IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

CONTINENTAL OIL COMPANY, ET AL.,

Petitioners,

vs

NEW MEXICO OIL CONSERVATION COMMISSION,

Respondents.

No. 16,213

MEMORANDUM BRIEF OF PERMIAN BASIN PIPE LINE COMPANY

THE ORDER COMPLAINED OF IS NOT CONFISCATORY AND DOES NOT DEPRIVE PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS. Petitioners have acquired no vested property rights which will be impaired by the Order complained of.

Paragraph 5 (k) of the Petition for Review of Continental Oil Company, Cause No. 16,213, is as follows:

> (k) Orders No. R 1092 A And No. R 1092 B are unreasonable, arbitrary and discriminatory in the effect of said Orders is to confiscate and deprive petitioner of its property without due process of law contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States of Americaand of Article II, Section 18 of the Constitution of the State of New Mexico, in that in reliance upon the provisions of Order No. R 520, this Petitioner has acquired vested property rights in the Jalmat Pool which rights will be impaired by said Orders No. R 1092 A and No. R 1092 C."

The allegations of the other petitioners on the Constitutional question raised by Continental are identical in all material particulars.

Section 65 3 10, NMSA 1953, is as follows:

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

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Section 65 3 13 (c), NMSA 1953, insofar as is here material, provides as follows:

> (c) "Whenever, to prevent waste, the total allowable natural gas production from gas wells producing from any pool in this state is fixed by the commission in an amount less than that which the pool could produce if no restrictions were imposed, the commission shall allocate the allowable production among the gas wells in the pool delivereng to a gas transportation facility upon a reasonable basis and recognizing correlative rights * * *. In protecting correlative rights the commission may give equitable consideration to acreage, pressure, open flow, porosity, permeability, deliverability and quality of the gas and to such other pertinent factors as may from time to time exist, and insofar as practicable, shall prevent drainage between producing tracts in a pool which is not equalized by counter drainage. * * * * "

Thus it is seen that not only has the commission the right but it is charged with the duty of protecting correlative rights by regulating the production from a given pool so as to protect such rights.

Despite these specific provisions of the law, have petitioners acquired such vested property rights in Order No. establishing the basis of proration in the Jalmat Pool solely on acreage or in a proration formula based solely on acreage, we submit not. Assume experience has shown that a proration formula based solely on acreage has resulted in the drainage by the gas of leaseholders of the leases of others without any compensation and have the offending leaseholders acquired such an invested property right to drain the lands of their neighbors that the oil commission is powerless to protect correlative rights although specifically required so to do. To put the question another way... Does the fact that the commission has once acted prevent it from acting at from all future time because some person receives an advantage which he asserts has become vested. Obviously not. Thus, it is submitted that the real question for the Court to determine whether the Order complained of is arbitrary or unreasonable. If it is, it may impair vested rights. It it is not, it cannot impair rights because they cannot have become vested. We believe petitio

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per well allowance to these producers was
not an unnatural answer to the problem. Whether,
as contended by the respondent, the maximum figure
set by the commission is too high in that it leads to
capture of oil from beneath its leases by neighboring
operators, and whether a lower limit might

into the debatable territory which is not the province of Federal Courts to enter."

After the Federal Court had enjoined the Railroad Commission in the Rowen & Nichols Oil Co. case, the Commission had to do something. It thereupon changed its proration order to take into consideration two other factors which were bottom hole pressure and quality of the producing sand. The Federal District Court again entered an injunction which case will be found in 55 Fed. Sup. and the case wound up in the Supreme Court a second time. There the Court in the case entitled Railroad Commission vs Rowen & Nichols et al., 61 S. Ct. 343, 311 US 570, said:

"In achieving a reconciliation of these tangled and partly conflicting aims, the Commission evidently regarded the 20 barrel minimum allowance as a guiding factor taking its cue doubtless in part from the policy underlying the Texas marginal well statute. The justification for the Commission's order was its conviction of the minimum allowance accelerates the rate of production of the densely drilled areas on the edges of the field most subject to loses from the migration of the oil, that such an allowance is an appropriate incentive to the drilling of small tracts and that thereby investment losses in low producing wells are minimized.

Nothing in the constitution warrants a rejection of these expert conclusions. Though on the basis of intrinsic skills and equipment are the Federal courts qualified to set their independent judgment on such matters against those of the chosen state authorities. For its own good reason Texas vested authority over these difficult and delicate problems in its Railroad Commission. Presumably that body has the personnel representative of the state's regulatory policy to the oil industry equipped to deal with its engineering aspects possesses an insight and skill which can hardly be matched by judges who are called upon to intervene at fitful intervals * * *.

When we consider the limiting conditions of litigation, the adaptability of the judicial process to issues definitely circumscribed and susceptible of being judged by the technics and criterion with which appeal confidence of lawyers...it is clear that the due process clause does not require the feel (field) of the expert to be supplanted by an independent view of judges of the conflicting testimony and prophesys and impressions of expert witnesses."

In the case of Champlin Refining Co. vs Corporation Commission, 286 U.S. 210, 52 S.C. 559, The Champlin Refining Co. filed action against the Oklahoma Corporation Commission contending that its proration order entered under the Oklahoma Statute was void.

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[illegible] portion of the property [illegible] without [illegible] [illegible] were that while there was an over supply of [illegible] the United States and in Oklahoma, Champlin, [illegible] [illegible] could use all of the oil that it could [illegible] [illegible] own wells [illegible] the two fields in question. The [illegible] [illegible] if Champlin were permitted to produce [illegible] such oil [illegible] [illegible], the [illegible] owners of other wells to protect [illegible] drain [illegible] produce all [illegible] there was no market for the oil [illegible] adequate [illegible], [illegible] waste would result. There, the Court said:

> [illegible] has the right to drill wells [illegible] [illegible] from the pools below [illegible] [illegible] may [illegible] to reduce [illegible] [illegible] [illegible] thus acquire [illegible] [illegible] undue exertion of [illegible] [illegible] prevent unnecessary loss, [illegible] [illegible] and that power [illegible] tends to the [illegible] [illegible] wasteful use of natural gas pressure [illegible] lifting the oil to the surface, [illegible] [illegible] and wasteful depletion [illegible] [illegible] injury of [illegible] [illegible] take from the same pool.

The Court then further said:

> [illegible] the foregoing authorities, it is evident [illegible] [illegible] the police power of the State [illegible] [illegible] individual owner's taking from the common source of supply, as well as to authorize [illegible] distribution among the various owners [illegible] [illegible] land overlying the common source [illegible] [illegible] portion of said supply so taken [illegible] possession by the individual owner. The [illegible] drilling by the spacing of wells seems [illegible] more feasible and effective method of securing [illegible] distribution for such owners than restriction [illegible] production after same has already commenced, [illegible] [illegible] eliminate many distinct faults apparent [illegible] such regulations.'

[illegible] constitutionality of the rule and regulation, [illegible] [illegible] that:

> "And this would be true even though the plaintiff [illegible] able to prove a distinct loss to himself [illegible] operation of the statutes putting said [illegible] into force and effect.

> In Brown et al. v. Humble Oil & Refining [illegible], the following words were quoted with approval [illegible] Lombardo v. City of Dallas, 124 Tex. [illegible]

> 'All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss is [illegible]

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deprivation of property without due process of law; the exertion of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law.'

* * *

Regulation, of course, includes a determination of the location of the wells and the amount of oil each should be allowed to produce, so that the reservoir energy will not be exhausted before all of the recoverable oil is wrested from the common source of supply."

Similarly in the case of Patterson v. Stanolind [illegible] ., 77 P. 2d 83 (Okla. 193[illegible]), certain royalty owners contested the constitutionality of the Oklahoma Well Spacing Act ([illegible]) with regard to their interests in a well [illegible] prior to the spacing order of the Commission. Among the issues [illegible] were the due process clause, impariment of contractual obligations, and the retroactive effect of the well spacing order. The statute in question, provided, among other things, that the different royalty owners within a drilling unit shall share in the [illegible] proportion that their acreage bears to the entire drilling unit.

The Supreme Court of Oklahoma in overruling [illegible] contention said:

> 'The decision of the United States Supreme Court in the case of Ohio Oil Company v. State of Indiana, 177 U. S. 190, 44 L.Ed. 729, was based upon the theory that the right of the owner of land to the oil and gas thereunder is not exclusive but is common to and merely co equal with the rights [illegible] land owners to take from the common source of supply, and therefore that his property rights [illegible] are subject to the legislative power to prevent the destruction of the common source of supply. It has already been decided that this police power of the State to prevent the destruction of the common source of supply may be exercised by regulation of [illegible] therefrom."

If the legislature has the power in the first instance [illegible] create a commission to regulate well spacing proration [illegible] to prevent waste and protect correlative rights, the mere fact that the commission has once acted does not create or vest any property rights in any producer so as to prevent the commission [illegible] entering subsequent orders modifying its earlier orders if such later order is reasonably designed to further protect correlative rights and prevent waste.

In the case of Railroad Commission vs Humble Oil & Refining Co., 193 SW 2d. 824, affirmed by Supreme Court 1923, 141 Tex. the facts were these: The Texas Railroad Commission had previously in effect a proration order in the Hawkins field under which the allowable was based on what was termed a 50-50 basis, that is, half the daily allowable was allocated on a per well basis and the other half was based on surface acreage. The spacing unit was [illegible]. Under this formula a well on less than one acre was given one half the allowable of a well on 20 acres. Under the Amendment, the basis [illegible] was in effect raised to 40 acres and the allowable of one well on a tract of more than 20 acres was given 5 per cent additional [illegible] for each additional acre up to and including 40 acres. Thus, the well on a 40 acre tract had an allowable of twice that of a well on a 20 acre tract or four times the allowable of a well on a tract of less than one acres. There the Court said:

> "The Commission's power to regulate oil production in the interest of both conservation and of protecting correlative rights is a continuing one, and its proration orders are subject to change, modification or amendment at any time, upon [illegible] notice and hearing either upon the Commission's own motion or upon application of any interested party. This principal is not so well established as to require no citation of authority. It should be noted that each of the prorated orders governing the Hawkins field contained the following provision: 'That this cause be held open on the docket for such other and furbher orders as may be necessary and supported by evidence of record.'
>
> Thus, each order carried on its face notice to everyone thereafter dealing with properties in the field that it was subject to appropriate change."

(It is my understanding that Order [illegible] contained a clause reciting that it was subject to modification. If this [illegible] I should be supplied with the pertinent language. If not the [illegible] part of the above quotation should be deleted.)

In the case of Texas Trading Co., et al., vs [illegible], 161 S.W. 2d 1046 (1942), the Texas Trading Co. appealed from an order of the Commission which cancelled Appellant's permit to drill an additional well within a drilling unit. The Plaintiff contended as a matter of law it was entitled to drill the additional well because under the then spacing rules and regulations in existence at the time the subject land was segregated and when it acquired the lease the Plaintiff had the right to drill the additional well.

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this contention, the Texas Court of Appeals had this to say:

> "The contention is overruled. Spacing rules must be subject to change from time to time to permit fair and equitable adjustment of the machinery of oil proration to meet changing conditions. If a lease owner could acquire a 'vested right' in the spacing rules existing at any particular time, then the power of the Railroad Commission to make new rules for regulating drilling and oil production equitably and fairly among lease owners, and properly to conserve the oil resources of the State, would be greatly hindered. In the very nature of the police powers from which the State derives its right to regulate the production of oil and gas, the oil operators can acquire no 'vested right' in the same rules by which the power is exercised from time to time."

In view of the foregoing, it is respectfully submitted that if it be determined by the Court that the order complained of is not arbitrary or unreasonable that no Constitutional question is presented to the Court; that no vested property rights are impaired and that petitioners are not and cannot be deprived of any of their constitutional rights.

Respectfully submitted,

Robert W. Ward

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