

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO EX REL
OIL CONSERVATION COMMISSION,
NEWIN L. NECHEN, MURRAY E. MORGAN,
A. L. FOWLER, JR., MEMBERS OF SAID
COMMISSION, TEXAS PACIFIC COAL AND
OIL COMPANY, AND EL PASO NATURAL
GAS COMPANY,

Relators,

vs.

HON. JOHN R. BRAND, JUDGE OF
THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF NEW MEXICO,

Respondents

6483

No. _____

ALTERNATIVE WRIT OF PROHIBITION

THE STATE OF NEW MEXICO TO: District Court of the Fifth Judicial
District of the State of New Mexico sitting within and for
the County of Lea, and the Honorable John R. Brand, District
Judge of the Fifth Judicial District, GREETINGS:

WHEREAS a petition for Writ of Prohibition has been filed
in this Court in the above entitled cause alleging as follows:

1. That there is pending in the District Court of the Fifth
Judicial District of the State of New Mexico in and for the County
of Lea, Cause No. 16213, Continental Oil Company, et al, Peti-
tioners, vs. Oil Conservation Commission of New Mexico, et al,
Respondents.

2. That said Cause No. 16213 is a review action from Order
Nos. R-1092-A and R-1092-C entered by the Oil Conservation Com-
mission on January 29, 1958, and April 25, 1958, respectively.
Copies of said Orders have been filed with the Supreme Court of
New Mexico and are incorporated herein by reference.

3. That after the entry of Order R-1092-C, eight separate petitions for review were filed in the District Court of the Fifth Judicial District seeking a review of the action of the Oil Conservation Commission. The Court docketed these cases as Nos. 16213 through 16220. The cases were subsequently consolidated and docketed as No. 16213. A copy of each petition for review has been filed with the Supreme Court of New Mexico and are incorporated herein by reference.

4. That a pre-trial conference was held in Cause No. 16213 on August 4, 1958, at Lovington, New Mexico, before the Hon. John R. Brand, District Judge and respondent herein. The remarks of the court, which constitute the pre-trial order have been filed with the Supreme Court of New Mexico and are incorporated herein by reference. At the pre-trial conference petitioners stated that they intended to present additional evidence at the trial of Cause No. 16213. The court advised the petitioners to notify relators and the court as to the gist of what testimony they proposed to offer and the reason for doing so. The court stated that it would rule on whether it would listen to such additional testimony at a second pre-trial conference.

5. That on September 15, 1958, petitioners submitted an "offer of proof" to relators and presumably to the court setting forth the additional testimony which they intend to present upon trial of Cause No. 16213. A copy of this offer has been filed with the Supreme Court of New Mexico and is incorporated herein by reference.

6. That a second pre-trial conference was had before the Hon. John R. Brand, District Judge, on September 23, 1958. At this time the relators urged that in a review of an order of the Oil Conservation Commission in District Court, evidence in

addition to the record made before the Commission could not be received nor considered by the Court in determining whether the Commission action is arbitrary, capricious, unreasonable, improper or unlawful. Argument was then had on the admissibility of each proposed item of additional evidence with relators stating that such argument in no way constituted a waiver of objection to the court's taking any additional evidence in this case.

7. At the close of argument the court stated that it would take such additional evidence as was not available to petitioners at the time of the hearings before the Oil Conservation Commission and which was not presented to the Commission. The court further stated that such evidence would be received in order to determine whether the orders complained of were arbitrary, capricious, unreasonable, improper or unlawful. A written pre-trial order was requested by relators. However, the court declined to issue a formal pre-trial order and stated that a transcript of its remarks would constitute the pre-trial order. A copy of this pre-trial conference ruling has been filed with the Supreme Court of New Mexico and is incorporated herein by reference.

8. That respondent herein will, unless prohibited by this Court, proceed to take evidence in addition to the transcript of proceedings before the Oil Conservation Commission for the purpose of determining whether the Oil Conservation Commission acted in an arbitrary, capricious, unreasonable, improper or unlawful manner, which evidence the respondent is wholly without jurisdiction to take. The "de novo" and "additional evidence" provisions of Section 65-3-22 (b), which Section grants a right of review from Commission action, does not contemplate nor permit

the taking of additional evidence in the District Court for the purpose of determining whether the Oil Conservation Commission acted in an arbitrary, capricious, unreasonable, improper or unlawful manner. Whether the action of the Oil Conservation Commission is arbitrary, capricious, unreasonable, improper or unlawful must be determined solely on the basis of the record made before the Commission. An interpretation of this statute to allow the taking of additional evidence for these purposes upon a review of Commission action would render the statute unconstitutional in that it would violate the separation of powers provision (Article III, Section 1) of the New Mexico Constitution.

9. That if respondent carries out his announced intention to take additional evidence such action would be error, and this court should therefore intervene in the exercise of its power of superintending control to prevent such error inasmuch as relators remedy by appeal is wholly inadequate for the following reasons:

(a) Remedy by appeal after the entry of final judgment or decree would be accompanied by unbearable expense and delay to relators.

(b) In order to preclude the possibility of having its action branded unreasonable, arbitrary, capricious or improper on the basis of additional evidence which it had no opportunity to consider, Relator Oil Conservation Commission would feel compelled to present testimony in the District Court to support its action. The preparation and presentation of such testimony and exhibits would be extremely costly, time consuming and detrimental to the efficiency of the already over-burdened technical staff of Relator Oil Conservation

Commission, all to the ultimate detriment of the State of New Mexico.

(c) Relator Texas Pacific Coal and Oil Company has already expended in excess of Thirty-five Thousand Dollars for reservoir studies and expert witness fees in presenting the case before the Oil Conservation Commission. If petitioners are permitted to present additional testimony, Relator Texas Pacific Coal and Oil Company must, of necessity, do likewise in order to adequately protect its interests. Preparation and presentation of such additional testimony will result in an additional expense of approximately Fifteen Thousand Dollars to said Relator.

(d) Relator El Paso Natural Gas Company has already expended in excess of Ten Thousand Five Hundred Dollars for reservoir studies and expert witness fees in presenting the case before the Oil Conservation Commission. If petitioners are permitted to present additional testimony, Relator El Paso Natural Gas Company must, of necessity, do likewise in order to adequately protect its interests. Preparation and presentation of such additional testimony will result in an additional expense of approximately Five Thousand Dollars to said Relator.

(e) Approximately 75 exhibits and one thousand pages of transcript of testimony originally taken before the Oil Conservation Commission, which will become a part of the record in the District Court at the hearing upon the merits in Cause No. 16213, together with the proceedings had before the District Court, would necessarily be included in the record to be filed in the Supreme Court, and the expense and delay occasioned thereby would be an undue burden upon relators.

(f) That by reason of the expense involved and the delay which will inevitably occur before a final decision may be obtained upon an appeal, the remedy by appeal is wholly inadequate and the entry of a Writ of Prohibition is necessary to prevent irreparable mischief, great, extraordinary, and exceptional hardship; costly delays and highly unusual burdens of expense.

WHEREFORE, relators pray that an alternative Writ of Prohibition be issued herein directing respondent to show cause, at a time fixed by this Court, why said Writ of Prohibition should not be made permanent and that said alternative Writ of Prohibition direct the respondent not to take any additional evidence in Cause No. 16213 until further order of this Court and that said Writ of Prohibition, alternative and permanent, direct and command respondent not to take any additional evidence in Cause No. 16213 on the Docket of the District Court, Lea County, New Mexico.

NOW, THEREFORE, you are hereby commanded to desist and refrain from taking any additional evidence in Cause No. 16213 in the District Court of Lea County, New Mexico, until further order of this court and you are hereby ordered to plead to this Writ on or before the 2nd day of October, 1958, showing cause, if any you have, why this writ should not be made absolute. And have you then and there this Writ with your certificate of having done as commanded.

WITNESS the Honorable Eugene D. Lujan, Chief Justice of the Supreme Court of the State of New Mexico and the seal of said Court, this 3rd day of September, 1958.

LONELL C. GREEN, Clerk

By:

James L. Green
Deputy