IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CONTINENTAL OIL COMPANY, et al.,	)	
Petitioners-Appellants,	)	
vs.	)	
OIL CONSERVATION COMMISSION OF NEW MEXICO, et al.,	)	No. 6830
Respondents-Appellees,	)	
OIL CONSERVATION COMMISSION OF NEW MEXICO,	)	
Cross-Appellant.	)	

APPEAL FROM THE DISTRICT COURT
OF LEA COUNTY

Honorable John R. Brand, Judge

CROSS-APPELLANT'S BRIEF-IN-CHIEF

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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CROSS-APPELLANT'S BRIEF-IN-CHIEF

STATEMENT OF THE CASE

and

STATEMENT OF THE FACTS

In their Brief-in-Chief, Petitioners-Appellants have furnished this Court with a full Statement of the Case and Statement of the Facts. Any objections which the Respondent-Appellee, Oil Conservation Commission, has to such Statements are raised in its Answer Brief.

The purpose of the Cross-Appellant, Oil Conservation Commission, under this heading in this brief is simply to relate briefly the matters which gave rise to this cross-appeal.

Order No. R-1092-C, entered by the Oil Conservation Commission after rehearing in Case No. 1327, was appealed to the District Court of Lea County, New Mexico. The challenged order changed the gas proration formula governing the method of computing the allowable for gas wells in the Jalmat Gas Pool, Lea County, New Mexico, from one based solely on acreage to one based on both

the acreage assigned to the well and the well's calculated deliverability.

Two pre-trial conferences were held and, prior to trial, the cause came before this Court on the application of the Oil Conservation Commission and other parties for a Writ of Prohibition. State v. Brand, 65 N.M. 384, 338 P.2d 113. The Alternative Writ of Prohibition was discharged as improvidently issued and the cause came on for trial in the District Court of Lea County.

At the very outset of the trial, Petitioners-Appellants, hereinafter referred to as Appellants, made a motion to prevent the Oil Conservation Commission from taking any part in the case as an "adversary" party (R. Vol. II, 4). This motion was sustained by the District Court (R. Vol. II, 5).

The motion, argument, and ruling on the motion were as follows (R. Vol. II, 4, 5):

> "MR. MALONE: At the outset of the hearing, the petitioners object to the participation by the New Mexico Oil Conservation Commission in the case as an adversary party. We recognize they are proper parties under the statute in an appeal from the decision which was rendered by the Commission and that, if there was a public interest for which the Commission had responsibility involved in the case, that they would be a proper adversary party, but, in view of the fact that the sole question in the case, as has been stated and stipulated, is correlative rights in the interest of the various petitioners in the pool itself, it is our view that the Commission's position should be as a nominal but not as an adversary party, and, we therefore object to their position as an adversary party.
>
> MR. PAYNE: If it please the Court, it has never been stipulated that the only issue in this case is correlative rights. It is our position that waste is also involved in this case. It is our further position in this case that, at any time an order of the Oil Conservation Commission is appealed to the District Court, we are at that point an adversary party.
>
> THE COURT: I could be mistaken but I think I remember a stipulation -- at least a tacit

understanding that waste was not an issue in this matter.

MR. PAYNE: I don't believe that's correct, your Honor.

THE COURT: It does not seem proper to me for the Oil Conservation Commission to appear as an adversary party in a matter in which an appeal has been taken on one of its decisions, and Mr. Malone's motion will be sustained. You may proceed."

After opening argument by counsel for Appellants and counsel for Appellee Texas Pacific Coal and Oil Company, the Oil Conservation Commission, Appellee and Cross-Appellant, entered the following objection to the Court's ruling (R. Vol. II, 75, 76, 77):

"MR. WARD: Comes now the Oil Conservation Commission of New Mexico and respectfully objects and takes exception to the Honorable Court's ruling that the Oil Conservation Commission of New Mexico is not an adverse party, or adversary party, in this proceeding and hence is precluded from taking part therein and as grounds therefor shows the Court as follows:

(1) That Section 65-3-22 of the New Mexico Statutes Annotated, 1953, clearly contemplates that the New Mexico Oil Conservation Commission should be made a party to any appeal from any of its decisions because it is provided that notice be served upon the Commission.

(2) That the Oil Conservation Commission of New Mexico is obligated by statute to act in the public interest to protect the correlative rights of the public and prevent waste and, once having entered an order purporting to do so, it has a right and obligation to appear in court if necessary and represent the public interest.

THE COURT: I will make the observation that the last few words spoken by Mr. Ward contained the language, "if necessary". In a hearing such as this on an order of the Oil Conservation Commission in which the contending parties, or opposing parties, are represented and are apparently amply able to sustain their positions, I see no reason for the Oil Conservation

> Commission to appear as a litigant; and I would further state that I think that their attempt to participate as a partisan in an attempt to support their own feeling, as evidenced by the order that they put up in this case, is improper. An administrative body, where there is no adversary proceeding, certainly has a duty and a right under the Act to appear in the public interest, but the Oil Conservation Commission apparently desires to appear here in the interest of one of the litigants, which is an entirely different matter, although it no doubt has concluded that the position they took is in the public interest.
>
> MR. WARD: If the Court please, may I go a little further with the objection which might really explain our position? The respondents further object for the reason that the Oil Conservation Commission and its attorneys having participated in the two pre-trial conferences heretofore without any objection on the part of the petitioners, and having participated in the prohibition proceedings in the Supreme Court, and the question not having been raised until the morning of the trial, after which time it was impossible for the parties to go back and re-allocate the work, that the objection is not timely made and the petitioners have, in fact, waived the right to make such objection."

After the Court sustained the Appellants' motion objecting to participation by the Commission, and prior to proceeding with testimony, Appellees made a motion to dismiss the petitions for review. The basis for this motion was the trial court's ruling excluding the Oil Conservation Commission from active participation in the trial. This motion was denied. (R. Vol. II, 137).

ARGUMENT AND AUTHORITIES

POINT I

THE TRIAL COURT ERRED IN RULING THAT THE OIL CONSERVATION COMMISSION WAS NOT A PROPER ADVERSARY PARTY AND THUS COULD NOT ACTIVELY PARTICIPATE IN THE TRIAL OF THIS CAUSE, INASMUCH AS THE OIL CONSERVATION COMMISSION WAS THE ONLY PARTY SPECIFICALLY REPRESENTING THE PUBLIC INTEREST.

Appellants' motion to prohibit the Oil Conservation

Commission from taking an active part in the review proceeding was based solely on the assumption that there was no "public interest for which the Commission had responsibility." (R. Vol. II, 4).

This contention simply is not correct. If ever a case contained a penetrating and deep-rooted public interest, it is this one. This is so for the following reasons:

(A) The Commission's original decision to prorate gas production in the Jalmat Gas Pool, as well as its decision to change the proration formula for that Pool, was based on its statutory obligation to prevent the waste of a natural resource and to protect correlative rights.

(B) The orders which were the subject of the review by the District Court were legislative in nature, affected the public at large, and were promulgated by the Commission in the exercise of its properly delegated police power.

(C) In an almost identical case, this Court ruled that an administrative agency is a proper, if not an indispensable, party when an order of that agency is appealed to the District Court.

(A)

The Commission's original decision to prorate gas production in the Jalmat Gas Pool, as well as its decision to change the proration formula for that Pool, was based on its statutory obligation to prevent the waste of a natural resource and to protect correlative rights.

Section 65-3-13(c), NMSA, 1953 Comp., clearly states that gas proration can be instituted by the Commission only to prevent waste. This Section provides in pertinent part as follows:

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

How, in the face of the above-quoted statute, can it reasonably be argued that there is no issue of physical waste

involved in this case and thus no public interest to be protected? Yet this is the very contention made by Appellants in moving to prohibit the Oil Conservation Commission from taking an active part in the review proceeding. (R. Vol. II, 4). And, at the time of this motion, the trial court apparently agreed. (R. Vol. II, 5).

It is clear, however, that by the time the review proceeding had been completed, the trial court had fully realized, as the Oil Conservation Commission had contended from the beginning (R. Vol. II, 4; R. Vol. 1, 87), that the challenged orders were designed not only to protect correlative rights but also to achieve a greater ultimate recovery of gas from the Jalmat Gas Pool, thereby preventing the waste of a valuable and vital natural resource. No stipulation, agreement or statement to the contrary was ever made by any counsel for Cross-Appellant or by any counsel for any Appellee.

In the letter to counsel, dated July 27, 1959 (R. Vol. II, 272-276), the court stated as follows:

> "I feel, too, that a program which rewards good and prudent operation and discourages the contrary sort, contributes to the prevention of waste and the better utilization of the natural resource, and that the present plan is designed to further that result."

Finding of Fact No. 12 by the trial court reads as follows (R. Vol I, 117):

> "The deliverability formula in the Order complained of encourages prudent operations and discourages imprudent operations and, thus, contributes to prevention of waste and the better utilization of gas in the Jalmat Gas Pool than did the 100% acreage formula."

The court's Conclusion of Law No. 7 states as follows (R. Vol. I, 118):

> "Oil Conservation Commission Orders No. R-1092-A and R-1092-C protect correlative rights of owners of properties in the Jalmat Gas Pool and tend to prevent waste."

This Finding and Conclusion are amply supported by substantial evidence in the record made before the Commission. (Commission Record of Hearing on March 25, 1958, pp. 129, 130; Commission Record of Hearing on March 26, 1958, pp. 204, 205, 347, 348). And if there is any question as to the sufficiency of the evidence relative to the deliverability formula preventing the physical waste of gas, it must be remembered that such question arises out of the very error which we are contending was made by the trial court.

In the required "Offer of Proof" filed by Counsel for the Oil Conservation Commission (R. Vol. I, 87), it was stated that Randall Montgomery, then Proration Manager for the Commission, would testify that the new formula had prevented waste by encouraging operators to rework old wells. However, the trial court by virtue of its initial ruling precluded the Oil Conservation Commission from proceeding with such testimony (R. Vol. II, 5).

Now when an order of the Oil Conservation Commission encourages prudent operations, contributes to the prevention of waste, and at the same time protects correlative rights, as the trial court concluded (R. Vol. I, 117, 118), certainly the public interest is involved, and the Commission should be permitted to appear in court and actively participate to represent this public interest.

The oil and gas industry by its very nature is a business clothed with a public interest, and the manner in which these natural resources are produced and utilized is always of public consequence. See Eccles v. Ditto, 23 N.M. 235, 167 Pac. 726; See Moses, "The Constitutional, Legislative and Judicial Growth of the Oil and Gas Conservation Statutes", 13 Miss. L. J. 353 (1941). The Texas court stated this principle as follows in Gulf Land Company v. Atlantic Refining Company, 134 Tex. 59, 131 S.W.2d

73, 82:

> "Administrative boards or commissions have been set up in this State to perform many functions and purposes. We will not here attempt to classify these functions or purposes. The Railroad Commission is constituted the statutory agency to execute and enforce our oil and gas conservation statutes. In enacting such statutes, the State is seeking to regulate a business affected with a public interest. Oil and gas are very vital parts of our natural resources, and the public generally is very vitally concerned therein."

Attributing to private adversary parties the best of motives and ability, nonetheless, protection of the public interest can be ensured only by the active participation of the agency charged with such protection, in this case the Oil Conservation Commission. Can the public be sure otherwise that all the pertinent facts will be presented by the adversary parties and that the right thing will be done for the public as well as the parties? Obviously not.

We submit that if the agency is not permitted to actively participate in a proceeding to review one of its orders, the protection of the public interest is left in the hands of parties who have no duty to look out for the public.

In speaking of the Railroad Commission of Texas, the agency in that State which is comparable to the Oil Conservation Commission of New Mexico, the Texas court in Magnolia Petroleum Company v. Edgar, Tex. Civ. App., 62 S.W.2d 359, 361, had this to say:

> "...the commission does not act on behalf of interested private individuals, but as an administrative agency of the state representative of the public interest. To that extent and in that capacity the commission represents all the public, including not only the adjacent leaseholders but all others interested in and affected by the regulation of the entire field as to the drilling, locating, and spacing wells, proration of production, and in all matters and duties enjoined upon it by the conservation laws. Such we think was the intent of the Legislature. When acting

> within the scope of the authority vested in it by law in the regulation of oil production, the commission is presumed to act on behalf of all the public; and, when its action is called in question by suit in the district court as provided by the statute. . . . it continues to act both in the defense of or in the enforcement of its orders as a representative of the public." (Emphasis added)

Quite obviously the intent of the New Mexico Legislature was the same as that spelled out above. Otherwise, the statute providing for review of the Oil Conservation Commission's actions would not contain the following provision (Section 65-3-22(b), NMSA, 1953 Comp.):

> "Notice of such appeal shall be served upon the adverse party or parties and the Commission in the manner provided for the service of summons in civil proceedings." (Emphasis added)

At one point in the court proceeding, the trial court stated as follows (R. Vol. II, 137):

> "...the Conservation Commission is not dismissed but prohibited from--or is not stricken as a party. The order was to the effect that they might not take an active part in this matter."

It is grossly unfair, and certainly is not the law, that an agency of the State can be kept in a case as a party and yet be restrained from full participation in its efforts to represent the public interest.

(B)

The orders which were the subject of the review by the District Court were legislative in nature, affected the public at large, and were promulgated by the Commission in the exercise of its properly delegated police power.

The first ruling by the trial court on the matter of participation in the review proceeding by the Oil Conservation Commission is rather general in nature and simply states that "it does not seem proper to me for the Oil Conservation Commission to appear as an adversary party in a matter in which an appeal

has been taken on one of its decisions..." (R. Vol. II, 5).

Subsequently, however, the trial court made the observation that "In a hearing such as this on an order of the Oil Conservation Commission in which the contending parties, or opposing parties, are represented and are apparently amply able to sustain their positions, I see no reason for the Oil Conservation Commission to appear as a litigant..." (R. Vol. II, 76).

Thus it appears that the court viewed the action of the Oil Conservation Commission in entering the challenged orders as quasi-judicial. The court also apparently felt that the orders affected only the adversary parties. However, this definitely is not the situation.

In enacting the orders complained of, which established a new gas proration formula for the Jalmat Gas Pool, the Commission was acting in a legislative capacity under its properly delegated police power. Superior Oil Company v. Beery, 216 Miss. 664, 64 So.2d 357. As the court stated in California Co. v. State Oil and Gas Board, 200 Miss. 824, 27 So.2d 542, 545:

> "The Legislature itself had the right in the first instance to prescribe the general rule and regulation as to the spacing of oil and gas wells and to provide for exceptions thereto under given circumstances, and it had the right to delegate this legislative power to a special administrative agency... And it is to be conceded that in adopting such general rule and regulation, the Oil and Gas Board was acting in a legislative capacity..." (Emphasis added)

Certainly this is sound law. The powers of the Oil Conservation Commission are prospective in nature and deal primarily with the determination of state policy regarding the conservation of oil and gas and the promulgation of rules, regulations and orders to implement such policies. See Section 65-3-10, NMSA, 1953 Comp.

When the Oil Conservation Commission enters an order establishing a formula under which gas is to be prorated, the

public at large has a definite interest in this legislative action, just as it would if the legislature itself enacted a proration formula statute.

An extremely lucid test for determining whether an administrative agency performs legislative or judicial functions was set forth by the Supreme Court of Washington in the case of Floyd v. Department of Labor and Industries, 44 Wash.2d 560, 269 P.2d 563. The court quoted with approval the test originally propounded by Mr. Justice Holmes in Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S.Ct. 67, 69, 53 L.Ed. 150 as follows:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."

In addition, the Washington court stated that two questions must be asked: (1) Could the court have been charged in the first instance with the responsibility of making the decisions the administrative body must make? (2) Are the functions performed by the administrative agency ones which the courts have historically been accustomed to performing and did perform prior to the creation of the administrative body? If, as in the instant case, both questions must be answered in the negative, then the action of the agency is legislative in nature.

The proration orders complained of look to the future and make a new rule to be applied to gas proration in the Jalmat Gas Pool. The courts have never been accustomed to devising formulae for oil and gas proration, and, indeed, could not have been charged in the first instance with making such decisions. See Peterson v. Livestock Commission, 120 Mont. 140, 181 P.2d 152.

Rules, regulations and orders entered by a conservation

agency charged with protecting the natural resources of a state. are made in the exercise of the police power. Oklahoma Natural Gas Company v. Choctaw Gas Company, 205 Okl. 255, 236 P.2d 970; Railroad Commission of Texas v. Fain, Tex. Civ. App., 161 S.W.2d 498; Magnolia Petroleum Company v. Edgar, Tex. Civ. App., 62 S.W.2d 359. And it is elementary that the "police power" is an attribute of sovereignty which is founded upon the duty of the state to protect the public welfare, public health, public safety, and public morals. McKay Jewelers, Inc. v. Bowron, 19 Cal.2d 595, 122 P.2d 543; State of Washington v. Mamlock, 58 Wash. 631, 109 Pac. 47. So even in terminology it is patent that the general public has a decided interest in any action taken by a state agency pursuant to delegated police powers.

It is our opinion that the trial court made its erroneous ruling by failing to recognize the basic distinction between the functions performed by administrative agencies and those performed by courts. The court obviously viewed the case as simply a matter of litigation between private parties. (R. Vol. II, 76, 78).

In this connection, the following statement by the court in Rommell v. Walsh, 127 Conn. 16, 15 A.2d 6, 9, seems quite pertinent:

> "Administrative boards differ radically from courts because frequently in the performance of their duties they are representing such (public) interests, whereas courts are concerned with litigating the rights of parties with adverse interests who appear before them. Appeals taken from decisions of such boards are in a very different category than are appeals taken from a lower to a higher court, where the lower court, having acted, ceases to have any interest in the controversy, direct or representative."

One of the clearest expressions of this fundamental difference was stated as follows by Mr. Justice Frankfurter in Federal Communications Commission v. National Broadcasting

Company, Inc., 319 U.S. 239, 248, 63 S.Ct. 1035, 87 L.Ed. 1374 (dissent):

> "Unlike courts, which are concerned primarily with the enforcement of private rights although public interests may thereby be implicated, administrative agencies are predominately concerned with enforcing public rights although private interests may thereby be affected."

The action of the Commission in entering the challenged orders reached out decidedly beyond the interests of the private adversary parties. Hasbrouck Heights v. Division of Tax Appeals, 48 N.J. Super. 328, 137 A.2d 585. Not only did the action affect the public at large, it had a direct and immediate effect on every working interest owner, every overriding royalty interest owner, and every royalty owner, including the State and the Federal Government, in the Jalmat Gas Pool.

In the case of Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424, the court stated that the Railroad Commission is the only necessary party in a judicial proceeding which has for its purpose the setting aside of a Commission order granting a well location exception. State v. Public Service Commission of Missouri, 338 Mo. 117, 90 S.W.2d 390; L. P. & B. Oil Corporation v. Gulf Oil Corporation, Tex. Civ. App., 115 S.W.2d 1034. The court went on to say that the public has a vital interest in every rule or order passed by the Commission.

Frankly, we are unable to visualize any order of the Commission which is of consequence only to a certain few private parties. This basic principle was quite succinctly stated by the court in Board of Adjustment of City of Fort Worth v. Stovall, 147 Tex. 366, 216 S.W.2d 171.

In that case, Stovall brought a proceeding against the Board of Adjustment to review a decision of the Board in granting a permit to build a drive-in theatre on a designated tract of land. The Board appealed a decision of the court which set

aside its order. It was argued in the Supreme Court that the Board had no appealable interest in the controversy. In answering this contention, the court stated as follows at page 173 (216 S.W.2d 171):

> "In determining whether a permit applied for under the quoted ordinance shall be granted or denied, the board is engaged in a delegated policy-making function, and it is not merely adjudicating private rights. The functions of the Board of Adjustment are an integral part of the system of zoning regulations.... The public, as well as the affected private parties, has an interest in upholding the order of the Board if it is valid, and the Board itself is the proper party to represent this public interest where its order is under review." (Emphasis added)

In reaching its decision, the court analogized the situation to one where an oil and gas operator seeks an exception to a spacing rule and the Commission decision is appealed. The court stated as follows at page 173 (216 S.W.2d 171):

> "In these respects the functions of the Board of Adjustment are analogous to the action of the Railroad Commission in granting or denying drilling permits as exceptions to Rule 37. While in those cases, as in the case now before us, private property rights are involved in the granting or refusal of permits, the Commission's action also has an important bearing on the whole scheme of conservation regulations." (Emphasis added)

We do not believe it can be seriously contended that an order of the Oil Conservation Commission establishing a proration formula for gas wells in one of the State's largest gas pools does not also have an important bearing on the whole scheme of conservation regulations.

(C)

In an almost identical case, this court ruled that an administrative agency is a proper, if not an indispensable, party when an order of that agency is appealed to the District Court.

In the case of Plummer v. Johnson, 61 N.M. 423, 301 P.2d 529, the State Engineer was dismissed out of a review proceeding

by the District Court and he cross-appealed on this point. This court held that the District Court erred in this regard and stated that "on appeal from his decision, the engineer becomes a proper, if not an indispensable, party."

This court quoted with approval the general rule as announced in 73 C.J.S., Public Administrative Bodies and Procedures, Section 178, as follows:

> "In the absence of a statutory provision as to parties, the question with respect to who may or must be joined as parties to a proceeding to review the decisions and orders of an administrative agency is governed by the rules as to parties in civil actions generally. Accordingly, only necessary or proper parties may be joined, and the agency which made the order in question is usually considered a necessary, or at least a proper, party, particularly where there is a public interest to be protected as distinguished from that of the parties directly affected by the order of the agency."

It goes without saying that the decision in the Plummer case cannot be circumvented by the dubious device of not dismissing the agency but keeping it in the case as a "party", yet at the same time refusing it the right of full participation. To permit such a procedure would render meaningless the principle set forth in the Plummer case and would result in the public interest being protected only incidentally, if at all.

CONCLUSION

In order for the Oil Conservation Commission to properly represent the public interest in the vital sphere of conservation regulations it is imperative that it be permitted to actively participate in any court review of its orders. Other administrative agencies in New Mexico, such as the Corporation Commission, the Office of the State Engineer and the Chief of Division of Liquor Control, have always been allowed to participate in court proceedings to review their orders. And the orders entered by

the Oil Conservation Commission under its statutory powers and duties to prevent the waste of oil and gas and to protect correlative rights affect and are as vital to the citizens of New Mexico as are the orders entered by any regulatory agency in this State.

This Court should specifically rule that the trial court erred in refusing to permit the Oil Conservation Commission to actively participate in the trial of this cause.

Respectfully submitted,

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I Oliver E. Payne hereby certify that I mailed a copy of the foregoing brief to resident counsel of record on October 21st, 1960.