pooling and argues that it was designed for small tracts which are found within a single spacing unit. In support of their statements, they cite primarily Texas law (Brief in Chief p. 13, 14, 15). This theory simply is not applicable to the State of New Mexico for Rule 104 of the Rules and Regulations of the New Mexico Oil Conservation Commission establishes a broad rule governing the spacing of wells. If it had been the intention of the Commission to permit compulsory pooling of only small tracts, it would not have included in the rule the words "more or less" since the spacing units created pursuant to this rule encompass the acreage frequently involved in compulsory pooling action. In addition, the following testimony from the de novo appeal (Tr. 194, 195) shows that a requirement of only 320 acres or less would create serious administrative problems for the Commission:

> Q. (BY MR. HINKLE) Let's assume for the moment here that you were only permitted to dedicate 320 acres in either the East half or the West half for the respective wells that have been drilled in Section 3. What would you do with the rest of the acreage after you dedicated 320 acres to each of those wells?
>
> A. (BY MR. AYCOCK) Then you would be forced to either take the balance of the 816.42 acres, that being a substandard proration unit, and try to force the drilling of another well, or you would be forced to cross the boundary lines of the section and involve other operators to create another full standard 320-acre unit.
>
> Q. Isn't it true that there would be quite a problem in trying to work out the crossing of these section lines?
>
> A. I think it would put the Commission in the position of dictating to the operators how they would handle their business.

Section 3 contains 816.42 acres. If the Commission could create units comprising only 320 acres it would create two units of 320 acres and this would leave 176.42 acres in Section 3 to be dedicated to a third well. This portion left over is equal to only 55 percent of a unit and, alone, would be an uneconomical unit to produce. It would be necessary, therefore, to take 144 acres from adjacent sections to create a 320-acre unit for the rest of Section 3. This is the type of administrative problem that Mr. Aycock referred to in his testimony cited above.

Precedence for the establishment of units of non-standard size can be found in Rules 104 II H and I of the Commission Rules and Regulations which provide for variations in size of drilling tracts. Rule 104 II H provides for the pooling or communitization of fractional lots of 20.49 acres or less with 40-acre oil proration units. This rule allows units of up to 151 percent the size of standard units. Applying the same variation to the 320-acre standard gas units in question this could result in non-standard units of up to 484 acres. The units under attack in this proceeding comprise only 409.22 acres and 407.20 acres, respectively (Tr. 193).

Appellant states that all compulsory pooling statutes assume that the tract sought to be pooled is embraced within a standard spacing or prorationing unit (Brief in Chief p. 14). This statement is inaccurate. Nothing in New Mexico statutes limits compulsory pooling to tracts embraced within a standard spacing or proration unit. Commission Rule 104 requires, however, that the spacing or proration units be in a single governmental section.

The Commission, by force pooling the acreage in question, has complied with New Mexico statutes and long established precedent. It has complied with Rule 104 of the Rules and Regulations of the

Commission, and its actions are consistent with the New Mexico spacing and compulsory pooling statutes and with the basic concept of compulsory pooling as this concept is applicable in the State of New Mexico.

The findings that correlative rights will be protected by these forced pooling orders are supported by substantial evidence. "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 review 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).

When these units were created the Commission was aware of the fact that there were oversized units to both the east and west of the ones being created in Township 26 South, Range 24 East, NMPM, Eddy County, New Mexico (Tr. 195, 196).

It will be noted from Black River's Exhibit No. 2 introduced in connection with Commission Cases 4763, 4764 and 4765 that the entire north tier of sections in Township 26 South, Range 24 East, possibly with the exception of Section 1, are all irregular sections, and Sections 2, 3, and 4 particularly, each contain considerably more than 640 acres.

Since the units to the east and west of the ones in question are also oversized, any drainage between these units should be offset by counter drainage.( )

Mr. Aycock advocated placing the wells in question on production as soon as possible to prevent drainage and thereby protecting the correlative rights of all the interest owners in Section 3 (Tr. 70, 122, 123).

Mr. Rutter testified that his interests were being diluted due to the size of the units in question (Tr. 80). Appellant then proposed alternative plans which would result in units more nearly 320 acres in size.

(1) Mr. Rutter proposed a plan which would result in a unit in the West half of Section 3 of approximately 320 acres, a unit in the East half of Section 3 of about 322 acres and a third unit comprised of the South half of the South half of Section 3 and acreage from the South half of the South half of Sections 2 and 4. This would create a narrow unit about 2 miles long (Tr. 81, 82) which could be produced only after a new well was drilled (Tr. 84, 139). Such a proposal is inconsistent with sound petroleum engineering principles and would require the crossing of section lines which would cause exceptions to Rule 104 and would lead to tremendous administrative problems.

(2) Mr. William LeMay, testifying as an expert witness for Rutter and Wilbanks, proposed an alternative plan whereby there would be three units within Section 3, each of which would be undersized (Tr. 213, 214, 215). This proposal, like Mr. Rutter's, would require the drilling of an additional well (Tr. 219), but Appellants propose such an alternative as a means to best protect the correlative rights of the interest owners in Section 3.

When the Commission exercises its statutory mandate to protect correlative rights, it must weigh statutorily prescribed factors and reach a decision which will allow the owner of each property in the pool to produce, "as far as it is practicable to do so," "...his just and equitable share" (emphasis added) of the oil or gas underlying his property (Section 65-3-29(H) NMSA, 1953 Comp.).

Section 65-3-14(b) NMSA, 1953 Comp., first requires the Commission to consider "...the economic loss caused by the drilling of unnecessary wells,...." in deciding on the size of production units.

The Petitioner in this matter seems to confuse the terms necessary and economical. When Mr. LeMay was asked if he thought this would be an economic well he responded: "I think there is no doubt but it would be an economic well--it certainly would pay for itself and show good profits if that's what you mean by an economical well." (Tr. 216)

Since the transcript shows that the two wells drilled in Section 3 will effectively drain that section (Tr. 193, 206), the question then becomes whether or not another well would be unnecessary even if it would be economical in that it would pay for itself and produce some profits. The Commission concluded that it would be unnecessary. (Findings No. 7, Orders No. R-4353-A and R-4354-A).

It should be further noted that drilling a well in the southern portion of Section 3 would cost $180,000 if it was a dry hole and from $225,000 to $250,000 if it was a producer (Tr. 227). The question before the Commission was, therefore, is it reasonable to require the drilling of an additional well at

these costs in an effort to effect a $37,500 redistribution of royalty income (Tr. 224).

The evidence further shows that there would be some risk involved in drilling a well in the southern part of Section 3. When being cross-examined by Mr. Cooley on the necessity of drilling a well in the southern portion of Section 3, Mr. Aycock testified:

> Well, I think right now, it would be unnecessary. But we have discussed here the fact that you would be running an extreme risk of drilling a dry hole down structure, so it could be a complete commercial failure. (Tr. 206, 207)

Even in the direct testimony of Mr. LeMay for the Appellant, when he was asked if a well in the southern part of Section 3 would be productive from the Morrow formation, he said: "It would be close...." (Tr. 216)

Regardless of whether or not a well in the southern portion of Section 3 would be productive, it would increase the total cost of producing the gas underlying that section of land. Since the present wells can drain the section (Tr. 193, 206), a third well would be unnecessary (Tr. 206) and would increase the costs of producing the gas under this section.

The Appellant in this case was seeking an order of the Oil Conservation Commission which would require that in the interest of preventing waste, Section 3 be divided into three units and that a well which might cost a quarter of a million dollars be drilled in the southern part of that section in an effort to effect what might amount to a $37,500 redistribution of royalty income.

The Commission could not agree with the contentions of Appellant in this regard (Findings 8, Orders No. R-4353-A and R-4354-A) and found that waste would be prevented by the non-standard units

established in Orders R-4353 and R-4354.

As admitted by Mr. Rutter, the Appellant is attempting to reduce the size of the production units in Section 3 and thereby cut out royalty owners in the southern portion of that section (Tr. 227). It must be remembered that the Commission is required to protect correlative rights by Section 65-3-10 NMSA, 1953 Comp., and as this term is defined in Section 65-3-29(H) NMSA, 1953 Comp., the Commission must act to protect the rights of the owners of each property in a pool. The Appellant proposed dividing Section 3 into three non-standard units (Rutter and Wilbanks, Exhibit 2, Tr. 213, 214, 215). This division would leave the owners of property in the southern portion of this section with no well to produce the hydrocarbons underlying their land (Tr. 219) while this land was being drained by the two wells presently completed in the Morrow formation (Tr. 193, 206).

Since this suggestion, if adopted, would greatly impair the correlative rights of mineral interest owners in the southern portion of Section 3, the Commission could not accept it.

Appellants allege that their property is being taken without due process of law (Brief in Chief p. 5). It is therefore important to examine briefly the due process requirements in cases like those before the Court in this proceeding.

Due process of law has traditionally been defined as requiring two things--notice and opportunity to be heard, Baldwin v. Hale, 68 U.S. 223, 17 L.Ed. 531, Mullane v. Central Hanover Trust Co., 339 U.S. 306.

It also should be noted that the Supreme Court has found that the right to a hearing under the due process clause as applied to administrative determination does not necessarily require a full

blown trial, however, as enunciated in Morgan v. United States, 304 U.S. 1, 18-19:

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. (Emphasis added)

The Appellant herein had sufficient notice and a proper hearing on the matters before the Court in this appeal. It participated in the examiner hearings on July 12, 1972, and it was pursuant to its application that the de novo hearing was held on November 21, 1972.

That Rutter and Wilbanks had an opportunity to know the arguments against them which supported the proposed non-standard units can be presumed since it had the right to present argument at both the examiner and de novo hearings before the Commission. No presumption is necessary, however, for the Appellant obviously was aware of opposing arguments for it based a portion of its argument to the Commission in the de novo proceeding on evidence offered by Black River Corporation at the examiner hearings (Tr. 210, 211).

There is an additional requirement, however, if the mandate of the due process clause is to be met. In Interstate Commerce Commission v. Louisville and N.R. Co., 227 U.S. 88, the United States Supreme Court held that in comparatively few cases in which due process questions have been raised pursuant to administrative hearings, it has been distinctly recognized that administrative orders are void if a hearing was denied or if the hearing granted was inadequate or manifestly unfair.

For Appellant to show that the hearings before the Commission were inadequate or unfair, it would have to show that they were denied a hearing before a competent tribunal or that the

Commission's orders were inconsistent with the evidence. No such showings can be made.

In the cases under review, it is obvious that Rutter and Wilbanks had notice and a hearing and that the hearing was sufficient for the de novo appeal was merely an opportunity for the Appellant to come forward and present their case against the establishment of the unorthodox units dedicated to the wells in Section 3.

SUMMARY AND CONCLUSION

We respectfully submit that the arguments advanced by Rutter and Wilbanks are without merit for there is no requirement that the Commission establish proration units in the Washington Ranch Morrow Gas Pool or determine the amount of gas in place under the pool and under each spacing unit involved in Section 3 before it can either approve non-standard spacing units or force pool a tract.

Under the provisions of Section 65-3-14(c) NMSA, 1953 Comp., which governs force pooling, all that it is necessary for the Commission to find is that the force pooling will avoid the drilling of unnecessary wells and be in the interest of the protection of correlative rights and the prevention of waste. As we have pointed out, in the case of force pooling, the production from the spacing unit is to be allocated to the respective tracts within the unit in the proportion that the number of surface acres included within each tract bears to the number of surface acres included in the entire unit, Section 65-3-14 NMSA, 1953 Comp. These statutes clearly set out what factors the Commission should consider when compulsorily pooling spacing units. The creation of proration units may require other determinations such as deliverability, porosity and permeability and it was unnecessary for the Commission to consider these factors in compulsorily pooling the East and West halves of Section 3.

There is no question but that the Commission has authority to establish non-standard spacing units, Section 65-3-14.5 (c) NMSA, 1953 Comp. Where a non-standard spacing unit is to be approved by the Commission, it is necessary that the Commission

find that all of the lands within the spacing unit are reasonably proven to be productive of gas. Appellant's own evidence clearly shows that all of Section 3 is productive of gas in commercially paying quantities (Exhibit 1, Tr. 210).

The non-standard spacing units created by orders of the Commission in these cases were strictly in accordance with the provisions of Article II(a) of Rule 104 of the Commission Rules and Regulations, which provides that for gas wells of Pennsylvanian age or older the unit shall consist of any two contiguous quarter sections of a single governmental section being a legal subdivision of the U. S. Public Land Surveys. The Commission rules must of necessity afford some flexibility due to the fact that there are many sections along township lines which are irregular. To limit spacing units to approximately 320 acres would cause a lack of flexibility, much confusion and the creation of many non-standard units. Such a limitation would make it almost impossible to protect the correlative rights of all parties having interests in irregular sections.

Under all of the circumstances of the cases involved in this appeal, there can be no question but that the correlative rights of each interest owner in the pool are protected by the Commission's orders so far as it is practicable to do so. It must be kept in mind that to create spacing units in these cases which included less than the respective half sections involved would certainly violate the correlative rights of the other mineral owners who would be left out of the spacing units. Furthermore, the creation of spacing units for less than the respective half sections would require the drilling of an additional well or wells which would unquestionably result in economic loss and waste and in the end would not recover any additional gas in addition to what

will be recovered from the wells presently located in Section 3.

The Commission has found that the creation of the non-standard spacing units and the force pooling will be in the interest of conservation, the prevention of waste and will protect correlative rights. The evidence supports all of these findings. Again, we call attention to the fact that the United States owns a 12 1/2 percent royalty under all of the federal lands involved in the respective spacing units. We feel certain that if the government felt its correlative rights were being violated by reason of the orders of the Commission, it would have protested the formation and approval of the non-standard units.

We respectfully submit that the orders of the Commission should be upheld.

Respectfully submitted,

/s/ William F. Carr

WILLIAM F. CARR
Special Assistant Attorney General
New Mexico Oil Conservation Commission

Attorney for Respondent-Appellee

HINKLE, BONDURANT, COX & EATON

By _____
Attorney for Intervenor

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

NO. 9907

Respondent-Appellee,

and
BLACK RIVER CORPORATION,

Intervenor-Appellee.

CERTIFICATE OF SERVICE

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

Jason W. Kellahin, Esquire
Attorney at Law
P. O. Box 1769
Santa Fe, N. M. 87501

by first class mail with postage thereon fully prepaid.

Dated at Santa Fe, New Mexico, this 4th day of April, 1974.

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

By: Irene R. Valdez
Deputy Clerk

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

April 4, 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

Dear Mrs. Alderete:

Please serve a copy of the attached Respondent and Intervenor's Answer Brief on:

Jason W. Kellahin
Kellahin & Fox
P. O. Box 1769
Santa Fe, New Mexico 87501

Very truly yours,

WILLIAM F. CARR
General Counsel

WFC/dr
enclosure

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RUTTER AND WILBANKS CORPORATION, a Texas Corporation,	)	
Petitioner-Appellant,	)	
v.	)	No. 9907
OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,	)	
Respondent-Appellee,	)	
and	)	
BLACK RIVER CORPORATION,	)	
Intervenor.	)	

NOTICE

TO: Clarence Hinkle
Hinkle, Bondurant, Cox & Eaton
P. O. Box 10
Roswell, New Mexico 88201

Jason Kellahin
Kellahin & Fox
P. O. Box 1769
Santa Fe, New Mexico 87501

NOTICE IS HEREBY GIVEN that notice has been received from the Clerk of the Supreme Court, postmarked March 1, 1974, that Respondent-Appellee's Motion for extension of time to file Answer Brief on behalf of Oil Conservation Commission of the State of New Mexico has been granted.

This Notice is given in accordance with Rule 15 of the New Mexico Rules of Civil Procedure.

Dated this 6th day of March, 1974.

William F. Carr

WILLIAM F. CARR
Special Assistant Attorney General
Oil Conservation Commission
P. O. Box 2088
Santa Fe, New Mexico 87501

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RUTTER AND WILBANKS CORPORATION, a Texas corporation, Petitioner-Appellant, v. OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent-Appellee, and BLACK RIVER CORPORATION, Intervenor.	)	No. 9907

NOTICE

TO: William F. Carr,
Special Assistant Attorney General
Oil Conservation Commission
P.O. Box 2088
Santa Fe, New Mexico 87501

Jason Kellahin
Kellahin & Fox
P.O. Box 1769
Santa Fe, New Mexico 87501

NOTICE IS HEREBY GIVEN that notice has been received from the Clerk of the Supreme Court, postmarked March 4, 1974, that Intervenor's Motion for extension of time to file Answer Brief on behalf of Black River Corporation has been granted.

This Notice is given in accordance with Rule 15 of the New Mexico Rules of Civil Procedure.

DATED this 6th day of March, 1974.

HINKLE, BONDURANT, COX & EATON

By _____
Attorneys for Intervenor
P.O. Box 10
Roswell, New Mexico 88201

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RUTTER AND WILBANKS CORPORATION, a Texas corporation,	)	
Petitioner-Appellant,	)	
vs.	)	
OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,	)	
Respondent-Appellee,	)	No. 9907
and	)	
BLACK RIVER CORPORATION,	)	
Intervenor	)	

MOTION

COMES NOW Oil Conservation Commission of The State of New Mexico, Respondent-Appellee, in the above styled and numbered cause and respectfully moves the Court for a thirty-day extension of time, to April 8, 1974, within which to file its Answer Brief in said cause, by reason of the fact that Respondent-Appellee and Intervenor plan to file a joint brief and this extension is necessary to enable Intervenor and Respondent-Appellee to properly prepare due to the fact that both are attempting to work from a single copy of the transcript.

WILLIAM F. CARR, Special Assistant
Attorney General, representing the
Oil Conservation Commission of the
State of New Mexico, P. O. Box 2088
Santa Fe, New Mexico 87501

We hereby certify that we have
mailed a copy of the foregoing
pleading to all opposing counsel of
record this 1st day of March, 1974.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RUTTER AND WILBANKS CORPORATION, a Texas corporation, Petitioner-Appellant, v. OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent-Appellee, and BLACK RIVER CORPORATION, Intervenor	No. 9907

MOTION

COMES NOW Black River Corporation, Intervenor, in the above styled and numbered cause and respectfully moves the Court for a thirty-day extension of time, to April 8, 1974, within which to file its Answer Brief in said cause, by reason of the fact that there has been a delay in Intervenor's receiving a copy of the transcript until February 27, 1974.

HINKLE, BONDURANT, COX & EATON

By _____
Attorneys for Intervenor
P.O. Box 10
Roswell, New Mexico 88201

WE HEREBY CERTIFY THAT WE HAVE MAILED A COPY OF THE FOREGOING PLEADING TO ALL OPPOSING COUNSEL OF RECORD THIS 3/28/74

Hinkle, Bondurant, Cox & Eaton
P. O. Box 10 Attorneys ROSWELL, N. M. 88201

preme Court of the State of New M o

Santa Fe, New Mexico, March 1, 1974

Dear Sir:

Cause No. 9907

Rutter & Wilbanks Corp vs. Oil Conservation Comm

Receipt is acknowledged of cop of Motion to extend Answer Brief Oil Conservation Commission to April 8- Approved today filed in the above styled cause.

Rose Marie Adcock

Clerk of Supreme Court

William F. Carr, Special Assistant
Attorney General
Oil Conservation Commission
P.O. Box 2088
Santa Fe, New Mexico 87501

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RUTTER AND WILBANKS CORPORATION,
A Texas Corporation,

Petitioner-Appellant,

vs. No. 9907

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,

Respondent-Apellee,

and,

BLACK RIVER CORPORATION,

Intervenor.

CERTIFICATE OF SERVICE

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

William F. Carr
Attorney at Law
P. O. Box 2088
Santa Fe, New Mexico 87501

Clarence E. Hinkle
Hinkle, Bondurant, Cox & Eaton
P. O. Box 10
Roswell, New Mexico 88201

by first class mail with postage thereon fully prepaid.

Dated at Santa Fe, New Mexico, this 7th day of February, 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 THE STATE OF NEW MEXICO

RUTTER AND WILBANKS CORPORATION,
A Texas Corporation,

Petitioner-Appellant,

vs. No. 9907

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,

Respondent-Appellee,

and

BLACK RIVER CORPORATION,

Intervenor.

APPELLANT'S BRIEF IN CHIEF

JASON W. KELLAHIN
Kellahin & Fox
P. O. Box 1769
Santa Fe, New Mexico 87501

ATTORNEY FOR PETITIONER-APPELLANT

I N D E X

TABLE OF CASES AND AUTHORITIES

New Mexico Cases:

Texts:

Statutes:

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RUTTER AND WILBANKS CORPORATION,
A Texas Corporation,

Petitioner-Appellant,

vs. No. 9907

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,

Respondent-Appellee,

and

BLACK RIVER CORPORATION,

Intervenor.

APPELLANT'S BRIEF IN CHIEF

STATEMENT OF THE CASE

This appeal arises out of two suits brought in the District Court of Eddy County for a review of orders entered by the Oil Conservation Commission of New Mexico on August 7, 1972 (Tr. 5, 33) and November 29, 1972 (Tr. 7, 35) creating two non-standard gas proration units in the Washington Ranch-Morrow Gas Pool, Eddy County, New Mexico. The cases were consolidated for trial and after the trial court had reviewed the transcript before the Oil Conservation Commission (Tr. 55-248), and heard argument of counsel, the Court upheld the orders of the Commission (Tr. 20, 51). Petitioners appeal from the decisions of the Court.

STATEMENT OF PROCEEDINGS

On July 12, 1972, Richard L. Stamets, a duly appointed and qualified examiner for the Oil Conservation Commission of New Mexico, Respondent herein, conducted a hearing in Case No. 4763 and consolidated cases No. 4764 and No. 4765 (Tr. 55, 97). The testimony and exhibits offered in Case No. 4763 were incorporated by reference into the record in consolidated cases No. 4764 and No. 4765 (Tr. 100).

Pursuant to the above hearings the Commission entered its Order No. R-4353 in Case No. 4763, creating a 409.22 acre non-standard gas proration unit in the Washington Ranch-Morrow Gas Pool, (Tr. 5), and entered its Order No. R-4354 in consolidated cases No. 4764 and 4765 creating a 407.20 acre non-standard gas proration in the same pool, both in Eddy County, New Mexico. (Tr. 33)

Petitioner made application for a hearing de novo, which was held on November 21, 1972 as required by law, before Commission members A. L. Porter, Jr., and Alex Armijo (Tr. 183). The three cases involved were consolidated for purposes of the hearing (Tr. 184). Following this hearing, the Commission entered Order No. R-4353-A, which reaffirmed Order No. R-4353 (Tr. 2), and entered Order No. R-4354-A, which reaffirmed Order No. R-4354 (Tr. 35) (Note: These pages are not in proper sequence from p. 34 through 39. The proper sequence may be determined by reference to the numbering at the top of each page.)

Petitioner-Appellant filed application for rehearing in each of the cases, stating the grounds of the invalidity of the orders, as required by law (Tr. 9, 40). The application for rehearing was denied by the failure of the Commission to act thereon. Petitioner-Appellant then filed its petition for review in the District Court of Eddy County (Tr. 1, 29). Entry of appearance was filed on behalf of Black River Corporation (Tr. 16, 46).

The cases came on for hearing and were consolidated by order of the court. No record was made of the court proceedings.

Requested findings of fact and conclusions of law were filed on behalf of Petitioner-Appellant (Supp. Tr. 1, 7), and on behalf of Respondent-Appellee, Oil Conservation Commission and Intervenor Black River Corporation (Supp. Tr. 13)

Requested findings of fact submitted by Petitioner-Appellant and denied by the Court (Supp. Tr. 1-6, 7-12), included requests to find:

1. That the orders of the commission purported to approve non-standard gas proration units in the Washington Rangh-Morrow Gas Pool, when the Commission had never established a standard gas proration for the pool as provided by law. (Requested Finding 12, Supp. Tr. 3, 9-Challenged, Point One).

2. That adoption of a spacing regulation by Commission rule is not the equivalent to the creation of a proration unit pursuant to statute (Requested Finding 13, Tr. 3-4, 9-10-

Challenged, Point one).

3. That the tracts dedicated to the wells in the two cases, consisting of 409.22 acres and 407.20 acres respectively, bore no reasonable relation to the 320-acre spacing units provided for by Commission rule. (Requested Finding 14, Supp. Tr. 4, 10-Challenged Point One).

4. The Court was requested to find that findings 7, 8, and 10 of the Commission's orders R-4353 and R-4354 are not supported by substantial evidence.(Requested Finding 17, Supp. Tr. 4, 10-Challenged, Point One).

5. The Court was requested to find that findings 4, 5, 6, 7, and 8 of Commission Orders R-4353-A and R-4354-A were not supported by substantial evidence (Requested Finding 18, Supp. Tr. 4, 10-Challenged, Point One).

6. The Court was requested to find that the Commission's orders resulted in the dedication of non-productive acreage to the wells involved, impairing Petitioner-Appellant's correlative rights (Requested Finding 19, Supp. Tr. 4, 10-Challenged, Point One).

7. Plaintiff-Appellant requested a finding that the Commission failed to protect correlative rights (Requested Finding 20, Supp. Tr. 5, 11-Challenged, Point One).

8. Plaintiff-Appellant requested a finding that the Commission orders were not supported by substantial evidence (Requested Finding 21, Supp. Tr. 5, 11-Challenged, Point One).

9. Plaintiff-Appellant requested a finding that in the absence of prorationing of production in the pool, the Commission cannot act to protect correlative rights by adjusting production from tracts of differing sizes. (Requested Finding 23, Supp. Tr. 5, 11-Challenged, Point One).

The Trial Court was further requested to find as a matter of law, that the orders of the Commission were arbitrary and capricious and not supported by substantial evidence, (Supp. Tr. 5, 11), that the Commission is without authority to force pool lands in excess of a standard proration unit (Supp. Tr. 5, 21), and that the correlative rights of Petitioner-Appellant are not protected, and its property is being taken without due process of law (Supp. Tr. 6, 12-Challenged, Point One).

The Trial Court made no findings of fact or conclusions of law, but entered its judgment reaffirming Orders R-4353 and R-4353-A, and R-4354 and R-4354-A. (Tr. 20, 51).

Judgment was entered in commission case No. 4763, heard as Case No. 28477 in the District Court, and in Commission Case Nos. 4764 and 4765, heard as Case No. 28478 in the District Court, on September 14, 1973. (Tr. 20, 51). The time for appeal started running on September 14, 1973. Notice of appeal was filed on October 11, 1973 (Tr. 22, 53). Transcript was filed as a consolidated record on January 8, 1974, and an Order of Consolidation was entered by the Supreme Court.

ARGUMENT

NEW MEXICO OIL CONSERVATION COMMISSION ORDER NO. R-4353, REAFFIRMED BY ORDER NO. R-4353-A, AND ORDER NO. R-4354, REAFFIRMED BY ORDER NO. R-4354-A ARE UNLAWFUL, UNREASONABLE, ARBITRARY AND CAPRICIOUS, AND SHOULD HAVE BEEN SET ASIDE BY THE TRIAL COURT.

This case is before the court as a statutory appeal from orders of the Oil Conservation Commission of New Mexico approving two non-standard gas proration units in the Washington Ranch-Morrow Gas Pool, Eddy County, New Mexico, and pooling all of the mineral interests underlying the non-standard units. The cases were brought before the Commission on the application of the intervenor, Black River Corporation, and were opposed both as to the creation of the non-standard units and the compulsory pooling, by Petitioner-Appellant as the owner of an overriding royalty interest in each of the units. (Tr. 79, 221, 222).

Involved are units consisting of the East half of Section 3, and the West half of Section 3, both in Township 26 South, Range 24 East, N.M.P.M., Eddy County. The East half unit comprises 409.22 acres, and the West half, 407.20 acres. For reference we have attached hereto as Exhibit "A", a plat of Section 3, which was introduced at the hearing July 12, 1972, as Black River Corporation's Exhibit No. 5. The exhibit also shows location of the wells presently on the unit.

The trial court made no findings in upholding the orders of the Commission. This, however, does not impair the review in the Supreme Court, since this court makes the same review of the Oil Commission's action as that made by the District Court. Otero v. New Mexico State Police Board, 83 N.M. 594. 495 P.2d 374.

The effect of these two orders is to dilute the interest owned by Petitioner-Appellant in Lots 1 through 8, as shown on Exhibit "A", attached hereto. The reduction of Petitioner-Appellant's interest is between twenty-five and thirty per cent, as a result of the orders complained of. (Tr. 221-223). 495 P. 2d 374.

(A) THE COMMISSION HAS NOT COMPLIED WITH NEW MEXICO STATUTES IN CREATING THE NON-STANDARD PRORATION UNITS.

The Oil Conservation Commission's authority over the creation of proration units is found in Sec. 65-3-14 (b), N.M.S.A., 1953 Comp., which provides:

> "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 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 two few wells."

The Commission has never, pursuant to this section, created a proration unit for the Washington Ranch-Morrow Gas Pool. Instead it has relied solely on one of its rules, Rule 104, Article II, which provides that wells drilled to a formation of Pennsylvanian age or older, in pools created and defined by the Commission after June 1, 1964, shall be located on a designated drilling tract of 320 acres, more or less, comprising any two continguous quarter sections of a governmental survey. The Commission's authority to create spacing units is found in Sec. 65-3-11(10), N.M.S.A., 1953 Comp.

It should be pointed out here that production from the Washington Ranch-Morrow Gas Pool never has been and is not now prorated, and there has never been any necessity to create proration units as such.

A "proration unit" is the maximum area in a pool which can be efficient and economically drained by one well, as determined by the Commission. Sec. 65-3-14(b), supra. It is also defined as the acreage assigned to an individual well for the purposes of allocating allowable production thereto. Williams & Meyers, Manual of Oil and Gas Terms, (1957), p. 198.

No order of the Commission exists which makes any finding as to the area one well will drain and develop in the Washington Ranch-Morrow Gas Pool.

As stated by this Court in Continental Oil Co. vs. Oil Conservation Commission, 70 N.M. 310, 373 P. 2d 809, at p. 318:

> "The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it."

In the exercise of its legislative function 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. Continental Oil Co. v. Oil Conservation Commission, supra. The legislature, in Sec. 65-3-14(b) has set out the standards to be followed in creating a standard proration unit for an oil or gas pool. The Commission has never followed these standards, nor has it created a standard proration unit.

Under Sec. 65-3-11 (10), N.M.S.A., 1953 Comp.,"the Commission is given the authority simply to fix the spacing of wells." No criteria is set out on the basis of which the Commission is to act, and nowhere is the authority of the Commission to create spacing units set out. In fact in only one place in the statutes are spacing units mentioned, where the authority of the Commission to pool separate tracts is set out in Sec. 65-3-14(c) N.M.S.A., Repl. Vol. 9, pocket supplement. We will discuss this section later.

Respondent-Appellee and Intervenor rely on the provisions of Commission Rule 104, Article II as the Commission's authority for the formation of the two non-standard units involved here (Supp. Tr. 17, 18). The Court can take judicial notice of the rules and regulations adopted by the Oil Conservation Commission. U. S. v. Gumm, 9 N.M. 611, 58 P. 398; Goldenburg v. Village of Capitan, 53 N.M. 137, 203 P. 2d 370; New Mexico Rules of Evidence, Rule 201.

Commission Rule 104, Article II (a) provides that a development well projected to a formation of Pennsylvanian age or older in a pool created subsequent to June 1, 1964, shall be located on a designated drilling tract of 320 acres comprising any two continguous quarter sections of a single governmental quarter section.

This, it is submitted, is not the equivalent of creation of a proration unit, as provided by Sec. 65-3-14(b) N.M.S.A. 1953, supra.

It may be argued that a spacing unit, as provided under Rule 104, Article II, is essentially the same thing as a proration unit, and that the terms are used interchangeably. This is the view taken by 1A Summers, Oil & Gas, Sec. 95, where at note 16, pa 52, the test writer states:

> "In states like New Mexico, Louisiana, Oklahoma, Arkansas, and others where the conservation agency is authorized to create drilling or spacing units and to limit and prorate the production of oil or gas, or both, the terms drilling unit and proration unit become practically synonymous."

If this be true, then the same requirements for creation of a drilling or spacing unit that are required for the creation of a proration unit should be observed. It is fundamental that if the two are to be treated and considered the same under the orders of the commission, in order to achieve the protection of correlative rights, and the prevention of waste, the Commission must, as a minimum, follow the statutory procedure required under Sec. 65-3-14, supra. To hold that it can create a spacing unit without following this procedure renders the section meaningless.

(B) THE ORDERS OF THE COMMISSION ARE ARBITRARY AND CAPRICIOUS IN THAT THEY DO NOT PROTECT THE CORRELATIVE RIGHTS OF PETITIONER AND OTHER OWNERS OF INTERESTS IN THE UNITS, AS REQUIRED BY LAW.

The New Mexico statutes at a number of points, enjoin the Commission to protect correlative rights. Sec. 65-3-10, N.M.S.A., 1053 Comp., provides:

> "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."

Correlative rights is defined in Sec. 65-3-19 H., N.M.S.A. 1953 Comp., as follows:

> "H. 'Correlative rights' means the opportunity affored, 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."

The protection of correlative rights is not limited to those who have the right to drill and develop the property, but extends to the rights of royalty owners. Sec. 65-3-14(b), N.M.S.A., 1953 Comp.

The authority of the Commission to force pool separately owned properties within a spacing or proration unit is found in Sec. 65-3-14c, N.M.S.A., Rep. Vol 9, 1973 Supp., which provides:

> "C. When two (2) or more separately owned tracts of land are embraced within a spacing or proration unit, or where there are owners of royalty interest or undivided interests in oil and gas minerals which are separately owned or any combination thereof, embraced within such spacing or proration unit, the owner or owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owner or owners have not agreed to pool their interest, and where one such separate owner, or owners, who has the right to drill has drilled or proposes to drill a well on said unit to a common source of supply, the commission, to avoid the drilling of unnecessary wells or to pro-

> tect correlative rights, or to prevent waste, shall pool all or any part of such lands or interests or both in the spacing or proration unit as a unit." (Emphasis added).
>
> "All orders effecting such pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner or owners of each tract or interest in the unit the opportunity to recover his just and fair share of the oil or gas, or both. * * * For the purpose of determining the portions of production owned by the persons owning interests in the pooled oil or gas, or both, such production shall be allocated to the respective tracts within the unit in the proportion that the number of surface acres included within each tract bears to the number of surface acres included in the entire unit. * * * "

As shown above, the Commission has never established a proration unit for the Washington Ranch-Morrow Gas Pool. At best it has created spacing units of doubtful validity. Assuming however, that the Commission has in fact established some sort of unit to which it can grant an exception, it is submitted the Commission has exceeded its authority and has failed to protect correlative rights in the creation of the oversize units created in these two cases.

We cannot question the Commission's authority to create non-standard units. This authority is found in Sec. 65-3-14.5 C, N.M.S.A., 1953 Comp., Rep. Vol. 9. The section provides that non-standard spacing or proration units may be established by the commission, but sets up no standards to guide the Commission in the creation of such units. The commission has adopted no guidelines or standards of its own pursuant to the power conferred by the section.

Admittedly some expections are essential to adjust unit boundaries to minor variations in surveys, and to provide

for the situation where acreage for a full unit is not available to dedicate to the well. There are, however, certain requirements, to which standards laid down by the legislature must conform. In conferring discretionary power upon an administration agency, the standards proposed by the legislative authority must be reasonably adequate, sufficient, and definite for the guidance of the agency, and must also be sufficient to enable those affected to know their rights and obligations. 1 Am. Jur. 2d, Administrative Law, Sec. 117, p. 923. The only standards available to the commission in this connection are those for the formation of a proration unit, and we must look to those for guidance.

The authority of the Oil Conservation Commission to pool properties where the owners have not agreed to pool such acreage is limited to lands "embraced within a spacing or proration unit, or where there are undivided interests in oil and gas minerals which are separately owned or any combination thereof, embraced within such spacing or proration unit," Sec. 65-3-14 C, supra. (Emphasis added).

Here the commission has purported to pool acreage far in excess of any established unit at the time the action was brought.

The origin of the language "embraced with a spacing or proration unit" clearly arose from the origin of the compulsory pooling statutes. Twenty-two states have adopted compulsory pooling statutes similar to the New Mexico statute. In every one of them the language "embraced within" appears. Meyers, Oil & Gas Law, Sec. 9.01 (4), p. 210. These statutes arose out of the problem created by the small tract, smaller

than the normal spacing or proration unit. It was early held in Texas that the owner of a small tract could not constitutionally be deprived of the right to drill. Fixing an allowable for the well on the small tract that would be large enough to make the well profitable would confiscate the property of owners of neighboring properties, and if the allowable assigned is commensurate with the reserves underlying the tract, the well would be unprofitable, Meyers, Oil & Gas Law, Sec. 8.01(3), p. 209.

The plan of compulsory pooling was advocated as a means of resolving this problem and as being "the only method that can be adopted which will under all conditions prevent both confiscation of property and the drilling of unnecessary wells. . . It seems to be the only real solution of the small tract problem." Walker, "The Problem of the Small Tract Under Spacing Regulations." Tex. L. Rev. LVII, p. 157 (1938).

The problem is particularly acute where city lots are concerned, and it was early held that municipalities could, by ordinance, restrict drilling within the municipal area, thus forcing agreement among the owners. 6 Williams & Meyers, Oil & Gas Law.

Hence all of the compulsory pooling statutes assume that the tract sought to be pooled is "embraced within" a standard spacing or proration unit. In fact the statutes uniformily presuppose the existence of an established drilling or spacing unit. 6 Williams & Meyers, Oil & Gas Law, Sec. 905.2, p. 28.6.

The compulsory pooling of units far in excess of the 320 acre spacing units that presumably had been established for the pool does violence to both the spacing and proration unit statutes, and the compulsory pooling statute of the State of New Mexico.

So far as we are able to determine, the Supreme Court has never directly passed upon the authority of the Commission to approve non-standard spacing and proration units of the size or character involved in this case but it has answered the problem of what standard is to be applied. In Sims v. Mechem, et al., 72 N.M. 186, 382 P.2d 183, this court held that where an order establishing two separate standard proration units did not contain a finding as to the existence of waste, or that pooling would prevent waste, based upon evidence to support such a finding the commission was without jurisdiction to enter a pooling order, and it was void.

In the Sims case the court recognized the authority of the Commission to require the pooling of property when such pooling had not been agreed upon, but the court went on to point out, at page 189:

> "But the statutory authority of the commission to pool property or to modify existing agreements relating to production within a pool under either of the subsections (Sec. 65-3-14(c) and (e) must be predicated on the prevention of waste. Section 65-3-10, 1953 Comp."

This, of course, is consistent with the ruling of this court in Continental Oil Co. v. Oil Conservation Commission, supra, and with El Paso Natural Gas Co. v. Oil Conservation Commission, 76 N.M. 268, 414 P.2d 496. In the Continental Oil Co. case, the Supreme Court pointed out that the New

Mexico Legislature has explicitedly defined both "waste" and "correlative rights" and placed upon the Commission the duty of preventing the one and protecting the other. At page 318 of the Continental opinion, the court had this to say:

> "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 Sec. 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."

In an effort to comply with this duty, the commission has made findings in each of the orders to the effect that waste will be prevented, and that correlative rights will be protected.

In its Order No. R-4353 the commission found:

> "(7) That to avoid the drilling of unnecessary wells, to protect correlative rights, and to afford to the owner of each interest in said non-standard unit the opportunity to recover or receive without unnecessary expense his just and fair share of the gas in said pool, the subject application should be approved by pooling all mineral interest, whatever they may be, within said unit."

(Tr. 6).

An almost identical finding was made in commission Order No. R-4354. There is no mention of waste in either of these orders.

On hearing de novo the commission simply found that the initial orders provided protection for the correlative rights of all mineral interest owners, and will result in

the prevention of waste. Findings (7) and (8), (Tr. 8, 34). The type of waste contemplated is not mentioned.

Correlative Rights

Petitioner-Appellant contends that the findings that correlative rights will be protected by the orders complained of are not supported by substantial evidence.

In Continental Oil Co. v. Oil Conservation Commission, supra, this court had this to say about 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); (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." (Emphasis by the Court).

In addition the commission is required to prevent drainage between producing tracts that is not equalized by counter-drainage under the provisions of Sec. 65-3-13(c), N.M.S.A., 1953 Comp.

The findings and conclusions of the commission in the orders complained of here make no mention of any of the above factors, nor is there any evidence in the record to support such findings.

On the question of recoverable gas in the pool there is no mention whatsoever.

On the question of recoverable gas underlying the tracts involved, we find the testimony by Mr. William P. Aycock, engineer for Black River Corporation:

> "Q. Have you made any calculations of the reserves underlying Section 3?
>
> "A. I have made no calculations with regard to specific areas, I have made some reserve estimates based on relative deliverability and assuming drainage areas to be of various sizes. I do not represent them to be accurate at this stage, because it was done before the wells in Section 3 were drilled, and at the time I did work them out, there were no Upper Morrow completions. So the calculations I have -- I have done some, but they are obsolete." (Tr. 204-205)

Later along the same line the witness testified:

> "A. No, sir. In my opinion, it would take one to two years to make reserve estimates that I would have any confidence in."

(Tr. 205).

We find no other testimony in the record relating to the question of reserves -- the only information on the basis of which the Commission can determine correlative rights. Continental Oil Co. v. Oil Conservation Commission, supra.

There was some general testimony in regard to correlative rights, which was in no way based upon the amount of recoverable gas in the pool, or underlying the various tracts. The witness Aycock, in answer to a question as to whether the formation of the non-standard units would protect correlative rights, stated that it would. (Tr. 67-68, 116). Again when asked if getting the well on production as quickly as possible would protect correlative rights, he answered that it would. (Tr. 123).

This is all that we find in the record to support the

finding of the Commission that correlative rights will be protected.

As stated in the Continental Oil Co. case, that the extent of correlative rights must first be determined before the commission can act to protect them is manifest. Yet the commission says that correlative rights will be protected. On the contrary, there is ample evidence to support a finding that creation of the two non-standard units will not protect correlative rights, but will violate such rights.

It must be borne in mine that production from this pool is not prorated or restricted in any way by the Oil Conservation Commission (Tr. 203).

The Commission has made findings that one well will effectively drain each of the two non-standard units involved here. (Tr. 6, 8, 34, 36). This means that each of the wells, according to the commission's findings, is capable of draining in excess of 400 acres. The finding can only support the conclusion that the offsetting wells, located on standard 320 acre units, can also drain in excess of 400 acres. There is no prorationing or other restrictions by which the commission can control the production of wells located on the smaller units, in order to protect against drainage that is not compensated by counter drainage.

This was recognized by the Intervenor, who was the applicant for the non-standard units and compulsory pooling. The witness Aycock, the only witness offered in support of the proposed units, after testifying that approval of the units would protect correlative rights (Tr. 68) on cross

examination testified as follows:

Q. Are you aware of capacity allowables today in New Mexico?

A. Yes.

Q. Then how are you going to adjust that to give--

(Objection)

A. If the pipe line is in there, the Commission at such time would require ratable take. Now, all of these wells are shown capable of producing gas at a commercial rate, and it would not be a difficult thing to achieve the protection of all correlative rights.

Q. Other than through proration units (prorationing), have you ever known this Commission to require ratable take?

A. No.

(Tr. 74).

Again on direct examination the same witness recognized the problem and stated that prorationing of the production from the pool would be necessary if correlative rights are to be protected:

MR. HINKLE: Have you any suggestions that you could make as to how the Oil Conservation Commission can adjust the production from the well in the West half to give it credit for 407.20 acres as opposed to a well on 320 acres?

THE WITNESS: Yes, sir, I think that pool rules have been promulgated to protect correlative rights, and the rules already say that at such time as this happens, credit should be given for the excess acreage.

MR. HINKLE: Are you talking about a prorationing order?

THE WITNESS: Right.

The problem was further recognized by the Commission examiner:

MR. STAMETS: You responded to several questions that Mr. Kellahin asked concerning the protection of royalty interests in the South half of Section 2. I'm not quite clear as to whether you feel this pool will have to be prorated or needs to be prorated in order to protect the royalty interests of the operators in the South half of Section 3 if these large units we are discussing here are approved.

THE WITNESS: In my opinion, this Commission will have to take that into account, take into account the size of the proration units, yes.

The Commission, in entering its orders in these cases, chose to ignore this testimony, and did not in any way take into account the problem created by the differing sizes of proration units in the pool. The pool was not then nor is it now prorated, nor production restricted by the commission in any other way.

A. W. Rutter, witness for Petitioner-Appellant, discussed the effect of the over-size units on the interests of his company:

Q. Did you decline to join in the unit?

A. Yes, sir.

Q. For what reason?

A. The East half of the section contains 407 acres and portions of Lots 1, 2, 7, and 8, and in the North half of the Southwest quarter contain 322.15 acres. This exceeds the standard proration unit and to add additional acreage is in effect diluting our royalty interests without any offsetting increase in reserves or current production. So, therefore, it would be damaging to our correlative rights.

(Tr. 80)

The commission, in entering its orders, must protect correlative rights, and in doing so, is required to give consideration to acreage, as well as to other factors. Sec. 65-3-13 N.M.S.A., 1953 Comp.

Not only are the commission's findings that correlative rights will be protected not supported by substantial evidence but the commission has ignored positive evidence that approval of the non-standard units will in fact impair correlative rights.

Creation of the non-standard proration units was not necessary to protect the correlative rights of anyone, and as we have shown, did not protect the correlative rights of the owners within the units.

As an alternative, Petitioner-Appellant made suggestions as to how units of more nearly standard 320 acre size, could be formed.

A. W. Rutter proposed as an alternative, the formation of three units comprising the south half of the south half of Sections 2, 3 and 4, creating a unit of approximately 320 acres, leaving units of 310.43 acres for the West half of Section 3, and 322.15 acres for the East half of the section. (Tr. 82). See Exhibit "A" attached hereto.

When the objection was made that this would require crossing section lines, William LeMay, a consulting geologist located in Santa Fe, New Mexico, proposed the formation of three units within Section 3. His proposal, offered as Rutter & Wilbanks Corporation Exhibit No. Two at the hearing November 21, 1972, is attached hereto as Exhibit "B".

As can be seen from Mr. LeMay's exhibit, the units proposed by Black River Corporation are 27.25% and 27.88% oversize if we consider 320 acres the standard. His suggestion

would result in units 17.78%, 13.35% and 13.75% under the standard 320 acres, doing considerably less violence to the correlative rights of the owners in the pool. (Tr. 213-215)

As to whether this well would be an unnecessary well, Mr. LeMay testified as follows:

> Q. Now, you heard the testimony that a well so located would be an unnecessary well. Mr. LeMay, on examining the data shown on Black River's Exhibit Number Six, showing the initial potential of the wells, and the testimony that has been offered here today, showing the accumulative production to date, in your opinion, would a well located as you propose, a third well, would it be an economical well?
>
> A. I think there is no doubt but it would be an economical well--it certainly would pay for itself and show good profits if that's what you mean by an economical well.

(Tr. 216)

Mr. LeMay then declined to conclude there would be waste, if a third well were not drilled on the section, but stated that correlative rights could be injured if a well is not drilled in the South half of Section 3. (Tr. 220).

CONCLUSION

Primarily we are confronted with the question of whether the commission's action in approving the units involved is reasonable. In a pool presumably spaced on 320 acre units the commission has approved two units of 409.22 and 407.20 acres, respectively. This amounts to an excess of 89.22 acres in one instance and 87.20 acres in the other, over presumably standard units. Exhibit "A", attached hereto.

The units are located in a pool, the production from which is not prorated so there is no possibility of adjusting production from the individual wells to adjust for the discrepancy in the acreage allotted to these two units as compared to other units in the pool. There were eleven wells completed at the time of the November hearing before the Commission, all of which will be permitted to produce at the same rate.
(Tr. 204).

Under these circumstances, it is contended the action of the commission was unreasonable, arbitrary and capricious.

The commission has never followed the statutory procedure for the creation of standard units in the Washington Ranch-Morrow Gas Pool by determining what area one well in the pool will economically and efficiently drain and develop. It has never determined what correlative rights are in the pool by determining the amount of recoverable gas in the pool, the amount under each tract, the proportion that one bears to the other, and the amount of that proportion that can be recovered without waste. Had the commission made such findings, they would not have been supported by substantial evidence, nor by any evidence. Before the commission can act to protect correlative rights it must first determine what those rights are, and it has failed to do so.

The trial court erred in not setting aside Commission Orders Nos. R-4353, affirmed by R-4353-A, and R-4354, affirmed by R-4354-A.

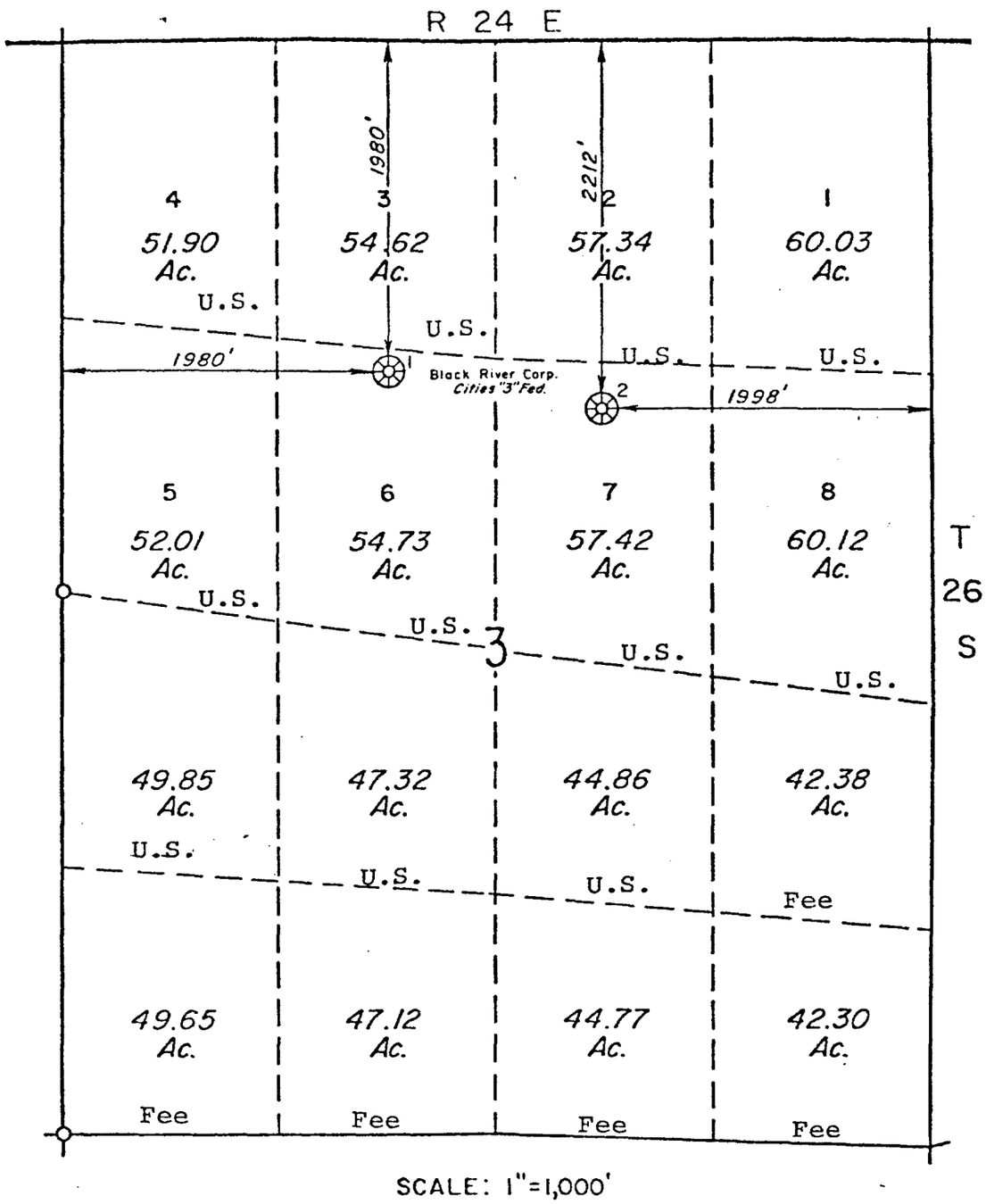
For the foregoing reasons Appellants respectfully request a reversal of the judgment entered by the trial court and a decision setting aside the orders of the Oil Conservation Commission.

Respectfully submitted,

Jason W. Kellahin

JASON W. KELLAHIN
Kellahin & Fox
P. O. Box 1769
Santa Fe, New Mexico 87501

ATTORNEY FOR PETITIONER-APPELLANT.



SCALE: 1"=1,000'

ACREAGE

W/2 : 407.20 Ac.
E/2 : 409.22 Ac.
Total : 816.42 Ac.

O – USGLO Brass Cap Monumentation

CREDITS: U. S. Dept. Int.
Gen. Land Off.
AND: John W. West, P.E. & L.S.
N.M. No. 676

BLACK RIVER CORPORATION

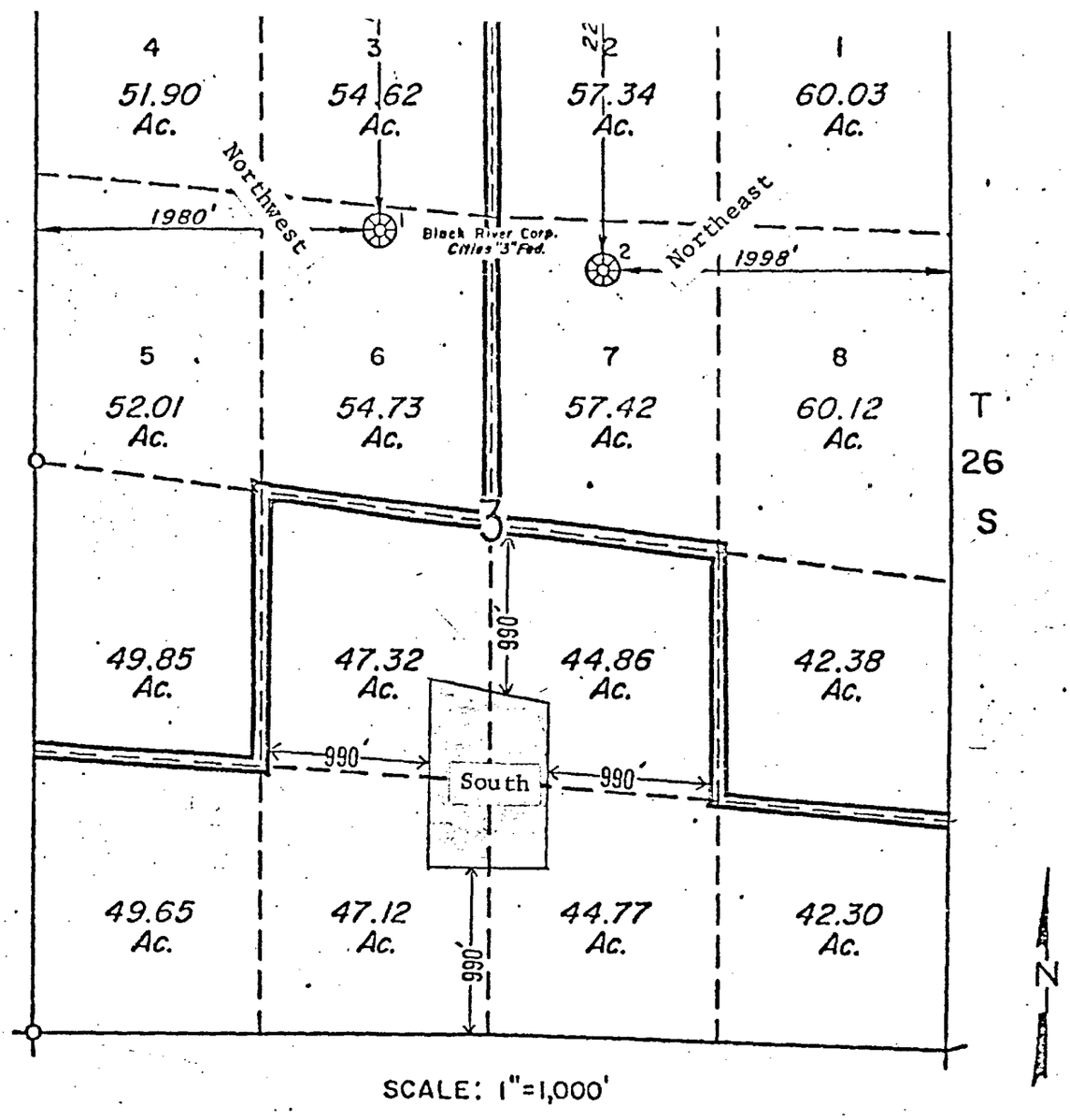
SURVEY PLAT

SUBDIVISIONS OF SECTION 3
T-26-S R-24-E
WASHINGTON RANCH (Morrow) FIELD
EDDY COUNTY, NEW MEXICO

W. P. A. 11-20-72

SIPES, WILLIAMSON & RUNYAN, INC.
Consulting Engineers Midland, Texas

EXHIBIT "A"



Case No. 4763 & 4764

Exhibit No. 2

Recommended Gas Proration Units

Section 3, T-26-S, R-24-E, Eddy Co., N. M.

Total Acreage: 816.42 Acres

PRORATION UNIT	SIZE	PERCENT UNDER 320
Northwest	263.11 acres	17.78%
Northeast	277.29 acres	13.35%
South	276.02 acres	13.75%

This compares to 27.25% over standard for a W½ (407.20 acres) of Section 3 Gas Proration Unit and 27.88% over standard for an E½ (409.22 acres) of Section 3 Gas Proration Unit.

RECOMMENDED "LOCATION BOX" -- minimum of 990 feet from outer boundary of South Proration Unit.

O - USGLO Brass Cap Monumentation

CREDITS: U.S. Dept. Int.
Gen. Land Off.
AND: John W. West, P.E. & L.S.
N.M. No. 676

EXHIBIT "B"

William J. LeMay
Geologist

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

February 25, 1974

Mr. Clarence Hinkle
Hinkle, Bondurant, Cox & Eaton
P. O. Box 10
Roswell, New Mexico 88201

Re: Rutter and Wilbanks Corporation, Appellants v. Oil Conservation Commission, Appellee and Black River Corporation, Intervenor, No. 9907

COPY

Dear Mr. Hinkle:

Enclosed is a copy of my rough draft of our Answer Brief and copies of the transcript and supplemental transcript in this case. I have no pride of authorship so please take the liberty of editing it at will.

I am circulating copies of this brief to both Dan Nutter and Dick Stamets and they are checking it to make sure it is technically correct.

I found Appellant's brief to be somewhat disjointed and I believe Jason is using a scatter-gun approach in this case. This made it difficult for me to organize our answer as well as I would have liked. I have not yet drafted, therefore, a conclusion to the brief, and thought it would be best to wait until its format had been definitely established.

The Commission received the Appellant's Brief in Chief on February 8, so I calculate that our Answer Brief is due on March 10 unless we get an extension from the Court. Should we determine it is necessary, I can come to Roswell any day to work on the final draft. We also will be happy to type the brief in final form and get it to you for signature.

Very truly yours,

WILLIAM F. CARR
General Counsel

WFC/dr
encl.

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

December 28, 1973

Jason Kellahin, Esq.
Kellahin & Fox
P. O. Box 1769
Santa Fe, New Mexico 87501

Re: Eddy County District Court
Causes Nos. 28477 and 28478
(Consolidated)

Dear Jason:

I am returning herewith the record prepared by the clerk of the District Court of Eddy County in the above-captioned cause. I have reviewed it and believe it is sufficient although certain pages are out of order and my files indicate that in addition to the material in the record filed with the Supreme Court, there should be a stipulation and order consolidating these cases.

Very truly yours,

WILLIAM F. CARR
General Counsel

WFC/dr

cc: Clarence Hinkle

KELLAHIN AND FOX
ATTORNEYS AT LAW
54½ EAST SAN FRANCISCO STREET
POST OFFICE BOX 1769
SANTA FE, NEW MEXICO 87501

JASON W. KELLAHIN
ROBERT E. FOX

TELEPHONE 982-4315
AREA CODE 505

Nov. 6, 1973

Mrs. Frances M. Wilcox
Clerk of the District Court
P. O. Box 99
Carlsbad, New Mexico 88220

Re: Rutter & Wilbanks vs. Oil Conservation Commission
Nos. 28477-28478 (Consolidated)

Dear Mrs. Wilcox:

Enclosed is a Praecipe for preparation of the record for appeal in the above cases, which were consolidated for hearing before the District Court. I will prepare and forward a stipulation and order for consolidation of the cases on appeal.

Also enclosed are certificates showing that satisfactory arrangements have been made with you, and with Mr. Herman W. Linnaweh, Court Reporter, in connection with this appeal.

Yours very truly,

JASON W. KELLAHIN

JWK:ss
cc: Mr. William F. Carr
Mr. Clarence E. Hinkle

COPY

ILLEGIBLE

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner,

vs. No. 28477
28478
(Consolidated)

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,

Respondent,

and

BLACK RIVER CORPORATION,

Intervenor.

P R A E C I P E

TO: Clerk of the District Court of
Eddy County, New Mexico:

Please prepare a transcript of the record proper and of the proceedings in this cause to be filed with the Supreme Court of the State of New Mexico in support of the appeal heretofore taken by petitioner; the complete record and proceedings shall include, but not be limited to, the following specified matters:

(1) Complete transcript of all proceedings before the Oil Conservation Commission in Case No. 4763, Cases Nos. 4764, and 4765 (consolidated), including transcript of testimony and all orders, petitions, applications, pleadings and exhibits therein;

(2) Petition for review filed by petitioner in this case;

(3) Petitioners' requested findings of fact and conclusions of law;

(4) Judgment, order, and decision of the Court in this action;

(5) Notice of Appeal (filed October 10, 1973), together with certificate of service attached thereto;

(6) This Praecipe; and

(7) Certificate of Clerk of the District Court and Court Stenographer, showing that satisfactory arrangements have been made with them by petitioner-appellant for payment of their compensation.

In addition to the complete record proper and proceedings in this cause, there shall be included in the transcript all affidavits of service and acceptance of service with respect to this cause.

KELLAHIN & FOX

BY Jason W. Kellahin

Jason W. Kellahin
P. O. Box 1769
Santa Fe, New Mexico 87501

ATTORNEYS FOR PETITIONER-APPELLANT

CERTIFICATE OF MAILING

I certify that I caused to be mailed one each true and correct copy of the foregoing Praecipe to William F. Carr, Special Assistant Attorney General, representing the New Mexico Oil Conservation Commission, and to Clarence E. Hinkle, P. O. Box 10, Roswell, New Mexico, 88202, attorney for Black River Corporation, Intervenor, being the opposing counsel of record, this 6th day of November, 1973.

Jason W. Kellahin
JASON W. KELLAHIN

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner,

vs.

No. 28477
28478
(Consolidated)

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

Respondent,

and

BLACK RIVER CORPORATION,

Intervenor.

O R D E R

THIS MATTER coming on regularly to be heard on the stipulation of counsel for consolidation of the appeals and preparation of the record herein, and the Court being fully advised, and good cause appearing therefore,

NOW, THEREFORE, IT IS ORDERED that Causes Nos. 28477 and 28478 on the docket of this Court be, and the same hereby are consolidated for all purposes, and

Permission is hereby granted to prepare and submit a single transcript and record in said consolidated cause.

DISTRICT JUDGE

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner,

vs. No. 28477
28478
(Consolidated)

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

Respondent,

and

BLACK RIVER CORPORATION,

Intervenor.

STIPULATION

WHEREAS, Petitioner has heretofore filed its notice of appeal, from the judgment entered in each of the above captioned causes, and

WHEREAS, said causes were consolidated for trial in the District Court, heard on a common record, and a consolidated judgment entered therein, and

WHEREAS, said causes present identical questions for review in the Supreme Court,

NOW, THEREFORE, the undersigned attorneys of record for the respective parties hereto, hereby stipulate and agree that said appeals may be consolidated for all purposes, and that said appeals by petitioner may be heard and determined upon a single transcript and record,

KELLAHIN & FOX

BY_____
Attorneys for Petitioner

_____
WILLIAM F. CARR, Attorney
for Respondent Oil Conservation Commission of New Mexico

_____
CLARENCE E. HINKLE, Attorney
for Intervenor Black River Corporation

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION
a Texas Corporation,

Petitioner,

vs. No. 28477

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,

Respondent,

and

BLACK RIVER CORPORATION,

Intervenor.

NOTICE OF APPEAL

COMES NOW the Petitioner Rutter & Wilbanks Corporation, and hereby gives notice that it is appealing to the Supreme Court of the State of New Mexico from the Judgment, Order and Decision of the Court in this action, which was filed on September 14, 1973.

Jason W. Kellahin

JASON W. KELLAHIN
Attorney for Petitioner Rutter &
Wilbanks Corporation

KELLAHIN & FOX
P. O. Box 1769
Santa Fe, New Mexico 87501

CERTIFICATE OF MAILING

I certify that I caused to be mailed a true and correct copy of the foregoing Notice of Appeal to William F. Carr Special Assistant Attorney General, P. O. Box 2088, Santa Fe, New Mexico, 87501, attorney for Respondent Oil Conservation Commission; and to Clarence E. Hinkle, Hinkle, Bondurant, Cox & Eaton, P. O. Box 10, Roswell, New Mexico, 88201, attorney for Black River Corporation, Intervenor, opposing counsel of record, this 10th day of October, 1973.

Jason W. Kellahin

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION, a Texas Corporation,

Petitioner,

vs.

No. 28478

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,

Respondent,

and

BLACK RIVER CORPORATION,

Intervenor.

JUDGMENT

This cause having come on for hearing by Petitioner, Rutter and Wilbanks Corporation, appearing through its Attorney, Jason W. Kellahin, and Respondent, Oil Conservation Commission of the State of New Mexico, appearing through its Attorney, William F. Carr, and Intervenor, Black River Corporation, appearing through its Attorney, Clarence E. Hinkle, and the Court having considered the arguments of counsel together with the Petition for Review, the transcripts of the examiner hearing held before the Respondent on July 12, 1972, and the de novo hearing held before Respondent on November 21, 1972, together with all exhibits introduced into evidence during those hearings, all of which have been filed with the Court in this action and being otherwise fully advised in the premises, the Court finds that Judgment should be granted in favor of the Respondent affirming Respondent's Orders Nos. R-4354 and R-4354-A.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Judgment be and it hereby is granted in favor of the Respondent affirming

Respondent's Orders Nos. R-4354 and R-4354-A.

DISTRICT JUDGE

SUBMITTED TO:

JASON W. KELLAHIN,
Attorney for Petitioner

WILLIAM F. CARR,
Attorney for Respondent

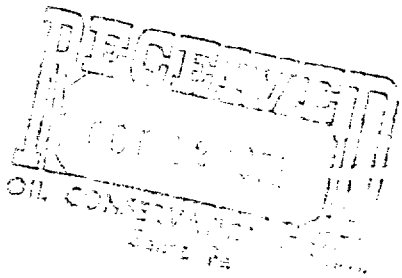
CLARENCE E. HINKLE,
Attorney for Intervenor

KELLAHIN AND FOX
ATTORNEYS AT LAW
54½ EAST SAN FRANCISCO STREET
POST OFFICE BOX 1769
SANTA FE, NEW MEXICO 87501

JASON W. KELLAHIN
ROBERT E. FOX

TELEPHONE 982-4315
AREA CODE 505

October 10, 1973



COPY

Mrs. Frances M. Wilcox
Clerk of the District Court
Eddy County Courthouse
P. O. Box 98
Carlsbad, New Mexico 88220

Re: Rutter & Wilbanks Corporation
vs. Oil Conservation Commission
Cases Nos. 28477 and 28478
Eddy County, New Mexico

Dear Mrs. Wilcox:

Enclosed are Notice of Appeal in each of the above cases, for filing.

Yours very truly,

Jason W. Kellahin

JWK:ks
Enclosure

cc: Mr. William Carr
Mr. Clarence Hinkle

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner,

vs. No. 28478

OIL CONSERVATION COMMISSION OF
THE STATE OF NEW MEXICO,

Respondent,

and

BLACK RIVER CORPORATION,

Intervenor.

NOTICE OF APPEAL

COMES NOW the Petitioner Rutter & Wilbanks Corporation, and hereby gives notice that it is appealing to the Supreme Court of the State of New Mexico from the Judgment, Order and Decision of the Court in this action, which was filed on September 14, 1973.

JASON W. KELLAHIN
Attorney for Petitioner Rutter &
Wilbanks Corporation

KELLAHIN & FOX
P. O. Box 1769
Santa Fe, New Mexico 87501

CERTIFICATE OF MAILING

I certify that I caused to be mailed a true and correct copy of the foregoing Notice of Appeal to William F. Carr, Special Assistant Attorney General, P. O. Box 2088, Santa Fe, New Mexico, 87501, attorney for Respondent Oil Conservation Commission; and to Clarence E. Hinkle, Hinkle, Bondurant, Cox & Eaton, P. O. Box 10, Roswell, New Mexico 88201, attorney for Black River Corporation, Intervenor, opposing counsel of record, this 10th day of October, 1973.

LAW OFFICES
HINKLE, BONDURANT, COX & EATON
600 HINKLE BUILDING
POST OFFICE BOX 10
ROSWELL, NEW MEXICO 88201

TELEPHONE (505) 622-6510

CLARENCE E. HINKLE
W. E. BONDURANT, JR.
LEWIS C. COX, JR.
PAUL W. EATON, JR.
CONRAD E. COFFIELD
HAROLD L. HENSLEY, JR.
STUART D. SHANOR
C. D. MARTIN
PAUL J. KELLY, JR.

MIDLAND, TEXAS OFFICE
521 MIDLAND TOWER
(915) 683-4691

September 13, 1973

Honorable D. D. Archer
District Judge
Fifth Judicial District Court
P.O. Box 98
Carlsbad, New Mexico 88220

Re: Rutter & Wilbanks v. Oil Conservation Commission
Nos. 28477 and 28478
Eddy County

Dear Judge Archer:

Pursuant to Mr. Carr's letter of September 6 relative to the above cases, I have signed the Judgments and the same are enclosed herewith.

The delay in sending these on to you has been due to the fact that I have been out of town for the last 10 days.

Yours very truly,

HINKLE, BONDURANT, COX & EATON

By Clarence E. Hinkle
cs

CEH:cs
Enc.
cc: William F. Carr
cc: Jason Kellahin

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

September 6, 1973

COPY

The Honorable D. D. Archer
District Judge, Division I
Fifth Judicial District Court
Eddy County Courthouse
P. O. Box 98
Carlsbad, New Mexico 88220

Re: Rutter and Wilbanks v.
Oil Conservation Commission
State of New Mexico
Nos. 28477 and 28478
Eddy County, New Mexico

Dear Judge Archer:

I have prepared and forwarded to Clarence Hinkle Judgments in the above-captioned cases which have previously been submitted to Jason Kellahin.

I assume Mr. Hinkle will be forwarding these Judgments to you within the next few days.

Very truly yours,

WILLIAM F. CARR
Special Assistant Attorney General
Oil Conservation Commission

WFC/dr

cc: Mr. Clarence Hinkle
Mr. Jason Kellahin

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION, a Texas Corporation,	)	
Petitioner,	)	
vs.	)	No. 28477
OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,	)	
Respondent,	)	
and	)	
BLACK RIVER CORPORATION,	)	
Intervenor.	)	

JUDGMENT

This cause having come on for hearing by Petitioner, Rutter and Wilbanks Corporation, appearing through its Attorney, Jason W. Kellahin, and Respondent, Oil Conservation Commission of the State of New Mexico, appearing through its Attorney, William F. Carr, and Intervenor, Black River Corporation, appearing through its Attorney, Clarence E. Hinkle, and the Court having considered the arguments of counsel together with the Petition for Review, the transcripts of the examiner hearing held before the Respondent on July 12, 1972, and the de novo hearing held before Respondent on November 21, 1972, together with all exhibits introduced into evidence during those hearings, all of which have been filed with the Court in this action and being otherwise fully advised in the premises, the Court finds that Judgment should be granted in favor of the Respondent affirming Respondent's Orders Nos. R-4353 and R-4353-A.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Judgment be and it hereby is granted in favor of the Respondent affirming

Respondent's Orders Nos. R-4353 and R-4353-A.

DISTRICT JUDGE

SUBMITTED TO:

Jason W. Kellahin

JASON W. KELLAHIN,
Attorney for Petitioner

William F. Carr

WILLIAM F. CARR,
Attorney for Respondent

CLARENCE E. HINKLE,
Attorney for Intervenor

KELLAHIN AND FOX
ATTORNEYS AT LAW
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POST OFFICE BOX 1769
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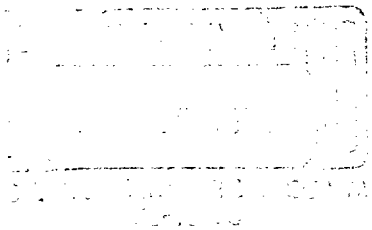
JASON W. KELLAHIN
ROBERT E. FOX

TELEPHONE 982-4315
AREA CODE 505



August 27, 1973

COPY

Hon. D. D. Archer
District Judge
Fifth Judicial District
Eddy County Courthouse
Carlsbad, New Mexico 88220

Dear Judge Archer:

Enclosed are Requested Findings of Fact and Conclusions of Law of Rutter & Wilbanks Corporation in Cases No. 28477 and No. 28478, recently heard by the Court.

Yours very truly,

Jason W. Kellahin

JWK:ks

Enclosure

cc: Clarence E. Hinkle, Esq.
William F. Carr, Esq.

a Texas Corporation,

Petitioner,

-vs-

No. 28478

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,

Respondent,

and

BLACK RIVER CORPORATION,

Intervenor.

REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PETITIONER, RUTTER & WILBANKS CORPORATION

COMES NOW Petitioner Rutter & Wilbanks Corporation in the above styled and numbered cause and respectfully requests the Court to adopt the following:

FINDINGS OF FACT

1. Petitioner is a corporation duly organized under the laws of the State of Texas, and is the owner of royalty and non-operating mineral interests acquired by transactions outside of the State of New Mexico, and Petitioner is the owner of royalty, non-operating mineral interests in and under the lands involved in Cases Nos. 4764 and 4765 (Consolidated) on the docket before the Oil Conservation Commission of New Mexico.

2. The respondent Oil Conservation Commission of New Mexico is a duly organized agency of the State of New Mexico, whose members are I. R. Trujillo, Chairman, Alex Armijo, member, and A. L. Porter, Jr., Secretary-Director.

3. Intervenor Black River Corporation is a corporation duly organized under the laws of the State of New Mexico, and was the applicant in Case No. 4764, which case was consolidated with Case No. 4765 for hearing before Richard L. Stamets, a duly appointed examiner for the New Mexico Oil Conservation Commission. Case No. 4765 was the application of Michael P. Grace and Corinne Grace for compulsory pooling of the same unit.

4. On August 7, 1972, the Commission entered its order No. R-4354 which pooled the entire West half of Section 3, Township 26 South, Range 24 East, N.M.P.M., Eddy County, New Mexico, to form a 407.20-acre non-standard gas proration unit for production of gas from the Washington Ranch-Morrow pool. The applicant Black River Corporation was designated as operator of the unit.

5. Petitioner timely filed its application for a hearing de novo before the Oil Conservation Commission as provided by law, and on November 21, 1972, the case was heard de novo by the Commission.

6. On November 29, 1972, the Commission entered its order No. R-4354-A, which order re-affirmed Order No. R-4354 in its entirety.

7. Petitioner timely filed its application for rehearing

setting forth the respect in which Commission Order No. R-4354, as reaffirmed by Order No. R-4354-A, is erroneous, as provided by law. The application for rehearing was denied by the Commission's failure to act thereon within ten days after it was filed. The Commission entered no order on the application for rehearing.

8. On January 17, 1973, and within the time allowed by law, Petitioner filed its petition for review in this Court.

9. This cause came on for hearing before the Court on August 1, 1973, all parties being present and represented by counsel. Michael P. Grace and Corinne Grace were served with notice of the petition for review but did not appear in the case.

10. For the purpose of trail on the merits, this case was consolidated with Case No. 28477 on the docket of this Court.

11. The transcript of evidence and the exhibits introduced before the Commission have been received in evidence by this Court for review.

12. The Commission, by its Order No. R-4354, reaffirmed by Order No. R-4354-A, purported to approve a non-standard gas proration unit in the Washington Ranch-Morrow Gas Pool. The Commission has never established a standard proration unit. for the Washington Ranch-Morrow Gas Pool as provided by law.

13. The Commission, by its adoption of its Rule 104, II, (a), of the Rules and Regulations of the Oil Conservation Commission,

revised December 1, 1971, adopted a spacing regulation requiring that wells drilled to a formation of Pennsylvanian age or older shall be located on a tract consisting of 320 acres. The adoption of a spacing rule is not the equivalent of the creation of a proration unit pursuant to statute.

14. The tract dedicated to the well under the provisions of Order No. R-4354, reaffirmed by Order No. R-4354-A is in excess of the 320-acre unit, and bears no reasonable relation to the 320-acre spacing unit provided by Commission Rule 104, (a).

15. Order No. R-4354, reaffirmed by Order No. R-4354-A created a gas proration unit of 407.20 acres, and pooled all of the mineral interests underlying the non-standard unit so created, for the production of gas from the Washington Ranch-Morrow Gas pool.

16. The Commission's authority to compulsorily pool separately owned tracts of land is found in Section 65-3-14, N.M.S.A., 1953 Compilation.

17. Findings Nos. 7, 8, and 10 of Commission Order No. R-4354, as reaffirmed by Order No. R-4354-A, are not supported by substantial evidence.

18. Findings Nos. 4, 5, 6, 7 and 8 of Commission Order No. R-4354-A are not supported by substantial evidence.

19. The evidence before the Commission shows that the S 1/2 S 1/2 of Section 3, Township 26 South, Range 24 East is non-productive from the Lower Morrow formation, and is probably non-productive from the Upper Morrow formation. The Commission has, by its Order No. R-4354, reaffirmed by Order No. R-4354-A,

has attributed non-productive acreage to the well on the unit, impairing Petitioner's correlative rights.

20. The Commission has failed to protect correlative rights, including the correlative rights of royalty owners, including Petitioner, contrary to the provisions of law.

21. On the record before the Commission, Order No. R-4354, reaffirmed by Order No. R-4354-A, is not supported by substantial evidence, and Order No. R-4354-A is not supported by substantial evidence.

22. Production from the Washington Ranch-Morrow Gas Pool is not now, and never has been prorated.

23. In the absence of prorationing of production from a pool, the Commission is powerless to adjust the production of gas from wells of equal capacity, located on tracts of differing sizes, and is therefore unable to protect the correlative rights of those owning mineral interests underlying such tracts.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties hereto and the subject matter of this cause.

2. The Court is limited in its review to a review of the record before the Commission.

3. The Commission is without authority to create a non-standard proration unit, having never created a standard proration unit.

4. The Commission is without authority to force pool lands to form a unit in excess of a standard spacing or proration unit.

5. There is no provision in law for the Commission to grant exceptions to its orders.

6. Order No. R-4354 and No. R-4354-A are not supported by substantial evidence, and are arbitrary and capricious, and are invalid and void.

7. Order No. R-4354 and No. R-4354-A does not protect correlative rights of petitioner and other owners of interests in the unit.

8. Orders No. R-4354 and No. R-4354-A deprive petitioner of its property without due process of law contrary to the provisions of the Constitution of the United States of America and of the State of New Mexico.

9. Orders No. R-4354 and No. R-4354-A are invalid and void, and should be vacated and set aside.

Respectfully submitted,

Jason W. Kellahin

JASON W. KELLAHIN, Attorney for Petitioner, Rutter & Wilbanks Corporation.

C E R T I F I C A T E

I hereby certify that a true copy of the foregoing Requested Findings of Fact and Conclusions of Law was served on opposing counsel of record by mailing a copy thereof to them this 27th day of August, 1973.

Jason W. Kellahin

JASON W. KELLAHIN

LAW OFFICES
HINKLE, BONDURANT, COX & EATON
600 HINKLE BUILDING
POST OFFICE BOX 10
ROSWELL, NEW MEXICO 88201

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CLARENCE E. HINKLE
W. E. BONDURANT, JR.
LEWIS C. COX, JR.
PAUL W. EATON, JR.
CONRAD E. COFFIELD
HAROLD L. HENSLEY, JR.
STUART D. SHANOR
C. D. MARTIN
PAUL J. KELLY, JR.
[redacted]

MIDLAND, TEXAS OFFICE
521 MIDLAND TOWER
(915) 683-4691

August 23, 1973

Hon. D. D. Archer
District Judge
Fifth Judicial District
Carlsbad, New Mexico 88220

Dear Judge Archer:

We enclose herewith in duplicate Requested Findings of Fact and Conclusions of Law of the New Mexico Oil Conservation Commission and Black River Corporation. As you know there were two cases docketed in connection with the appeal, which were cases 28477 and 28478. Due to the fact that these were consolidated for the purpose of hearing and were consolidated in the hearing before the Commission, the findings cover both cases as they are identical. We enclose two copies, one to be filed in Case 27844 and one in Case 28478.

Yours sincerely,

HINKLE, BONDURANT, COX & EATON

By

CEH:cs
Enc.
cc: William F. Carr
cc: Jason Kellahin

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

August 22, 1973

COPY

Mr. Clarence E. Hinkle
Hinkle, Bondurant, Cox & Eaton
P. O. Box 10
Roswell, New Mexico 88201

Dear Mr. Hinkle:

I am enclosing an original and two copies of the requested Findings of Fact and Conclusions of Law in the Rutter & Wilbanks cases.

If they meet with your approval, I would appreciate your filing the original with the District Court and transmitting one copy to Jason Kellahin.

I appreciate your preparing the rough draft and have made only minor changes in it.

Best regards.

Very truly yours,

WILLIAM F. CARR
General Counsel

WFC/dr

enclosures

cc: Mr. Jason Kellahin
P. O. Box 1769
Santa Fe, New Mexico

IN THE DISTRICT COURT OF EDDY COUNTY

STATE OF NEW MEXICO

RUTTER & WILBANKS CORPORATION, a Texas corporation, Petitioner,	)	Nos. 28477 and 28478
vs.	)	
OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent.	)	

REQUESTED FINDINGS OF FACT OF OIL CONSERVATION COMMISSION OF STATE OF NEW MEXICO AND BLACK RIVER CORPORATION

1. On July 12, 1972 a hearing was conducted by an examiner of the New Mexico Oil Conservation Commission at which three separate applications were considered, which were consolidated for the purpose of the hearing because of similiarity of facts, which were as follows:

(a) Application of Black River Corporation for compulsory pooling and non-standard proration unit covering E/2 Section 3, Township 26 South, Range 24 East, NMPM, Eddy County, New Mexico, to form a 409.22 acre non-standard gas proration unit to be dedicated to Cities "3" Federal Well No. 2 located 2212 feet from the north line and 1998 feet from the east line of Section 3, which was docketed as Oil Conservation Commission Case No. 4763.

(b) Application of Black River Corporation for compulsory pooling and non-standard proration unit covering W/2 Section 3, Township 26 South, Range 24 East, NMPM, Eddy County, New Mexico, to form a 407.20 acre non-standard gas proration unit to be dedicated to Cities "3" Federal Well No. 1 located 1980 feet from the north line and 1980 feet from the west line of said Section 3, which was docketed as Oil Conservation Commission Case No. 4764.

(c) Application of Michael P. Grace and Corinne Grace for compulsory pooling and non-standard proration unit covering W/2 Section 3, Township 26 South, Range 24 East, NMPM, Eddy County, New Mexico, to form a 407.20 acre non-standard gas proration unit to be dedicated to Cities "3" Federal Well No. 1 located 1980 feet from the north line and 1980 feet from the west line of said Section 3, which was docketed as Oil Conservation Commission Case No. 4765.

2. The applications of Black River Corporation and Michael P. Grace and Corinne Grace referred to above provide for compulsory pooling and non-standard proration units covering the W/2 Section 3, the only difference in these applications being that the application of Black River Corporation requests that it be designated as unit operator and the application of Michael P. Grace and Corinne Grace requests that one of these applicants be the unit operator.

3. After the hearing before the Oil Conservation Commission held on July 12, 1972 covering the three applications above referred to, on August 7, 1972 the Oil Conservation Commission issued the following orders:

(a) Order R-4353 in Case No. 4763 pooling all mineral interests in the Washington Ranch-Morrow Gas Pool underlying the E/2 Section 3 to form a 409.22 acre non-standard gas proration unit to be dedicated to Black River Corporation's Cities "3" Federal Well No. 2 and designating Black River Corporation as unit operator.

(b) Order R-4354 in Cases No. 4764 and 4765 pooling all mineral interests in the Washington Ranch-Morrow Gas Pool underlying the W/2 Section 3 to form a 407.20 acre non-standard gas proration unit to be dedicated to Black River Corporation's Cities "3" Federal Well No. 1 and designating Black River Corporation as unit operator.

4. Upon Petitions timely filed and notices given as required by law, the applications above referred to were heard de novo before the Commission on November 21, 1972. At this hearing, it was stipulated and agreed that the record made in connection with the hearing before the examiner on the three applications would be considered as a part of the record in connection with the de novo hearing and the applications would be consolidated for the purpose of taking testimony in connection with the de novo hearing.

5. On November 29, 1972 the Oil Conservation Commission issued Order R-4353-A in Case No. 4763 confirming Order R-4353 previously entered and on the same date issued Order R-4354-A in consolidated Cases 4764 and 4765 confirming its previous Order R-4354.

6. Within the time provided by statute Rutter & Wilbanks Corporation filed separate petitions for review of Orders R-4353 affirmed by Order R-4353-A and Order R-4354 affirmed by Order R-4354-A which were docketed as Cases 28477 and 28478 respectively on the docket of the District Court of Eddy County.

7. Cases 28477 and 28478 were consolidated for the purpose of the hearing due to the fact that the factual situation involved in both cases are for all practical purposes identical.

8. Section 3, Township 26 South, Range 24 East, according to the survey plat which was introduced in evidence and which was not disputed, contains 816.42 acres and the E/2 of said section containing 409.22 acres was dedicated to the gas well in the E/2 and the W/2 containing 407.20 acres was dedicated to the gas well in the W/2.

9. Rutter & Wilbanks Exhibit No. 1 introduced at the de novo hearing, is a structural map prepared by William J. LeMay a geologist who testified on behalf of the petitioners which clearly showed that all of Section 3 is estimated to be productive of gas in commercial quantities.

10. There was no conflict in the testimony which showed that each of the wells in Section 3 would effectively, efficiently and economically drain the respective half sections dedicated to it.

11. Dedicating 320 acres or less than a half section to the respective wells would necessitate the creation of an additional non-standard spacing or drilling unit.

12. As shown by Exhibit No. 1 introduced on behalf of the petitioners, all of Sections 2, 3, 4, 5 and 6 in Township 26 South, Range 24 East are irregular sections containing more than 640 acres and gas wells have been completed in the W/2 Section 2 and the E/2 of Section 4 and half of each of these sections has been dedicated to the respective wells.

13. What would ordinarily be the NE/4 SE/4 and the S/2 S/2 of Section 3 are fee lands and all of the rest of the lands in the section are lands of the United States.

14. The government lands are covered by a federal lease on which there is an outstanding 5% overriding royalty of which 4.7% is owned by petitioners.

15. The oil and gas leasehold interests covering the federal and fee lands embraced within the respective half sections dedicated to the gas wells are not owned uniformly and Black River Corporation was designated by the working interest owners to drill the wells and the working interest owners paid the cost of said wells in proportion to their acreage interests in the respective half sections, except at the time of the examiner's hearing in connection with Cases 4764 and 4765 Michael Grace was claiming to have the lease rights in and to the SE/4 SW/4 Section 3 adverse to that of Black River Corporation.

16. The other owners of overriding royalty interests under the federal lands originally joined with Rutter & Wilbanks Corporation in protesting the approval of the E/2 and W/2 respectively as the spacing or proration units to be dedicated to the respective wells; however, these owners did not join with Rutter & Wilbanks

Corporation in its petitions to review the Commission's orders. Consequently, none of the working interest owners, royalty owners, including the United States, have objected to or protested the orders of the Commission creating the well spacing or proration units, and none of the owners of overriding royalties has objected except Rutter & Wilbanks.

17. At the de novo hearing Rutter & Wilbanks Corporation made a proposal that Section 3 be divided into three non-standard spacing or proration units and introduced a plat showing these units, which was petitioner's Exhibit No. 2. The formation of a third drilling and spacing unit would require the drilling of a third well in order to protect lease and correlative rights in Section 3, although the working interest owners who participated in the drilling of the two gas wells indicated that they would not be willing to drill a third well, which would cost between $225,000.00 and $250,000.00 to drill and complete.

18. The drilling of a third well in Section 3 would result in economic waste.

19. Petitioners have not objected to the pooling of the mineral and royalty interests involved in the respective half sections but only to the creation of non-standard proration units due to the fact that both half sections contain more than 320 acres.

20. Both of the gas wells are producing from the Morrow formation or Pennsylvanian age and were drilled as a south extension to the Washington Ranch-Morrow Pool or Field.

21. The formation of the two units involved in these cases is in conformity with Subsection (a) of Article II of Rule 104 of the Rules and Regulations of the Commission in that each consists of two contiguous quarter sections of a single governmental section.

REQUESTED CONCLUSIONS OF LAW OF
OIL CONSERVATION COMMISSION OF
STATE OF NEW MEXICO AND BLACK
RIVER CORPORATION

1. The Court has jurisdiction of the parties hereto and the subject matter hereof.

2. The New Mexico Oil Conservation Commission is authorized by statute (65-3-14.5 N.M.S.A. 1953 Comp.) to establish non-standard spacing or proration units and has authority to require pooling of lease and mineral interests when pooling has not been agreed upon by the parties.

3. The creation of a non-standard spacing or proration unit for the E/2 and W/2 of Section 3 respectively are within the provisions of Subsection (a) of Article II of Rule 104 of the Rules and Regulations of the Commission.

4. The formation of non-standard spacing or proration units for the E/2 and W/2 of Section 3 respectively comes within the provisions of Section 65-3-14.5 N.M.S.A. 1953 Comp.

5. There is substantial evidence to support all of the findings of the Commission in Orders R-4353 and R-4353-A issued in Case No. 4763, the petition for review of which is docketed as Case No. 28477, and to support the findings of the Commission in Orders R-4354 and R-4354-A issued in Cases No. 4764 and 4765, the petition for review of which is docketed as Case No. 28478.

6. The petitions of Rutter & Wilbanks Corporation in Cases 28477 and 28478 should be denied and thereby sustain the orders of the Commission.

HINKLE, BONDURANT, COX & EATON

By _____
Attorneys for Black River Corporation
P. O. Box 10
Roswell, New Mexico 88201

OIL CONSERVATION COMMISSION OF
STATE OF NEW MEXICO

By William F. Carr
General Counsel
P. O. Box 2088
Santa Fe, New Mexico 87501

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JASON W. KELLAHIN
ROBERT E. FOX
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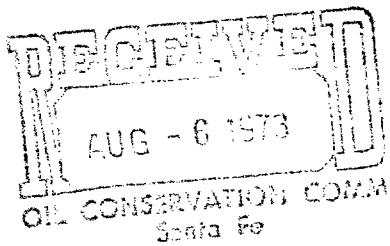
TELEPHONE 982-4315
AREA CODE 505

August 2, 1973



Mr. William F. Carr
Oil Conservation Commission
P. O. Box 1088
Santa Fe, New Mexico 87501

Re: Rutter & Wilbanks Corporation
v. Oil Conservation Commission
Cases Nos. 28477, 28478, Eddy
County, New Mexico

Dear Bill:

Following the hearing on the above cases in Carlsbad yesterday, I asked for time to file requested findings, and Judge Archer allowed thirty days, and requested that I notify you and Clarence Hinkle.

Sincerely,

Jason W. Kellahin

JWK:ks

D. D. ARCHER
DISTRICT JUDGE
P. O. Box 98
CARLSBAD, NEW MEXICO
88220

June 25, 1973

Mr. Clarence E. Hinkle
Attorney at Law
P. O. Box 10
Roswell, New Mexico 88201

Mr. Jason W. Kellahin
Attorney at Law
P. O. Box 1769
Santa Fe, New Mexico 87501

Mr. William F. Carr
Special Assistant Attorney General
P. O. Box 2088
Santa Fe, New Mexico 87501

Re: Rutter & Wilbanks Corporation
vs. Oil Conservation Commission
Nos. 28477 and 28478

Gentlemen:

The above matters will be heard at 1:30 P.M. on Wednesday, August 1, 1973, in the District Courtroom, Eddy County Courthouse, Carlsbad, New Mexico.

Very truly yours,

D. D. Archer

DDA/mg

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

March 12, 1973

Mr. William J. Cooley
152 Petroleum Center Building
Farmington, New Mexico 87401

Re: Rutter & Wilbanks v. Oil Conservation Commission
Cause No. 28477 and Cause No. 28478, District Court of Eddy County

Dear Mr. Cooley:

Enclosed are copies of Respondent's Entry of Appearance and Answer to Petition for Review in each of the above-captioned cases.

Sincerely,

WILLIAM F. CARR
Special Assistant Attorney General
Oil Conservation Commission

WFC/dr
enclosures

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

March 12, 1973

Mr. Clarence E. Hinkle
P. O. Box 10
Roswell, New Mexico 88201

Re: Rutter & Wilbanks v. Oil Conservation Commission
Cause No. 28477 and Cause No. 28478, District Court of Eddy County

Dear Mr. Hinkle:

The Oil Conservation Commission purchases two copies of the transcript of each hearing in which we are involved. In the above-captioned cases, there is one copy of the transcripts in our Santa Fe office and one in the District Court in Carlsbad.

The Commission has found itnecessary to adopt a policy whereby we do not loan our last copy of the transcript of any proceeding. It is, however, available in this office for anyone to review.

The reporter in this case is Dearnley, Meier and McCormick, P. O. Box 1092, Simms Building, Albuquerque, New Mexico 87103. We will be happy to do whatever we can to assist you and the reporter in securing a copy of these transcripts.

Sincerely,

WILLIAM F. CARR
Special Assistant Attorney General
Oil Conservation Commission

WFC/dr

IN THE DISTRICT COURT OF EDDY COUNTY

STATE OF NEW MEXICO

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner,

vs. No. 28478

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

Respondent.

ANSWER TO PETITION FOR REVIEW

Respondent, Oil Conservation Commission of New Mexico, answering the Petition for Review states:

FIRST DEFENSE

1. Respondent admits the allegations contained in Paragraphs 1, 2 and 3 of the Petition for Review.

2. Respondent denies the allegation in Paragraph 4 of the Petition for Review that the Petitioner is adversely affected by Commission Order No. R-4354 as reaffirmed by Order No. R-4354-A. Respondent admits all other allegations contained in Paragraph 4 of the Petition for Review.

3. Respondent denies each and every allegation contained in Paragraph 5 of the Petition for Review.

SECOND DEFENSE

Petitioner fails to state a claim upon which relief can be granted.

WHEREFORE, Respondent prays:

1. That the Petition for Review be dismissed.

2. That Commission Orders No. R-4354 and R-4354-A be affirmed.

3. That the Court grant Respondent such other and further relief as the Court deems just.

WILLIAM F. CARR
Special Assistant Attorney General
representing the Oil Conservation
Commission of New Mexico, P. O.
Box 2088, Santa Fe, New Mexico 87501

I hereby certify that on the 5th day of March, 1973, a copy of the foregoing pleading was mailed to opposing counsel of record.

Black River's Brief

IN THE DISTRICT COURT OF EDDY COUNTY

STATE OF NEW MEXICO

RUTTER & WILBANKS CORPORATION, a Texas corporation, Petitioner,	)	
vs.	)	Nos. 28477 and 28478
OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent.	)	

TRIAL MEMORANDUM

I. STATEMENT OF CASES

These cases are before this Court on appeals taken from Orders entered by the New Mexico Oil Conservation Commission in connection with two separate Applications for Compulsory Pooling and for the Approval of Non-Standard Spacing and Proration Units.

One of these applications was the application of Black River Corporation for compulsory pooling and non-standard proration unit filed as Case No. 4763, which involves the E½ of Section 3, Township 26 South, Range 24 East, Eddy County.

The other case grows out of two separate applications, one filed by Black River Corporation and the other by Michael P. Grace for compulsory pooling and approval of non-standard proration unit covering the W½ of Section 3, Township 26 South, Range 24 East, Eddy County. These were docketed as Cases 4764 and 4765 by the Commission and were consolidated for the purpose of hearing. Both applications request compulsory pooling and approval of the non-standard unit consisting of the W½ of Section 3, the only difference in the applications being the approval of the Unit Operator, that is whether it should be Black River Corporation or Michael P. Grace or his wife, Corrine Grace.

An Order was issued by the Commission on November 29, 1972 approving the application of Black River in Case 4763 as to the E½ of Section 3. An Order was entered by the Commission on August 7, 1972, being Order R-4354 in the consolidation of cases 4764 and 4765, approving the application of Black River and designating Black River as the Unit Operator as to the W½ of Section 3.

That by application timely filed with the Conservation Commission, Rutter & Wilbanks Corporation requested a de novo hearing before the full Commission to review both of the above mentioned Orders. A hearing was held before the full Commission on November 21, 1972, and on November 29, 1972 the Commission by Orders R-4353-A and R-4354-A affirmed the previous Orders of the Commission for compulsory pooling and the creation of non-standard spacing and proration units for both the E½ of Section 3 and the W½ of Section 3. Appeals have been taken from these Orders pursuant to the provisions of Section 65-3-22, New Mexico Statutes, 1953 Annotated. This section provides that upon appeal from an Order of the Commission evidence in addition to the transcript of proceedings before the Commission may be introduced. In this connection, we would like to call the Court's attention to the case of Continental Oil Company v. Oil Conservation Commission, et al, decided in May, 1962, 70 N.M. 310, 373 P.2d 809, wherein the Court held as follows:

> "Insofar as Section 65-3-22(b), supra, purports to allow the District Court, on appeal from the Commission, to consider new evidence, to base its decisions on the preponderance of the evidence or to modify the orders of the Commission, it is void as an unconstitutional delegation of power, contravening Article III, Section 1 of the New Mexico Constitution."

II. STATEMENT OF FACTS

Due to the decision in the Continental Oil Company case hereinabove referred to, these appeals must necessarily be considered solely upon the transcript of the hearings before the Commission. In the de novo hearing before the Commission, all three applications filed in connection with Cases 4763, 4764 and 4765 were consolidated for hearing, and it was stipulated by the parties that the transcripts of the Examiner's hearings previously held in connection with Cases 4763, 4764 and 4765 as consolidated could be made a part of the record for the de novo hearing. (Tr. p. 4, 5, 6, de novo hearing November 21, 1972). Because of this situation, there have been three separate transcripts filed in these cases, one covering the Examiner hearing in connection with Case 4763, and one in connection with the Examiner hearing for consolidated Cases 4764 and 4765, and the third being the transcript of the de novo hearing before the Commission upon the consolidation of all three cases.

The pertinent facts with respect to the case involving the non-standard spacing and proration unit as to the E½ of Section 3 and those which involve the non-standard spacing and proration unit as to the W½ of Section 3 are substantially the same. The principle issue in both of these cases is whether or not the Orders of the Commission creating non-standard spacing or proration units are valid under the particular facts and circumstances which exist by reason of Section 3 containing considerable more than 640 acres.

So that the Court may readily comprehend the factual situation, there is attached hereto as Exhibit "A" a plat of Section 3 which was introduced by Black River Corporation as Exhibit No. 5 in connection with the Examiner's hearings in Cases 4763, 4764 and 4765. It will be noticed that the E½ of Section 3 contains 409.22

acres and the W½ contains 407.20 acres. Exhibit "A" also shows the location of the two gas wells located upon these half sections and which were in the process of being placed on production at the time of the original Examiner's hearings. Both of these wells are producing from the Morrow formation of Pennsylvanian age. At the time these wells were drilled, the general rules and regulations of the Commission with respect to development wells for a defined gas pool of Pennsylvanian age provided for the dedication to such wells of 320 acres, more or less, comprising any two contiguous quarter sections of a single governmental section. Specifically the second paragraph of subsection (a) of Article II of Rule 104 of the Commission provides as follows:

> "Unless otherwise provided in the special pool rules, each development well for a defined gas pool of Pennsylvanian age or older which was created and defined by the Commission after June 1, 1964, shall be located on a designated drilling tract consisting of 320 surface contiguous acres, more or less, comprising any two contiguous quarter sections of a single governmental section, being a legal subdivision of the U. S. Public Lands Surveys."

The testimony and exhibits introduced at the three hearings show that gas production had been obtained in Sections 27, 28, 33 and 34 in the Township which adjoins Section 3 on the north (Exhibits 1 and 2, Tr. Examiner's hearings 4763 and consolidated 4764 and 4765). There is no question but that the two wells which were drilled in Section 3 were development wells and constituted a south extension to the previous development to the north, which is referred to as the Washington Ranch Pool or Field.

It will be noted from Black River's Exhibit No. 2 introduced in connection with Cases 4763, 4764 and 4765 that the entire north tier of sections in Township 26 South, Range 24 East, possibly with the exception of Section 1, are all irregular sections, and Sections 2, 3 and 4 particularly each contain considerably more than 640 acres.

The controversy which exists in these cases is largely brought about by the fact that a considerable portion of Section 3 is Federal land and what would ordinarily be the NE¼SE¼ and the S½S½ is fee land. We have indicated on Exhibit "A" that portion which is Federal land and that portion which is fee land. Rutter & Wilbanks Corporation have less than a 5% overriding royalty interest carved out of the working interest in and to the Federal lease embracing the Federal lands above referred to (Tr. 4763, p. 25; Tr. 4764 and 4765, p. 39, and Tr. de novo hearing, p. 40). There were two other owners of overriding royalty interests under the Federal lease who objected along with Rutter & Wilbanks to the non-standard spacing unit at the original hearings before the Examiners. Altogether these royalty owners owned a 5% overriding royalty. Only Rutter & Wilbanks appealed and, consequently, the other overriding royalty interest owners elected to abide by the Orders of the Commission. Consequently, the only one objecting to the non-standard spacing units is Rutter & Wilbanks, who has something less than a 5% overriding royalty (Tr. de novo hearing, p. 40).

All of the working interest owners in both the E½ and the W½ of Section 3 agreed to the non-standard units and all participated in the cost of the respective test wells, except at the time of the Examiner's hearing in connection with Cases 4764 and 4765, Michael Grace was claiming to have the lease rights in and to the SE¼SW¼ of Section 3 adverse to that of Black River Corporation, and it was not certain at that time who would be responsible for the portion of the cost of the well in the W½ of Section 3 to be allocated to this acreage.

At the de novo hearing, Rutter & Wilbanks made a proposal that the E½ and the W½ of Section 3 be divided into three non-standard spacing or proration units and introduced a plat which was their Exhibit No. 2 to show these units. There is attached as Exhibit "B" a copy of this plat, and it will be noted that the units are

referred to as the Northwest, Northeast and South Units. The proposed Northwest and Northeast Units would be made up mostly of the Federal lands and the South Unit would be made up of most of the fee lands and a little of the Federal lands (Tr. de novo hearing, p. 32). The formation of a third drilling and spacing unit would, of course, require the drilling of a third well, and this, in the face of the fact that the working interest owners in the proposed South unit had already participated in the drilling of the two wells shown on Exhibit "B". It was indicated that these working interest owners would not be willing to drill a third well (Tr. de novo hearing, p. 48, 49).

III. AUTHORITIES AND ARGUMENT

There have been relatively few cases in our Supreme Court challenging the authority of the Oil Conservation Commission to issue orders, rules and regulations relating to oil and gas development in the state. The leading case and most cited case is that of Continental Oil Company, which we have already referred to. In this case the Supreme Court pointed out that the New Mexico Legislature has explicitedly defined both "waste" and "correlative rights" and placed upon the Commission the duty of preventing one and protecting the other. In this connection the Court stated:

> "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 rights 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 definitely 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."

So far as we are able to determine, the Supreme Court has not directly passed upon the authority of the Commission to approve non-standard spacing and proration units of the size or character involved in these cases. In the case of Sims v. Mechem, et al, as members of the Oil Conservation Commission, 72 N.M. 186, it was held that where an order of the Commission establishing two separate standard production units but which did not contain finding as to existence of waste or that pooling would prevent waste was void. In that case the Court held that the Oil Conservation Commission has authority to require pooling of property when pooling has not been agreed upon by parties and has further authority to modify any agreement between parties but the action of the Commission must be predicated upon prevention of waste.

At the outset we would like to point out that Order No. R-4353-A issued in Case 4763 and Order No. R-4354-A issued in connection with Cases 4764 and 4765 contain findings to the effect that the approval of non-standard units for both the E½ and the W½ of Section 3 will provide protection for the correlative rights of all mineral interest owners and will result in the prevention of waste. Consequently, it would have to be clearly shown that there is no substantial evidence to support these findings if these orders are to be held invalid.

We have already pointed out and quoted from a portion of Rule 104 of the Commission governing well spacing, as well as acreage requirements for drilling tracts. In this connection, we call your attention to subparagraph (c) of Section 65-3-14.5 of New Mexico Statutes, 1953 Annotated, which provides as follows:

> "Non-standard spacing or proration units may be established by the Commission and all mineral and leasehold interests in any such non-standard unit shall share in production from that unit from the date of the order establishing the said non-standard unit."

The above quoted provisions appear to be clear and unambiguous, and certainly gives the power and authority to the Commission to create non-standard spacing or proration units.

Section 65-3-14 of the statutes covers equitable allocation of production - pooling and spacing, and in effect defines correlative rights. The portions of this section which are particularly applicable here are as follows:

> "(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 practicably 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 effectively and economically drained and developed by one 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."

Paragraph (c) of the above referred to section provides for forced pooling where owners cannot agree upon the pooling of their interests, as was the case in the cases under consideration.

The Petition for Review filed in connection with the appeal of each case sets forth certain grounds for asserting the invalidity of the Orders of the Commission approving the non-standard spacing and proration units for the E½ and the W½ of Section 3, respectively. The grounds alleged in each Petition are substantially the same. We will set forth these grounds in the order in which they appear in the Petitions and discuss each one separately in the order in which they are listed in the Petition.

A. Petitioner alleges that the Commission purports to approve a non-standard gas proration unit in the Washington Ranch-Morrow Gas Pool, although the Commission has never complied with the provisions of Section 65-3-14(b).

We have quoted the provisions of Section 65-3-14(b) hereinabove. It will be noted that the Commission may establish a proration unit for each pool, such being the area that can be effectively and economically drained and developed by one well. As a part of our Statement of Facts on page 4, we have quoted the pertinent provisions of the second paragraph of subsection (a) of Article II of Rule 104. This provision is a part of the general rules and regulations adopted by the Commission and is a portion of those provisions which relate to development gas wells to be drilled in Lea, Chaves, Eddy and Roosevelt Counties. Under this rule where a development gas well is projected to produce from the Pennsylvanian formation, it is to be located on a designated drilling tract consisting of 320 surface contiguous acres "more or less, comprising any two contiguous quarter sections of a single governmental section, being a legal subdivision of the U. S. Public Land Surveys". The wells which were drilled on the E½ and the W½ of Section 3 were wells designed to extend the Washington Ranch-Morrow Gas Pool to the south and are certainly classed as development wells, and it is a matter of common knowledge that the Morrow zone or formation is a part of the Pennsylvanian zone. Due to the fact that this rule is applicable in this case, it was not necessary for the Commission to again adopt

a well spacing or proration unit in accordance with the provisions of Section 65-3-14(b).

B. Petitioner alleges that Rule 104, II(a) of the Rules and Regulations of the Commission provides that a well drilled to a formation of Pennsylvanian age or older shall be located on a unit consisting of 320 acres. We have already pointed out in connection with paragraph A above that the unit is not confined to 320 acres but may be more or less comprising any two contiguous quarter sections of a single governmental section, being a legal subdivision of the U. S. Public Lands Surveys. As the Court well knows, there are usually some irregular sections in connection with most townships, particularly along the township lines, and this rule was undoubtedly intended to be flexible enough to take care of varying circumstances where sections contained more or less than 640 acres.

The Oil Conservation Commission in issuing its rules and regulations is faced with many administrative problems. We believe that the Court can take notice of the fact that the Commission in approving non-standard spacing and proration units has always tried to adhere to the section in which the lands are located so as not to cross section lines. In cases where the section contains more than 640 acres if the Commission acted administratively to limit the dedication of not more than 320 acres to a well, it would leave odd numbers of acres to be pooled with other acreage crossing section lines, and this in turn would either reduce or enlarge the units in the adjoining sections resulting in the creation of non-standard spacing of proration units in that they would not consist of two contiguous quarter sections of a governmental section.

C. Petitioner alleges that Findings 5, 6 and 7 of the Commission's Order No. R-4353 and Findings 7, 8 and 10 of the Commission's Order No. R-4354 are not supported by substantial evidence. These findings in both Orders are substantially the same.

Findings 5 and 7 in the respective Orders are to the effect that the E½ and the W½ respectively of Section 3 can reasonably be presumed productive of gas in the Washington Ranch-Morrow Gas Pool. Mr. Rutter, on cross-examination in connection with Case 4763 (Tr. 4763, p. 29), testified as follows:

> "What you get down to is a practical matter, these reservoirs will be drained by the number of straws in them, and I think that the S½ of Section 3 will probably produce and the people who have royalty interests in those tracts that are proposed will get their share of royalties from that well."

Mr. Rutter was referring to the drilling of a third well in Section 3.

Mr. William P. Aycock, Petroleum Engineer and witness for Black River Corporation, testified in Cases 4764 and 4765 as follows:

> "Q. Considering your previous testimony, Mr. Aycock, with respect to the structural conditions, the cross-sections and regard to permeability and porosity and so forth, have you formed any opinion as to whether or not the well located in the W½ of Section 3 and shown on Exhibit 5 will efficiently and effectively drain all of the W½?
>
> A. Yes, I think it probably will.
>
> Q. In your opinion, will the pooling of all of the acreage and formations of non-standard units consisting of the W½ of Section 3 prevent the drilling of unnecessary wells?
>
> A. Yes, I believe it will.
>
> Q. And would this tend to protect correlative rights?
>
> A. Yes, I think so."

(Tr. 4764, 4765, p. 20).

In connection with the de novo hearing before the Commission, Rutter & Wilbanks introduced their Exhibit No. 1 (de novo tr., p. 7, 18). There is attached hereto as Exhibit "C" a copy of this Exhibit No. 1. This is a structural map which was prepared by William J. LeMay, Geologist, who was also one of the witnesses for Rutter & Wilbanks, and shows that all of Section 3 is estimated commercially productive of gas. Consequently, we have Mr. Rutter's own evidence showing that the entire Section 3 is productive of gas.

Findings 6 and 8 of the Commission in the respective Orders are to the effect that the entire E½ and W½ respectively of Section 3 can be efficiently and economically drained and developed by the respective wells drilled thereon.

Mr. Aycock, in testifying on behalf of Black River in the de novo hearing, responded to a question as follows:

> "Q. I believe your previous testimony before the Examiner will show that you testified that one of these wells will effectively and efficiently drain either the E½ or the W½ of that area dedicated to it?
>
> A. I think the evidence that we have now says that that is probably true, yes.
>
> Q. There has been no change because of additional drilling?
>
> A. The wells are producing essentially as we anticipated."

(Tr. de novo hearing, p. 12).

In connection with Case No. 4763, Mr. Rutter testified as follows:

> "Q. If the well you propose is not drilled, the well in the NE¼NW¼ of Section 10 that is proposed now would effectively drain the same area, would it not?
>
> A. Yes, sir. We are faced with the situation where if we have a bottle of soda and we put eight straws in it, you can divide the contents of the bottle of soda by eight. From the permeability testified to here, the reservoir is one reservoir, and you are going to divide it by the number of straws in there. Where the wells are located is not going to make a whole lot of difference."

Findings 7 and 10 in the respective Orders are to the effect that the applications should be approved by pooling all mineral interests, which would avoid the drilling of unnecessary wells, protect correlative rights and afford to the owner of each interest the opportunity to recover or receive without unnecessary expense his just and fair share of the gas in the pool.

In connection with Case 4763, Mr. Aycock testified on behalf of Black River as follows:

> "Q. Is the entire E½ of Section 3 productive of gas in your opinion?

A. I think all the data that we have indicates that it is. Yes, I think if you will refer to our first cross-section, you will notice that the superior well is completed in the Morrow zone even though it's way down structure. It is not as good a quality well, obviously, as Black River has enjoyed, but it does show that the Morrow formation is productive of gas."

(Tr. 4763, p. 22).

In connection with Cases 4764 and 4765, Mr. Aycock also testified:

"Q. Considering your previous testimony, Mr. Aycock, with respect to the structural conditions, the cross-sections and regard to permeability and porosity and so forth, have you formed any opinion as to whether or not the well located in the W½ of Section 3 as shown on Exhibit 5 will effectively and efficiently drain all of the W½?

A. Yes, I think it probably will." (Tr. 4764, 4765, p. 19)

Mr. Rutter's Exhibit No. 1, and which we have attached as Exhibit "C", also shows that all of Section 3 is productive of gas.

In our opinion, considering all of the evidence and exhibits introduced in connection with Examiner's hearings, as well as the de novo hearing, all indicate that the wells drilled in the E½ and W½ of Section 3, respectively, will effectively and efficiently and economically drain these half sections and that the drilling of a third well would be an unnecessary well and constitute an economic waste. Furthermore, under the forced pooling orders, the gas is to be allocated to the respective leases involved in these half sections in proportion to the acreage contained in each. If each of these wells will effectively and efficiently drain the gas from these sections, each lease will receive its proportionate part and royalties will be paid on that basis. Consequently, there could be no loss to Rutter & Wilbanks and the correlative rights of all parties will be effectively preserved.

D. It is alleged that the evidence shows that the S½S½ of Section 3, Townshp 26 South, Range 24 East is non-productive from the lower Morrow formation and is probably not productive from the upper Morrow formation and that therefore the Commission order is

attributing non-productive acreage to the wells in the non-standard units. There was some evidence to the effect that the well in Section 2 was not productive in the lower Morrow formation. In connection with all of its orders, the Commission has treated the Morrow as a single zone or formation in the Pennsylvanian formation and has not recognized stringers or porosity zones in the Morrow formation, such as upper and lower, as constituting separate reservoir due to the fact that undoubtedly there is communication between the stringers or porous zones in the Morrow formation. Again we call attention to the fact that Rutter & Wilbanks' Exhibit No. 1 shows the S½S½ of Section 3 to be productive of gas.

E. It is also alleged that the Commission has included in the respective units royalty interests owned by Petitioner with royalty under acreage which is claimed not to be productive from the lower Morrow formation and that is questionable as to the upper Morrow formation. We believe that this has been effectively answered in connection with the preceding paragraphs.

F. It is also alleged that the Commission, without just cause, has disregarded its own rules in dedicating more than 320 acres to each of the wells. We believe that this has also been effectively answered.

G. It is also alleged that the Orders of the Commission will result in irreparable injury to the correlative rights of Petitioner and deprive Petitioner of its property without due process of law. Again we believe that this has been effectively answered. However, we call your attention to testimony of Mr. Aycock in connection with Cases 4764 and 4765, which is as follows:

> "Q. Now, in your opinion, would approval by the Commission of a non-standard unit for the W½ of Section 3 be in the interest of conservation, the prevention of waste and tend to protect the correlative rights?
>
> A. Yes, I think in general, it certainly would be. When you get down to the fine points of the definition as to whether you are talking about physical waste or

economic waste, I think it would be to everybody's benefit and would prevent the unnecessary drilling of wells in this area."

(Tr. 4764, 4765, p. 27).

H. It is further alleged that the non-standard unit approved by the Commission has no reasonable relation to the 320 acre unit required by Rule 104, II(a), and is not based upon any rule or regulation of the Commission nor any law of the State of New Mexico, and in that respect is arbitrary and capricious.

We believe that this has also been effectively answered. However, in this connection we again refer to Rule 104, a portion of which is quoted on page 4 hereinabove, which clearly provides that the acreage to be dedicated to a well producing from the Pennsylvania formation shall consist of 320 surface contiguous acres, more or less "comprising any two contiguous quarter sections of the single governmental section being a legal subdivision of the U. S. Public Lands Survey". The formation of the two units in question comply with this rule in that the units do consist of two contiguous quarter sections of a single governmental section.

I. It is further alleged that the orders of the Commission approving the non-standard units are arbitrary and capricious and are therefore unlawful, invalid and void.

There is nothing contained in the evidence or in the orders of the Commission which indicate in any way that the Commission acted arbitrarily or capriciously. On the other hand, the Commission simply followed its long standing rules and regulations of confining spacing and proration units to a single section, not crossing the section lines, and following the Government Land Surveys. Any other course of action would obviously lead to a great deal of confusion and administrative difficulties.

We also call your attention to the fact that Mr. Rutter corroborated the testimony of Mr. Aycock to the effect that the

wells in Section 3 will effectively and efficiently drain all the gas in Section 3 (de novo Tr., p. 43).

CONCLUSION

In conclusion, we wish to bring to the attention of the Court a few matters which we think are extremely important and have a distinct bearing on these cases.

1. Approval of Non-Standard Units by United States Geological Survey: As we have already pointed out, a considerable portion of Section 3 is Federal land covered by a Federal lease. The interest of Rutter & Wilbanks, which is less than the 5% overriding royalty, has been carved out of the working interest of the Federal lease. The owners of the working interest and the United States Government, which has a 12½% royalty, have a much larger interest than Rutter & Wilbanks. The testimony clearly indicates and it has not been disputed that the United States Geological Survey indicated that they would approve these non-standard units if approved by the Oil Conservation Commission and the U.S.G.S. has raised no objections to the orders or intervened in these cases, and we believe it can be conclusively assumed that they have been approved by the U.S.G.S. (Tr. 4763, p. 16, and Tr. 4764 and 4765, p. 20). Only one conclusion can be drawn from this situation and this is that the U.S.G.S. have not considered that the Commission's orders approving the non-standard units will constitute waste or dilute in any way the Government's royalty interest or interfere with its correlative rights.

2. Precedent of the Commission in Approving Units in Excess of 320 acres: At the de novo hearing, it was brought out by the testimony of Mr. Aycock on behalf of Black River that there are a number of instances where special pool rules have been adopted in connection with wells producing from the Morrow formation providing for 640 acre spacing. There are a number of these cases which are

shown by the orders on file with the Commission, and the Commission was requested to take notice of these cases (Tr. de novo hearing, p. 47, 48, 49, 52).

The fact that the Commission has adopted special pool rules for a number of Morrow pools providing for 640 acre spacing clearly indicates that wells producing from the Morrow formation are capable of draining large areas. Consequently, the formation of two non-standard units somewhat in excess of 320 acres are not unusual in any sense of the word. Consequently, there is ample precedent for the Commission establishing the units in these particular cases, which were established by the applicable orders.

We respectfully submit that the Court should deny the Petitions filed herein and thereby uphold the orders of the Commission.

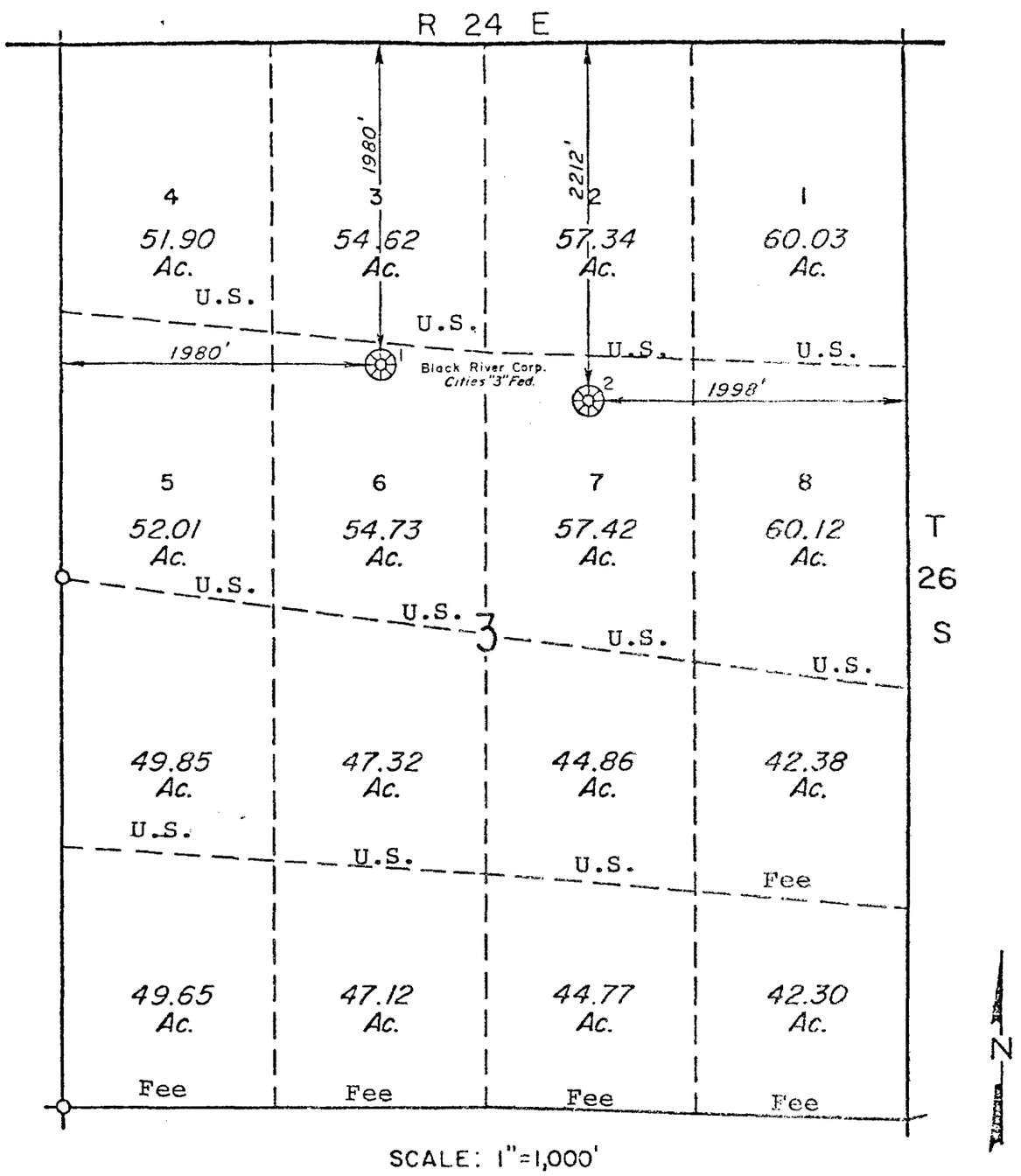
Respectfully submitted,

HINKLE, BONDURANT, COX & EATON

By _____
Attorneys for Black River Corporation
P. O. Box 10
Roswell, New Mexico 88201

WE HEREBY CERTIFY THAT WE HAVE MAILED A COPY OF THE FOREGOING PLEADING TO ALL OPPOSING COUNSEL OF RECORD THIS

Hinkle, Bondurant, Cox & Eaton
P O Box 10 Attorneys ROSWELL N M 88201



SCALE: 1"=1,000'

ACREAGE

W/2 : 407.20 Ac.
E/2 : 409.22 Ac.
Total : *816.42 Ac.*

O — *USGLO Brass Cap Monumentation*

CREDITS: *U. S. Dept. Int. Gen. Land Off.*
AND: *John W. West, P.E. & L.S. N.M. No. 676*

BLACK RIVER CORPORATION

SURVEY PLAT

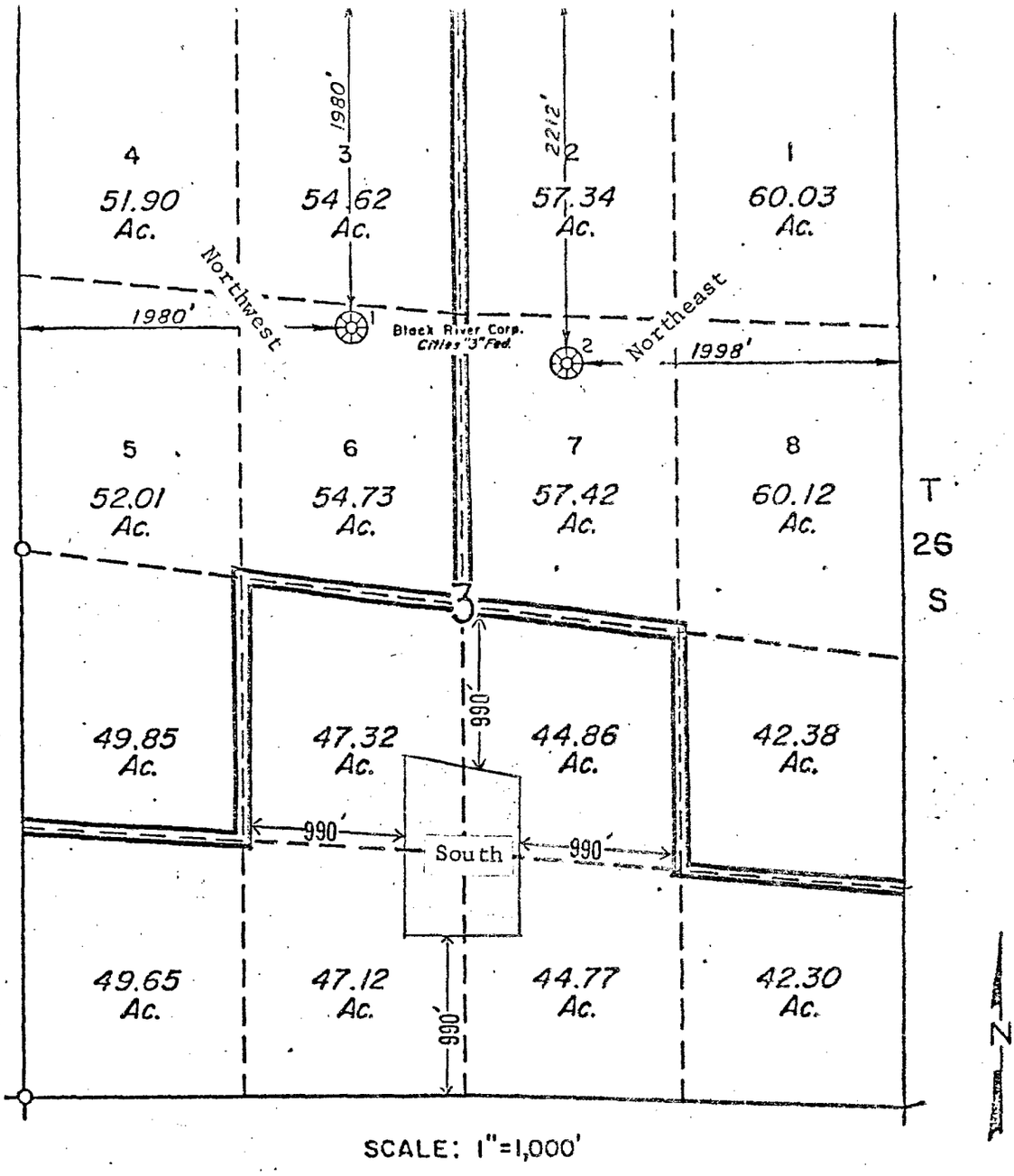
SUBDIVISIONS OF SECTION 3
T-26-S R-24-E

WASHINGTON RANCH (Morrow) FIELD
EDDY COUNTY, NEW MEXICO

W. P. A. 11-20-72

SIPES, WILLIAMSON & RUNYAN, INC.
Consulting Engineers Midland, Texas

EXHIBIT "A"



SCALE: 1"=1,000'

Case No. 4763 & 4764

Exhibit No. 2

Recommended Gas Proration Units

Section 3, T-26-S, R-24-E, Eddy Co., N. M.

Total Acreage: 816.42 Acres

PRORATION UNIT	SIZE	PERCENT UNDER 320
Northwest	263.11 acres	17.78%
Northeast	277.29 acres	13.35%
South	276.02 acres	13.75%

This compares to 27.25% over standard for a W½ (407.20 acres) of Section 3 Gas Proration Unit and 27.88% over standard for an E½ (409.22 acres) of Section 3 Gas Proration Unit.

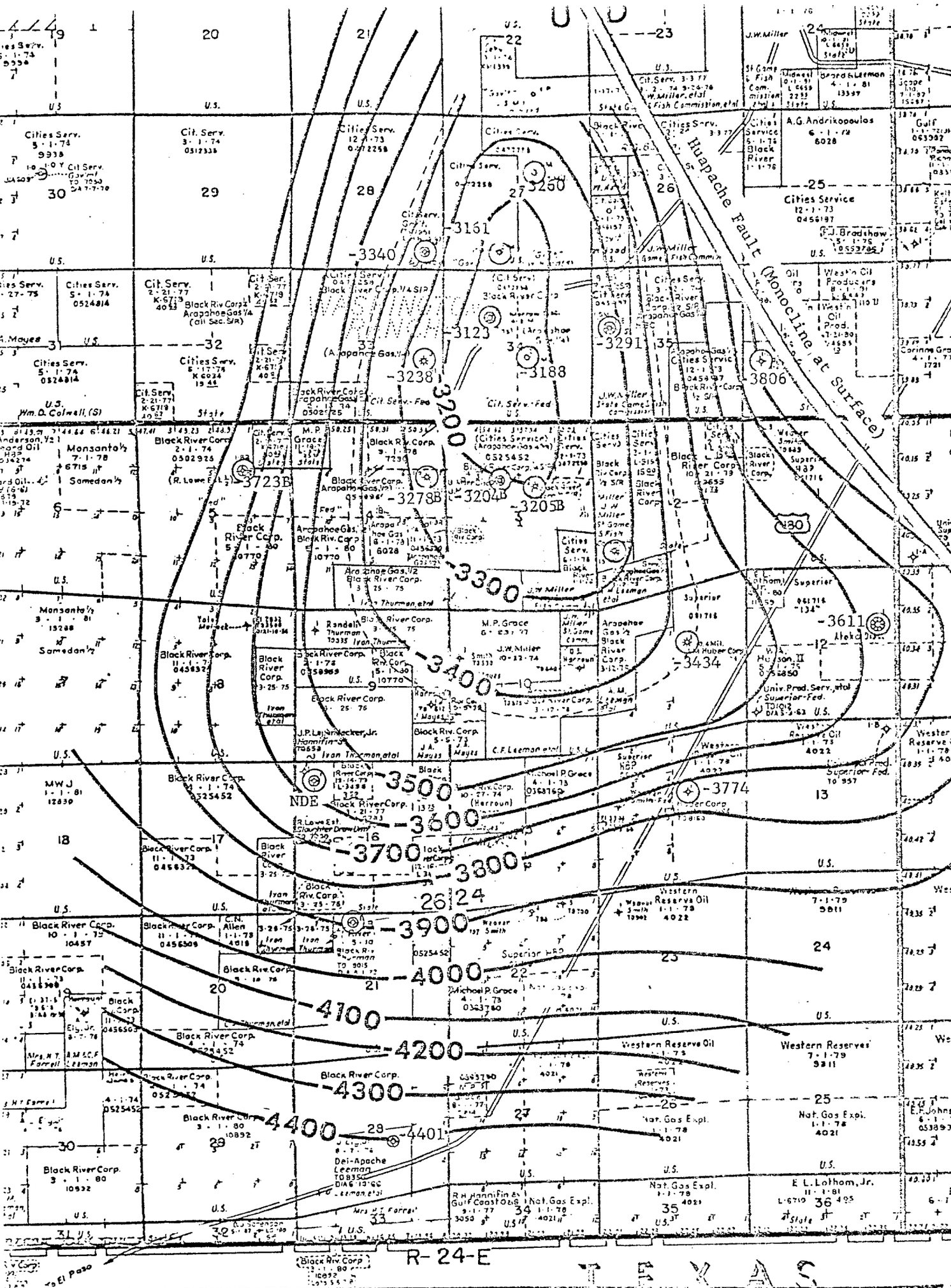
RECOMMENDED "LOCATION BOX" -- minimum of 990 feet from outer boundary of South Proration Unit.

O - USGLO Brass Cap Monumentation

CREDITS: U.S. Dept. Int.
Gen. Land Off.
AND: John W. West, P.E. & L.S.
N.M. No. 676

EXHIBIT "B"

William J. LeMay
Geologist



Case No. 4763 & 4764 Exhibit #1

STRUCTURE MAP

Washington Ranch Morrow Field

Datum: Top Chester Shale

C.I.: 100 feet

Estimated Commercially Productive Gas Acreage

LEGEND

Scale: 1 inch = 4,000 feet

Datums picked by W. J. LeMay when logs were released and available.

S = Scout

NDE = Well not drilled deep enough.

B = Datum taken from exhibit prepared by Bailey, Sipes, Inc.

EXHIBIT #1

William J. LeMay - Geologist

Supreme Court of the State of New Mexico

Santa Fe, New Mexico June 17, 19 74

Dear Sir:

Cause No. 9907

Rutter & Wilbanks v. Oil Conservation Comm

has been placed on the calendar for submission to the Court upon

oral argument / ~~briefs only~~ } on Monday, July 15, 19 74, at

~~9:00 o'clock a.m.~~ 1:30 o'clock P.M.

Please return to me promptly copy of transcript of the record in this case, if you have one.

ROSE MARIE ALDERETE,
Clerk of Supreme Court.

William F. Carr, Special Assistant Atty Gen
P.O. Box 2088
Santa Fe, New Mexico 87501

IN THE DISTRICT COURT OF EDDY COUNTY

STATE OF NEW MEXICO

RUTTER & WILBANKS CORPORATION, a Texas Corporation, Petitioner,	)	
vs.	)	Cause Nos. 28477 & 28478
OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent.	)	

RESPONDENT'S TRIAL BRIEF

STATEMENT OF THE CASE

This case is a statutory petition for judicial review of an action of the Oil Conservation Commission of New Mexico under Section 65-3-22(b), NMSA 1953. The action in question involves appeals from four orders of the Oil Conservation Commission issued pursuant to examiner and de novo hearings on two applications by Black River Corporation for compulsory pooling in Eddy County, New Mexico. Both cases before this Court for review involve Section 3, Township 26 South, Range 24 East, NMPM, Eddy County, New Mexico.

Order No. R-4353 (Cause 28477) pooled all the mineral interests in the east half of this section and formed a non-standard unit which comprises 409.22 acres and dedicated this acreage to Black River Corporation's Cities "3" Federal Well No. 2. Order No. R-4354 (Cause 28478) pooled all the mineral interests in the west half of this section forming a non-standard unit of 407.20 acres and dedicating this to Black River Corporation's Cities "3" Federal Well No. 1.

On November 29, 1972, pursuant to an application of Rutter and Wilbanks, owner of an overriding royalty in the area being forced pooled in these actions, a de novo hearing was held.

Orders were issued pursuant to this hearing which reaffirmed the previous orders of the Commission in their entirety. Application for rehearing was timely filed by the Petitioner, Rutter and Wilbanks. It was not acted upon by the Commission within 10 days and was thereby denied pursuant to Section 65-3-22(a), NMSA 1953.

SCOPE OF REVIEW

The scope of review in this proceeding is limited by the fact that this is an appeal from administrative orders issued pursuant to hearings before the Oil Conservation Commission. The Court, therefore, may only look at the record made in the administrative hearings and may not consider additional evidence. Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809.

The Court should determine whether or not the Oil Conservation Commission acted fraudulently, arbitrarily, or capriciously, acted outside the scope of its statutory responsibilities, or issued orders not supported by substantial evidence. Otero v. The New Mexico State Police Board, 495 P.2d 374, 83 N.M. 594 (1972).

In the absence of a determination by the Court that the Commission acted in one of the above ways, the Court should hold for the Respondent, Oil Conservation Commission, and affirm the orders challenged in the Petitions for Review.

It should be noted that there is a conflict in the technical evidence in these cases. In this proceeding, however, the real question is whether or not there is substantial evidence which supports the orders of the Commission and whether or not the Commission acted consistent with its statutory responsibilities.

Although the cases on appeal herein involved compulsory pooling actions when they were before the Oil Conservation Commission, the question before the Court is much narrower in scope. For as noted by Mr. Kellahin in the transcript on Page 5 the

Petitioners, Rutter and Wilbanks, do not object to compulsory pooling but merely to the size of the units. (All references to the transcript refer to the transcript of the de novo proceeding unless otherwise noted.) It is important, therefore, that we focus our attention on the issues which have arisen concerning the establishment of these non-standard units.

In the Petitions for Review in both Cases 28477 and 28478, the Petitioner, in Paragraph 5, raises a number of questions about the sufficiency of the proceedings before the Oil Conservation Commission and the orders issued pursuant thereto.

On careful examination, the issues can be limited to the following:

1. Did the Oil Conservation Commission act consistently with its statutory responsibilities;

2. Did the actions of the Commission cause waste or violate the correlative rights of any of the mineral interest owners in the pool;

3. Did the proceeding before the Commission violate Petitioner's right to due process, and

4. Are the findings in the various orders supported by substantial evidence or has the Commission acted in an arbitrary, capricious, unlawful and invalid fashion thereby rendering its orders in the subject cases void?

Since this case must be decided by the Court on the basis of the record made before the Commission without the aid of additional evidence, a review of the evidence is essential.

THE EVIDENCE

It should first be noted that the records of the examiner hearings held on July 12, 1972, were incorporated into the record of this case on de novo appeal. There is considerable overlapping in the transcripts but for the purposes of the causes before the Court in these actions the evidence consists primarily of the testimony of Mr. William P. Aycock for Black River Corporation and six exhibits, the testimony of William J. LeMay and

A. W. Rutter, Jr. for Rutter and Wilbanks and two exhibits and the brief testimony of several other overriding royalty interest owners.

Black River Corporation, in support of its application offered six exhibits. Exhibit 1 is a land plat showing the area involved in these applications. Exhibit 2, a structure map, depicts the Morrow formation underlying Section 3. Exhibit 3 is a cross section of gama ray neutron logs taken from a trace on Exhibit 1 which reflects that the Upper and Lower Morrow formations are not productive over the entire area in question although productive under Section 3. It further shows that to get a producing well it is very critical to hit the structure in just the right place. Testimony offered in connection with this exhibit (Tr. 12) indicated that wells in this area have been either very good or very poor, depending on exactly where the Morrow formation was intercepted. Exhibit 4 is another cross section indicating the productive areas of the Morrow formation.

Exhibit 5, a surface plat, shows the locations of the present wells in Section 3. Testimony offered in connection with Exhibit 5 indicated that Section 3 is an irregular section comprised of a total of 816.42 acres and that the two wells in Section 3 will each drain the acreage dedicated to them.

Exhibit 6 is an updated and expanded tabulation of data offered at the examiner hearings on well completions in the Washington Ranch-Morrow Gas Field.

Rutter and Wilbanks offered two exhibits prepared by William J. LeMay. Exhibit 1 was a structure map based partially on data presented by Black River Corporation during the examiner hearings. Exhibit 2 is an alternative recommendation for proration units in Section 3. This recommendation involved three units comprised of 263.11 acres, 277.29 acres and 276.02 acres (Tr. 33-34).

Mr. Rutter testified concerning the effect of the present

division on the interest of Rutter and Wilbanks.

In rebuttal, Mr. Aycock pointed out that the present two wells would drain the entire section (Tr. 48), that dedication of more than 320 acres to a well of this depth is not an unusual practice (Tr. 48), that all the working interest owners in this area were in agreement with the proposal of Black River Corporation (Tr. 48), and that no working interest owner anticipated drilling an additional well in the southern portion of Section 3 (Tr. 49).

Concluding the testimony, Max Coll of Coll Inc. offered a brief statement supporting the plan of Black River Corporation (Tr. 53).

POWER AND AUTHORITY OF THE OIL CONSERVATION COMMISSION

Rutter and Wilbanks allege in Paragraphs 5(a) of both of its Petitions for Review that the Commission in Orders R-4353 and R-4354 purported to approve non-standard gas proration units although it had never complied with the provisions of Section 65-3-14(d), NMSA 1953, as amended, for it had never established standard proration units for the Washington Ranch-Morrow Gas Pool.

Standard gas proration units were created for the Washington Ranch-Morrow Gas Pool by Order No. R-2707 which became effective on May 25, 1964. The order, which promulgated well spacing Rule 104, provided for 160-acre standard units for gas pools created and defined prior to June 1, 1964, and 320-acre standard units for pools created and dedicated after this date.

It is important in view of this accusation to carefully read Section 65-3-14(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 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."

No where in this subsection of statute is there a requirement that the Commission establish standard proration units in any gas pool and no where in this subsection are non-standard units prohibited nor are preconditions for their establishment set out. It appears that Paragraphs 5(a) of the Petitions for Review raise questions which are erroneous and frivolous.

Paragraph 5(b) of the Petitions for Review state that Rule 104 II (a) of the Rules and Regulations of the Oil Conservation Commission, as revised December 1, 1971, provide that a well drilled to a gas pool of Pennsylvanian age or older shall be located on a unit consisting of 320 acres. It then notes that by Orders Nos. R-4353, R-4353-A, R-4354 and R-4354-A, the Commission approved larger units.

The Petitioner fails to mention that Order R-2707, in creating Rule 104, provides for establishment of non-standard units:

> "The Secretary-Director of the Commission may grant administrative approval to non-standard gas units without notice and hearing when an application has been filed for a non-standard unit and the unorthodox size or shape of the unit is necessitated by a variation in the legal subdivision of the U. S. Public Land Surveys,..."

This portion of Rule 104 is directly in point in the cases before the Court on this appeal. It permits the Commission to create larger units when based on a variation in the legal subdivision of the U. S. Public Land Surveys. It should also be observed that this rule does not contain any requirement as to the size of the unit approved in this situation. If the non-standard unit is necessitated for any reason other than a survey variation, it must be smaller than the standard unit.

It would appear, therefore, that in the action challenged in this appeal, the Commission was merely exercising its authority consistent with Rule 104.

These paragraphs in the Petition for Review imply that the Oil Conservation Commission is required to establish units

of only 320 acres. It is important, therefore, to look at Rule 104 II (a) which reads in part as follows:

> "Unless otherwise provided in the special pool rules, each development well for a defined gas pool of Pennsylvanian age or older which was created and defined by the Commission after June 1, 1964, shall be located on a designated drilling tract consisting of 320 surface contiguous acres, more or less, comprising any two contiguous quarter sections of a single governmental section, being a legal subdivision of the U. S. Public Land Surveys." (emphasis added)

The wells involved in these cases are development wells which fall under the spacing rule quoted above. This rule does not, however, set out a rigid standard from which the Commission cannot vary. If it had been the intent of the Commission to establish such a standard, it certainly would not have included in the rule the words "more or less." In addition, the testimony on the de novo appeal (Tr. 13-15) showed that a requirement of only 320 acre units would create serious administrative problems for the Commission and that the Commission has ample precedent for dedicating more than 320 acres to a well located on an irregular section of land:

"Q (By Mr. Hinkle) Let's assume for the moment here that you were only permitted to dedicate 320 acres in either the East half or the West half for the respective wells that have been drilled in Section 3. What would you do with the rest of the acreage after you dedicated 320 acres to each of those wells?

"A (By Mr. Aycock) Then you would be forced to either take the balance of the 816.42 acres, that being a substandard proration unit, and try to force the drilling of another well, or you would be forced to cross the boundary lines of the section and involve other operators to create another full standard 320 acre unit.

"Q Isn't it true that there would be quite a problem in trying to work out the crossing of these section lines?

"A I think it would put the Commission in the position of dictating to the operators how they would handle their business.

"Q Has the Commission set any precedent in this area by dedicating more than 320 acres in an irregular section?

"A We already have a well in the East half of Section 4 and as far as I know, it has never been contested. I don't know if the Commission has formally approved it or not, but it falls into the same category as this.

"Q Are there some 402 and a fraction acres dedicated to that well?

"A That's correct.

"Q That is also true of the West half of Section 2, is it not?

"A Yes, sir. I don't believe that has formally been approved yet either, but the same situation exists and there are 380 acres, more or less, dedicated there.

"Q And there has been no objection, as far as you know?

"A Not as far as I know. As far as I know there has never been any objection."

Section 3 contains 816.42 acres. If the Commission could create units comprised of only 320 acres, it would create two units of 320 acres and this would leave 176.42 acres in Section 3 to be dedicated to a third well. This portion left over is equal to 55 percent of a unit and alone would be an uneconomical unit to produce. It would be necessary, therefore, to take 144 acres from an adjacent section to create a 320 acre unit for the rest of Section 3. This is the type of administrative problem that Mr. Aycock mentions in his testimony cited above.

It is obvious, therefore, in reviewing the text of Rule 104 II (a) and looking at the transcript, that this rule does not require that the Commission establish units of only 320 acres. Such a rule would create serious administrative problems for the Commission and there is precedent for the Commission's action in this case.

Paragraph 5(f) of the Petition for Review alleges that the Commission has disregarded its own rules and regulations in dedicating to these wells more than 320 acres. This would seem to be merely a restatement of the arguments raised in Paragraphs 5(a) and 5(b) which have previously been discussed.

ISSUE OF WASTE AND CORRELATIVE RIGHTS

As previously noted, subsection (b) of Section 65-3-14 NMSA 1953, lists certain things the Commission should consider

when establishing a unit for each pool which can be effectively and efficiently drained by a single well. They are:

> "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 accessive number of wells, and the prevention of reduced recovery which might result from the drilling of too few wells." (emphasis added)

Correlative rights is defined by Laws of 1949, Chapter 168, Section 26(h) as follows:

> "CORRELATIVE RIGHTS shall mean the opportunity afforded, as 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." (emphasis added)

Relevant portions of the definition of waste set out in the Commission Rules and Regulations at Pages A-7 and A-8 read:

> "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." (emphasis added)

Pursuant to the statutory authority set out above, the Oil Conservation Commission issued the orders challenged herein pooling the interests underlying the east and the west halves of Section 3. In so doing, it formed non-standard proration units comprising 409.22 in the east and 407.20 acres in the west.

The statutes under which the Commission establishes proration units are broad in scope. They require that the Commission weigh a number of factors in reaching its decision.

When the Commission exercises its statutory mandate to protect correlative rights, it must weigh the statutorily prescribed factors and reach a decision which will allow the owners of each property in the pool to produce, "as far as it is practicable to do so," "...his just and equitable share" of the oil or gas underlying his property.

Section 65-3-14(b), NMSA 1953, first requires the Commission to consider "...the economic loss caused by the drilling of unnecessary wells,..." in deciding on the size of production units.

The Petitioner in this matter seems to confuse the terms necessary and economical (Tr. 35). When Mr. LeMay was asked if he thought this would be an economic well he responded: "I think there is no doubt but it would be an economic well--it certainly would pay for itself and show good profits if that's what you mean by an economical well."

Since the transcript shows that the two wells drilled in Section 3 will effectively drain that section (Tr. 12), the question then becomes would another well be unnecessary even if it was economical in that it would pay for itself and produce some profits. The Commission concluded that it would be unnecessary. (Findings No. 7, Orders No. R-4353-A and R-4354-A.)

It should further be noted that to drill a well in the southern portion of Section 3 would cost $180,000 if it was a dry hole and from $225,000 to $250,000 if it was a producer (Tr. 46). The question before the Commission was, therefore, is it reasonable to require the drilling of an additional well at these costs in an effort to effect a $37,500 redistribution of royalty income (Tr. 43).

The evidence further shows that there would be some risk

involved in drilling a well in the southern part of Section 3. When being cross-examined by Mr. Cooley on the necessity of drilling a well in the southern portion of Section 3, Mr. Aycock testified (Tr. 25-26): "Well, I think right now, it would be unnecessary. But we have discussed here the fact that you would be running an extreme risk of drilling a dryhole down structure, so it could be a complete commercial failure." Even in the direct testimony of Mr. LeMay for the Petitioner, when he was asked if a well in the southern part of Section 3 would be productive from the Morrow formation (Tr. 35), he said: "It would be close."

Regardless of whether or not a well in the southern portion of Section 3 would be productive, it would increase the total cost of producing the gas underlying that section of land. Since the present wells can drain the section (Tr. 12), a third well would be unnecessary and would increase the costs of producing the gas under this section.

What the Petitioner in this matter was seeking was a declaration by the Oil Conservation Commission which would require that in the interest of preventing waste, Section 3 be divided into three units and that a well which might cost a quarter of a million dollars be drilled in the southern portion of that section in an effort to effect a $37,500 redistribution of royalty income.

The Commission could not agree with the contentions of Petitioner in this regard (Findings 8, Orders No. R-4353-A and R-4354-A) and found that waste would be prevented by the non-standard units established in Orders R-4353 and R-4354.

What the Petitioner is attempting to do in these cases, is to reduce the size of the production units in Section 3 and thereby cut out royalty owners in the southern portion of that section. It must be remembered that the Commission is required to protect correlative rights (Sec. 65-3-10, NMSA 1953) and as this term is defined, the Commission must act to protect the rights of

the owners of each property in a pool. The Petitioner proposed dividing Section 3 into three non-standard units (Rutter and Wilbanks, Exhibit 2). This division would leave the owners of property in the southern portion of this section with no well to produce the hydrocarbons underlying their land (Tr. 38) while this land was being drained by the two wells presently completed in the Morrow formation (Tr. 12).

Since this suggestion, if adopted, would greatly impair the correlative rights of mineral interest owners in the southern portion of Section 3, the Commission could not accept it.

There is considerable precedence in the Commission Rules and Regulations for the establishment of units of non-standard size.

Rule 104 II H and I provide for variations in the size of drilling tracts. Rule 104 II M provides for the pooling or communitization of fractional lots of 20.49 acres or less with 40-acre oil proration units. This rule allows units of up to 151 percent the size of standard units. Applying the same variation to the 320-acre standard gas units in question, this could result in non-standard units of up to 483 acres.

It should be further noted that the rules cited above and the case before this Court all involve units which are irregular in size due to survey variations.

In Paragraph 5(d) of the Petitions for Review, the Petitioner, Rutter and Wilbanks, alleges that the evidence shows that certain acreage in the southern portion of said Section 3 is non-productive from the Lower Morrow formation and is probably non-productive from the Upper Morrow formation. It continues by alleging that the Commission is attributing non-productive acreage to the wells to which the non-standard units have been dedicated.

William J. LeMay testifying as an expert witness for Rutter and Wilbanks indicated that he computed the top of the Morrow zone based partially on information presented by Black

River Corporation at the examiner hearing on July 12, 1972. He indicated that he agreed with Black River Corporation except as to their interpretation of the R. Lowe-Slaughter Draw Unit Well in Section 16, Township 26 South, Range 24 East. He noted that the effect of this variance in interpretation would be that the north half of Section 10 and thereby the south half of Section 3 would be a much less risky potential for a well location (Tr. 30).

If the interpretation of Mr. LeMay is accepted as correct, it appears that the acreage in Section 3 dedicated to the two existing wells is entirely productive. In discussing the drilling of an additional well in the southern portion of Section 3, Mr. LeMay testified (Tr. 34):

"Q (By Mr. Kellahin) Now on the basis of your Exhibit Number One, would a well so located be productive from the Morrow formation?

"A (By Mr. LeMay) Yes, it would.

"Q Have you had an opportunity to examine Black River's Exhibit Number Two?

"A Yes, I have.

"Q And on the basis of that exhibit, would a well located where you propose be productive from the Morrow formation?

"A It would be close--I believe it would be productive, yes."

It appears that the division of Section 3 into two non-standard production units protects the correlative rights of all owners of interests in the Washington Ranch-Morrow Gas Pool as far as it is practicable to do so; that such division will result in the prevention of waste and that non-productive acreage has not been dedicated to the wells presently completed in this field.

DUE PROCESS ISSUE

Paragraphs 5(g) of both Petitions for Review allege that Orders R-4353, R-4353-A, R-4354, and R-4354-A deprive the Petitioner, Rutter and Wilbanks, of property without due process

of law. It is therefore important to examine briefly the due process requirements in cases like those before the Court in this proceeding.

Due process of law has traditionally been defined as requiring two things--notice and opportunity to be heard:

> "Parties whose rights are to be effected are entitled to be heard; and in order that they may enjoy that right they must be notified." Baldwin v. Hale, 68 U.S. 223, 17 L.Ed. 531.

As noted by the United States Supreme Court in the case of Mullane v. Central Hanover Trust Co., 339 U.S. 306:

> "Many controversies have raged about the cryptic and abstract words of the due process clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

It also should be noted that the Supreme Court has found that the right to a hearing under the due process clause as applied to administrative determinations does not necessarily require a full blown trial, however, as enunciated in Morgan v. United States, 304 U.S. 1, 18-19:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one." (emphasis added)

The Petitioner herein had sufficient notice and a proper hearing on the matters before the Court in this appeal. It participated in the examiner hearings on July 12, 1972, and it was pursuant to its application that the de novo hearing was held on November 21, 1972.

That Rutter and Wilbanks had an opportunity to know the arguments against them which supported the proposed non-standard units can be presumed since it had the right to present

argument at both the examiner and de novo hearings before the Commission. No presumption is necessary, however, for the Petitioner obviously was aware of opposing arguments for it based a portion of its argument to the Commission in the de novo proceeding on evidence offered by Black River Corporation at the examiner hearings (Tr. 29-30).

There is an additional requirement, however, if the mandate of the due process clause is to be met. In Interstate Commerce Commission v. Louisville and N. R. Co., 227 U.S. 88, the United States Supreme Court held that in comparatively few cases in which due process questions have been raised pursuant to administrative hearings, it has been distinctly recognized that administrative orders are void if a hearing was denied or if the hearing granted was inadequate or manifestly unfair.

For Petitioner to show that the hearings before the Commission were inadequate or unfair, it would have to show that they were denied a hearing before a competent tribunal or that the Commission's orders were inconsistent with the evidence. No such showings have been made.

In the cases under review, it is obvious that the Petitioner had notice and a hearing and that the hearing was sufficient for the de novo appeal was merely an opportunity for Rutter and Wilbanks to come forward and present their case against the establishment of the unorthodox units dedicated to the wells in Section 3.

The only other due process argument Petitioner could possibly have is that the Commission's orders were not consistent with the evidence presented. This matter is dealt with elsewhere in this brief.

CONCLUSION

To succeed in its charges that certain findings in Orders Nos. R-4353, R-4353-A, R-4354, and R-4354-A are arbitrary, capricious and therefore unlawful, invalid and void, the Petitioner needs to show that these findings are not supported by substantial evidence. Paragraphs 5(c) in the Petitions for Review allege that numerous findings are not so supported. On careful review, however, it is apparent that only the following points are so challenged:

1. is the acreage dedicated to the present wells productive from the Morrow formation
2. is this acreage drained by the present wells in the pool
3. do the orders of the Commission challenged herein prevent waste and protect the correlative rights of all mineral interest owners in Section 3 and does it do this without the risk of drilling unnecessary wells?

As outlined in this brief, the evidence present at the examiner hearings and before the Commission on the de novo appeal clearly showed that the acreage in question is productive from the Morrow formation and that the present wells will drain all of Section 3. It further showed that Orders R-4353, R-4353-A, R-4354, and R-4354-A protect the correlative rights, as far as it is practicable to do so, of all the owners of mineral interests in Section 3, that these orders prevent waste, and do not require the drilling of unnecessary wells.

In the proceeding at bar, the burden of proof is on the Petitioner to show that the Commission acted in an arbitrary, capricious or unlawful manner. Since Petitioner cannot show that the Commission acted in any of these ways, it should have judgment entered against it.

The Oil Conservation Commission of the State of New

Mexico, therefore, prays this Court to deny the relief sought by Petitioner and affirm Commission Orders Nos. R-4353, R-4353-A, R-4354, and R-4354-A.

/s/ William F. Carr

WILLIAM F. CARR
General Counsel
Oil Conservation Commission

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

March 1, 1973

Mrs. Frances M. Wilcox
Clerk
District Court of the Fifth
Judicial District
Carlsbad, New Mexico

Re: Rutter and Wilbanks v. Oil Conservation Commission,
Cause No. 28477 in the District Court of Eddy County,
New Mexico.

Rutter and Wilbanks v. Oil Conservation Commission,
Cause No. 28478 in the District Court of Eddy County,
New Mexico.

Dear Mrs. Wilcox:

We transmit herewith certified copies of the transcripts of proceedings, exhibits, and other documents for inclusion in the record in the above-entitled cases.

Sincerely,

WILLIAM F. CARR
Special Assistant Attorney General
Oil Conservation Commission

WFC/dr
enclosures

cc: Mr. Jason Kellahin
Mr. Clarence Hinkle

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

INDEX OF DOCUMENTS

Re: Rutter and Wilbanks v. Oil Conservation Commission, Cause No. 28477 in the District Court of Eddy County, New Mexico.

Rutter and Wilbanks v. Oil Conservation Commission, Cause No. 28478 in the District Court of Eddy County, New Mexico.

1. Docket No. 15-72, July 12, 1972.
2. Transcript of Oil Conservation Commission examiner hearing on Oil Conservation Commission Case No. 4763.
3. Exhibits 1 through 6 by applicant Black River Corporation admitted on July 12, 1972.
4. Order No. R-4353.
5. Transcript of Oil Conservation Commission examiner hearing on Oil Conservation Commission Consolidated Cases No. R-4764 and R-4765.
6. Grace Exhibits No. 1 and No. 2 admitted on July 12, 1972.
7. Order No. R-4354.
8. Docket No. 27-72, November 21, 1972.
9. Transcript of Oil Conservation Commission De Novo hearing on consolidated Cases No. R-4763, R-4764, and R-4765.
10. Black River Corporation's Exhibits 1 through 6 admitted on November 21, 1972.
11. Rutter and Wilbanks' Exhibits 1 and 2 admitted on November 21, 1972.
12. Order No. R-4353-A.
13. Order No. R-4354-A.

IN THE DISTRICT COURT OF EDDY COUNTY

STATE OF NEW MEXICO

RUTTER & WILBANKS CORPORATION, a Texas corporation, Petitioner vs. OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent.	)	No. 28478

ENTRY OF APPEARANCE

Come the undersigned, Hinkle, Bondurant, Cox & Eaton, and hereby enter an appearance in the above styled cause for and on behalf of Black River Corporation.

DATED this 22nd day of February, 1973.

HINKLE, BONDURANT, COX & EATON

By _____
Attorneys for Black River Corporation
P.O. Box 10
Roswell, New Mexico 88201

WE HEREBY CERTIFY THAT WE HAVE MAILED A COPY OF THE FOREGOING PLEADING TO ALL OPPOSING COUNSEL OF RECORD THIS 2/22/73

Hinkle, Bondurant, Cox & Eaton
P. O. Box 10 Attorneys ROSWELL, N. M. 88201

IN THE DISTRICT COURT OF EDDY COUNTY

STATE OF NEW MEXICO

RUTTER & WILBANKS CORPORATION, a Texas corporation, Petitioner, vs. OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent.	)	No. 28478

RESPONSE TO PETITION FOR REVIEW

Comes Black River Corporation, acting by and through its attorneys of record, Hinkle, Bondurant, Cox & Eaton, Roswell, New Mexico, and for its response to the Petition for Review states:

1. Respondent admits the allegations contained in Paragraphs 1, 2 and 3 of the Petition for Review.

2. Respondent denies the allegations contained in Paragraph 4 of the Petition for Review insofar as it alleges that Petitioner is adversely affected by Commission Order R-4354, as affirmed by Order R-4354-A.

3. Respondent denies the allegations contained in Paragraph 5 of the Petition for Review.

4. That the Petition for Review fails to state a claim upon which relief can be granted.

WHEREFORE, Respondent prays:

a. That the Petition for Review be dismissed.

b. That the Orders issued by the New Mexico Oil Conservation Commission be affirmed.

c. For such other relief as may be just in the premises.

HINKLE, BONDURANT, COX & EATON

By _____
Attorneys for Black River Corporation
P.O. Box 10
Roswell, New Mexico 88201

WE HEREBY CERTIFY THAT WE HAVE MAILED A COPY OF THE FOREGOING PLEADING TO ALL OPPOSING COUNSEL OF RECORD THIS 2/22/73
Hinkle, Bondurant, Cox & Eaton
P O Box 10 Attorneys ROSWELL, N M 88201

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION
a Texas Corporation,

Petitioner, No. 28478

vs.

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

Respondents.

ENTRY OF APPEARANCE

William F. Carr, Special Assistant Attorney General, hereby enters his appearance on behalf of the respondent, Oil Conservation Commission of New Mexico, in the above entitled and numbered cause.

William F. Carr

WILLIAM F. CARR
Special Assistant Attorney General
representing the Oil Conservation
Commission of New Mexico, P. O.
Box 2088, Santa Fe, New Mexico

I hereby certify that on the
14th day of February, 1973, a
copy of the foregoing pleading
was mailed to opposing counsel
of record.

William F. Carr

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION
a Texas Corporation,

Petitioner,

-vs- No. 28478

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO

ACCEPTANCE OF SERVICE

The undersigned acknowledges receipt of Notice of Appeal in the above captioned case and accepts service thereof for and on behalf of the Oil Conservation Commission of New Mexico.

William F. Carr
GENERAL COUNSEL

DATE Feb. 6, 1973

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner,

vs. No. 28478

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

Respondent.

NOTICE OF APPEAL

STATE OF NEW MEXICO TO THE FOLLOWING NAMED ADVERSE PARTIES:

OIL CONSERVATION COMMISSION OF NEW MEXICO
BLACK RIVER CORPORATION
MICHAEL P. GRACE and CORINNE GRACE

NOTICE IS HEREBY GIVEN that the above named Petitioner being dissatisfied with the Oil Conservation Commission of New Mexico's promulgation of Order No. R-4354. as affirmed by Order No. R-4354-A, entered in Cases Nos. 4764 and 4765(Combined) on the docket of the Commission, has appealed therefrom in accordance with the provisions of Sec. 65-3-22, New Mexico Statutes, Annotated, having filed their Petition for Review in the District Court for the Fifth Judicial District, Eddy County, New Mexico.

The attorneys representing Petitioner in said cause are:

KELLAHIN & FOX
P. O. Box 1769
Santa Fe, New Mexico 87501

(SEAL)

WITNESS the Honorable D. D. Archer, District Judge of the Fifth Judicial District Court of the State of New Mexico and the Seal of the District Court of Eddy County, New Mexico, this 17 day of January, 1973.

Frances M. Gilbert Clerk

STATE OF NEW MEXICO COUNTY OF EDDY

IN THE DISTRICT COURT

RUTTER & WILBANKS CORPORATION,
a Texas Corporation,

Petitioner,

vs. No. 28478

OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,

Respondent.

PETITION FOR REVIEW

Comes now Rutter & Wilbanks Corporation, hereinafter called Petitioner, and pursuant to the provisions of Section 65-3-22, New Mexico Statutes Annotated, 1953 Compilation, as amended, respectfully petitions the Court for review of the action of the Oil Conservation Commission of New Mexico in Cases Nos. 4764-4765 (Consolidated) on the Commission's docket, and its Order No. R-4354, affirmed by Order No. R-4354-A, entered therein, and states:

1. Petitioner is a corporation duly organized under the laws of the State of Texas, and is the owner of royalty and non-operating mineral interests acquired by transactions outside of the State of New Mexico, and Petitioner is the owner of royalty, non-operating mineral interests in and under the lands involved in Cases Nos. 4764-4765 (Consolidated) on the Commission's docket.

2. The respondent Oil Conservation Commission of the State of New Mexico is a statutory body created and existing under the provisions of the laws of the State of New Mexico, and vested with jurisdiction over all matters relating to the conservation of oil and gas in the State of New Mexico, the prevention of waste, the protection of correlative rights, and the enforcement of the

Conservation Act of the State of New Mexico, being Chapter 65, Article 3, New Mexico Statutes Annotated, 1953 Compilation, as amended.

3. On August 7, 1972, the Commission entered its Order No. R-4354 on the application of Black River Corporation, pooling all of the mineral interests, whatever they may be, including the interests owned by Petitioner, to form a non-standard gas proration unit consisting of 407.20 acres, to be dedicated to Black River Corporation's Cities "3" Federal Well No. 1. On November 29, 1972, the Commission, on hearing de novo, as provided by law, entered its Order No. R-4354-A, reaffirming Order No. R-4354 in its entirety. Petitioner timely filed application for rehearing which application was not acted upon by the Commission within ten days and was, therefore, denied. Through inadvertence Rutter & Wilbanks Corporation was designated as Rutter & Wilbanks Brothers on the application for rehearing. A copy of Commission Order No. R-4354 is attached hereto and made a part hereof, as Exhibit "A"; a copy of Commission Order No. R-4354-A is attached hereto and made a part hereof as Exhibit "B"; and a copy of Petitioner's Application for Rehearing is attached hereto as Exhibit "C", and made a part hereof.

4. Petitioner is the owner of Mineral interests in and under the lands affected by Cases Nos. 4764-4765, Order No. R-4354, reaffirmed by Order No. R-4354-A, and by reason of such ownership is adversely affected by Commission Order No. R-4354, reaffirmed by Order No. R-4354-A, is dissatisfied with the Commission's disposition of Case Nos. 4764-4765, and hereby appeals therefrom.

5. Petitioner complains of said Order No. R-4354, reaffirmed by Order No. R-4354-A, and as grounds for asserting the invalidity of said Order, Petitioner adopts the grounds

set forth in its Application for Rehearing, attached hereto as Exhibit "C" and made a part hereof, and states:

a. The Commission by its Order No. R-4354, purported to approve a non-standard gas proration unit in the Washington Ranch-Morrow Gas Pool, although the Commission has never complied with the provisions of Section 65-3-14 (b), New Mexico Statutes, Annotated, 1953 Compilation, as amended, and has never established a standard proration unit for the Washington Ranch-Morrow Gas Pool.

b. Rule 104, II (a) of the Rules and Regulations of the Oil Conservation Commission, revised December 1, 1971, provide that a well drilled to a formation of Pennsylvanian age or older shall be located on a unit consisting of 320 acres, but by its Order No. R-4354, reaffirmed by Order No. R-4354-A, the Commission has approved a unit consisting of 407.20 acres.

c. Findings Nos. (7), (8) and (10) of the Commission Order No. R-4354, reaffirmed by Findings Nos. (4), (5), (6), (7), and (8) of Commission Order No. R-4354-A are not supported by substantial evidence.

d. The evidence shows that the $S\frac{1}{2}$ $S\frac{1}{2}$ of Section 3, Township 26 South, Range 24 East is non-productive from the Lower Morrow formation, and is probably non-productive from the Upper Morrow formation, the Commission order therefore attributing non-productive acreage to the well to which the non-standard unit has been dedicated.

e. The Commission has included in the unit, and thereby pooled royalty interests owned by Petitioner with royalty under acreage which the testimony and evidence shows will not be productive from the Lower Morrow formation, and is of questionable productivity in the Upper Morrow, resulting in economic loss to Petitioner.

f. The Commission has disregarded its own rules in dedicating a total of 407.20 acres to a well in the Washington Ranch-Morrow Gas Pool.

g. Order No. R-4354, reaffirmed by Order No. R-4354-A, will result in irreparable injury to the correlative rights of Petitioner and deprives Petitioner of its property without due process of law in that it will permit owners of royalty underlying acreage which is shown to be non-productive to share in production from productive acreage underlying the nonstandard unit, including that acreage under which Petitioner owns interests.

h. The non-standard unit approved by the Commission has no reasonable relation to a 320-acre unit required by Rule 104, II (a), is not based upon any change in the requirements for a standard spacing or proration unit in the Washington Ranch-Morrow Gas Pool, nor on any rule or regulation of the Commission nor any law of the State of New Mexico, and in that respect is arbitrary and capricious.

i. Order No. R-4354, reaffirmed by Order No. R-4354-A, is arbitrary and capricious, and is therefore unlawful, invalid and void.

WHEREFORE petitioner prays that the Court review New Mexico Oil Conservation Commission Cases Nos. 4764-4765 (Consolidated) and Commission Order No. R-4354, reaffirmed by Order No. R-4354-A, to hold said Order No. R-4354, reaffirmed by Order No. R-4354-A, unlawful, invalid and void, and for such other relief as may be proper in the premises.

KELLAHIN & FOX

By Jason W. Kellahin
Jason W. Kellahin
Attorneys for Petitioner

Kellahin & Fox
P. O. Box 1769
Santa Fe, New Mexico 87501