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RECENT LEGAL DEVELOPMENTS IN STATE OIL AND GAS ADMINISTRATIVE HEARINGS

Patrick H. Martin [1/]

1. Introduction to Oil and Gas Conservation Agencies and Hearings

The Conservation Agencies - Each oil- and gas-producing state has an agency that regulates the oil and gas industry. It may be called the Railroad Commission as it is in Texas, the Corporation Commission as it is in Oklahoma and Kansas, the Oil and Gas Board as in Alabama and Mississippi, the Industrial Commission as in North Dakota, or the Office of Conservation as in Louisiana. In some states the conservation agency is established by the state constitution, while in others the conservation agencies are wholly a creature of the legislature. Authority may be vested in a commission or board or in a single individual. A commissioner may be elected or appointed under state law, and the position may be full-time employment or part-time service. In all significant oil-producing states there will be a large professional staff. These agencies developed years ago, even before the proliferation of federal and state agencies and the expansion of administrative due process. They have confronted many of the issues that are before agencies and administrative law judges today and are blown by the same winds in the law that buffet

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all agencies. The decisions I will discuss form simply a convenient database or sampling of the same types of issues arising in other types of agencies and agency proceedings. By using a multi-state perspective, the sampling may alert you to some new developments that you may not have encountered elsewhere.

The functions of the conservation agencies - The agencies regulate all phases of the oil and gas industry, from the permitting of wells to the disposal of oil field wastes. Of most concern to us for our discussion are the matters that involve quasi-judicial proceedings, proceedings in which the agency holds a hearing and issues an order based on findings of fact and the application of legal principles to those facts. These are often adversarial in nature, sometimes involving private parties contending against one another and other times involving primarily one party making contentions in regard to the state. Hearing proceedings typically include the granting of permits to drill wells at exception locations, production allowable determinations, and forced pooling (the merger of interests in an area around an oil or gas well that determines who will be entitled to share in the production from the well and who will have to bear a share of the costs of the well). Such decisions by the agency may involve millions of dollars and often are the subject of litigation.

2. Hearing Officials

In many states the hearing will be conducted before a hearing examiner (or administrative law judge) rather than the members of the Commission or Board itself. In New Mexico, for example, the Oil Conservation Division has three hearing examiners who are petroleum engineers, assisted by legal counsel. The hearing examiner makes recommendations to the Division Director who issues the order. [2/] By statute, one can appeal an examiner decision to the Commission (consisting of the Director of Oil Conservation Division, the Commissioner of Public Lands and the State Geologist, who is also the Director of the Mining and Minerals Division of the Energy and Minerals Department) within 30 days of the order for a de novo hearing. [3/] In Texas, a legal examiner usually conducts legal hearings, sometimes with the assistance of a technical examiner

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2/ Pearce, "Special Legal Issues and Practice Before the New Mexico Oil Conservation Division," Institute on Oil and Gas Conservation Law and Practice, Paper 5 at 5-9, 10 (Rocky Mountain Mineral Law Foundation, 1985).

3/ N. Mex. Stat. Section 70-2-13.

(e.g., exceptions to spacing or density rules or ratable take issue); a technical examiner (petroleum engineer or geologist) conducts technical hearings sometimes with the assistance of a legal examiner (e.g., special field rules). [4] In Louisiana, the conservation statute allows the Commissioner of Conservation to designate a staff member to hear proceedings, [5] but some Commissioners have been very active in conducting hearings personally.

Necessity of commissioners actually hearing - Challenges have been made to orders on the ground that the agency head or commission members did not actually hear all the testimony and evidence. As a matter of administrative law, such an assertion is on the principle announced by the United States Supreme Court in the decision in Morgan v. United States: "The one who decides must hear." [6] The principle enjoys no more favor in the states than at the Federal level after the Supreme Court backed away from its statement in Morgan, and the courts have tended to avoid ruling on the matter in conservation agency cases. [7] While statutes often specifically authorize the agency to designate a person to conduct hearings, issue may be raised on appeals from a hearing officer's decision or recommendations whether the Commissioners or Board members actually considered the evidence presented to the hearing examiner and contained in the record. To make out a claim of inadequate consideration by the deciding body, the litigant would need to be able to depose the members of the agency. Such discovery is inappropriate for a judicial or quasi-judicial official absent a prima facie showing of irregularity. [8]

4/ Schenkkan and Melvin, "Special Legal Issues and Practice Before the Texas Railroad Commission," Institute on Oil and Gas Conservation Law and Practice, Paper 7, at 7-5 (Rocky Mountain Mineral Law Foundation, 1985).

5/ La. R. S. 30:6B.

6/ Morgan v. United States, 298 U.S. 468 (1936).

7/ Summers v. Sutton, 428 So.2d 1121, 78 O.&G.R. 41 (La. App. 1983); White v. Amoco Production Company, 704 P.2d 470, 85 O.&G.R. 616 (Okla. 1985).

8/ See Florida Economic Advisory Council v. Federal Power Commission, 251 F.2d 643 (D.C. Cir. 1957) cert. denied, 356 U.S. 959 (1958). But see State Oil & Gas Board v. McGowan, 542 So.2d 244 (Miss. 1989) discussed infra.

Citing Morgan, a dissatisfied royalty owner in State Oil and Gas Board of Alabama v. Seaman Paper Company [9] objected to the enlargement of a reservoir-wide unit on the grounds that a majority of the members of the Board who made the order did not hear the testimony. The Alabama Supreme Court rejected this. The transcript showed that at all times there were two members of the Board present. Two constituted a quorum. And the court noted: "The transcripts of all proceedings held by the Board are available at all times for any new member or any absent member to read concerning the evidence presented at the hearing." [10] The court then went over the fact that certain of the Board members had heard all or much of the proceeding.

3. Notice

Who has a right to notice of an agency hearing and what type of notice one has a right to are issues affected not only by the procedural regulations of the agency, but also by statute and constitutional requirements. The two leading United States Constitution cases are not in the context of a conservation agency proceeding, but nonetheless are controlling. These are Mullane v. Central Hanover Bank & Trust Co. [11] and Greene v. Lindsey. [12] These hold that where a property right will be affected by a judicial or administrative decision, due process requires notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection. The notice, the court has said, must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

In determining reasonableness of effort to give notice, there are competing interests at work for both the agencies and the courts. If drilling and spacing units are being set up for a large area, say three or four thousand acres at one time, there may be many thousands of people who could be said to be affected by the agency

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9/ State Oil and Gas Board of Alabama v. Seaman Paper Company, 235 So.2d 860, 36 O.&G.R. 1 (Ala. 1970).

10/ 235 So.2d at 875.

11/ Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

12/ Greene v. Lindsey, 456 U.S. 444, 72 L.Ed.2d 249, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982).

proceedings. Each tract of land may have a separate owner (or several as in co-owned family property) and that owner may have created royalty interests or acquired the land subject to other royalty interests. Fractional mineral interests may have been created at one time or another. [13/] The mineral owners may have leased and the lessee may have assigned, subleased or farmed-out his interest. The time and expense of checking title to all of this can be great. Indeed, it will be onerous to an operator who is having to identify others who will share in the production of a well the operator is drilling; these others may come forward to oppose the operator's efforts.

Moreover, the agency proceeding may go through several stages before a hearing or final decision is reached. Is the applicant required to search out and discover changes in title that occur while the proceeding is pending or going forward? Is the state to bear the expense and responsibility of notices? If notice is not properly given to someone who might be affected, what is the consequence of this? Is the order void in its entirety, or is it ineffective just as to the party without proper notice? It would be unfair to the parties who have taken part in the proceedings and made decisions in reliance on an agency order to have to start all over for one party who had not had notice. It may be a burden on state resources to require the agency to attempt to locate all persons who might be affected by an order and give each individual notice of a proceeding. On the other hand, the oil and gas rights of an owner are property rights. These should not be taken or diminished without affording due process to the owner.

With these competing concerns at work, it is not surprising that the courts have interpreted due process as requiring simply reasonable efforts at giving notice. Seeing to it that notice is given will be primarily the responsibility of the applicant before the agency, not the agency, though the agency will generally be the one to provide jurisdictional notice (i.e., notice published in a specified newspaper pursuant to statutory requirement). The formal notice requirements observed in a court proceeding will not be

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13/ The difficulties of giving notice are vividly illustrated in the Arkansas case of Katter v. Arkansas Louisiana Gas Co., 765 F.2d 730, 85 O.&G.R. 443 (8th Cir. 1985). Here the well operator proposing a unit sought to pool the undivided one-half interest in minerals on 38.5 acres of land of the Katters in 1979. The family had resided in Beirut, Lebanon since the 1940's. The Commission gave them notice by mail to the American Embassy, which obviously did reach them.

demanded of an administrative agency. While at least one court has based a decision not requiring individual notice on the proposition that establishing spacing units is a quasi-legislative action, [14]/ this seems to be an incorrect view. Proceedings to establish spacing units or for pooling are quasi-judicial in character, but due process does not require the type of notice by personal service that would obtain in a judicial proceeding.

Whom should be given notice? The statutes may provide who has a right to notice and the procedural rules of the agency will generally specify the persons to be given notice. But they may do so only in general terms, such as those having a right to participate in production from the well. The persons specified by the regulations must be given notice at a minimum. Certainly all those who have a present interest to share in production from a proposed unit or who own the land should be given notice of proceedings for compulsory pooling or unitization. Prudence would counsel giving notice to adjacent owners even if it is not proposed that they share. Otherwise, the agency determination will not be binding upon them and they will be free to litigate the findings of the agency. If they are given notice and fail to take part in the agency proceeding, they will not be able to litigate the agency determination because they will be collaterally attacking an order of the agency or will have failed to exhaust an administrative remedy available to them.

From one point of view, lessors might be regarded as being by their lessees in administrative matters, and thus neither notice nor participation in a hearing would be necessary. But several reasons exist for rejecting such an approach. Lessors have an interest which they will enjoy from production and are directly affected by the proceedings. Second, the interests of lessor and lessee might well be antagonistic. The lessee with leases on two adjacent tracts, A and B (300 acres each), may put on evidence that a fault line lies on the B lessor's property such that five acres of B are drained by a well on tract A. The lessor should have the opportunity to show otherwise because he will not be able to attack the determination of the fault line collaterally in a suit against the

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14/ See Superior Oil v. Beery, 64 So.2d 357, 2 O.&G.R. 1094 (Miss. 1953). Compare Carlile Trust v. Cotton Petroleum Corporation, 732 P.2d 438, 91 O.&G.R. 294 (Okla. 1986): "Because spacing clearly calls for a factual finding and affects the proprietary incidents of the mineral estate of every owner sought to be brought within the new unit, we conclude that a quest for the formation of a drilling and spacing unit calls for adjudication rather than rulemaking." 732 P.2d at 442, 91 O.&G.R. at 301.

lessee. The converse is true also: if the lessor cannot take part in the hearing, then he ought to be able to attack the hearing order collaterally. This would put the court in the position of evaluating geological and engineering matters and would not be an efficient, effective means of resolving technical matters.

Notice to lessees sufficient to protect interests of lessors for order to permit infill drilling and assignment of allowables to infill wells - The case of Southwest Kansas Royalty Owners v. State Corporation Commission [15/] reviewed an order of the Kansas Corporation Commission amending the basic proration order for the Hugoton Gas Field to allow infill drilling. Personal notice was not served on all royalty owners. The applicant, Cities Service, mailed personal notice to its royalty owners, but the Commission mistakenly found that notice had been mailed to all royalty owners. This meant over 10,000 royalty owners were not given personal notice. But proper notice was given to the 137 operators of wells and all 10 of the pipeline purchasers in the field. The court distinguished the Oklahoma case of Harry R. Carlile Trust v. Cotton Petroleum Corporation, discussed infra, which required personal notice to all who might be affected by an order, on the ground that the order permitting infill drilling did not effect an involuntary change in existing property rights, but merely authorized the optional drilling of a second well on each production unit. While there was some potential for conflict between an operator and different royalty owners, the order did not change the contractual duties of the operator to the royalty owner under the implied covenant to prevent drainage. Notice to all operators protected the interests of the royalty owners. Therefore, the court said, every party who might be adversely affected received actual notice through personal service, publication notice, or contractual obligations. This was reasonable notice, and the constitutional test is simply one of reasonableness. But the court went on to say that the pipelines and utility appellants lacked standing to raise the question of notice to the royalty owners who were not complaining of lack of notice. Also, the notice provided was broad enough to cover the action actually taken by the Commission.

Rather than cover all the state rulings on notice, I will focus on several of the recent cases out of Oklahoma. The Oklahoma conservation statutes have contained several provisions for notice that have differed as to the type of proceeding. The notice has varied as to time for notice and as to place of publication of the

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15/ Southwest Kansas Royalty Owners v. State Corporation Commission, 244 Kan. 157, 769 P.2d 1 (1989).

notice. The Commission's rules of procedure have made additional requirements for notice, [16] and the Oklahoma Supreme Court has rendered several opinions spelling out in detail the notice that must be provided as a matter of due process. While the Oklahoma courts initially looked upon limited statutory notices by publication as adequate, [17] the Oklahoma Supreme Court in more recent years has imposed more extensive and detailed requirements that have not sharply distinguished among the types of proceeding before the Corporation Commission.

[18] The 1986 case of Carlile Trust v. Cotton Petroleum Corporation reviewed the recent developments and set forth a fairly definitive standard to be followed in most Corporation Commission proceedings. The case immediately concerned an issue of notice of a spacing hearing by publication. The lands at issue were included in an area for 640-acre spacing in 1974, and the Corporation Commission gave notice of the proceeding only by publication in accordance with the statute. Carlile's predecessors leased to a party who assigned to Cotton. Cotton drilled a well with the Carlile lease in the

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16/ See Rule 8 of the Oklahoma Corporation Commission Rules of Practice.

17/ Holmes v. Corporation Commission, 466 P.2d 630, 36 O.&G.R. 635 (Okla. 1970); Ranola Oil Co. v. Corporation Commission, 460 P.2d 415, 35 O.&G.R. 215 (Okla. 1969) [notice for pooling is under Section 97 requiring only 10-day notice published in Oklahoma City newspaper rather than 15-day notice of Section 87.1(a) dealing well spacing and drilling units]; Price v. Corporation Commission, 382 P.2d 425, 18 O.&G.R. 1051 (Okla. 1963). But see the Federal district court opinion in Moore Oil, Inc. v. Snakard, 150 F.Supp. 250, 8 O.&G.R. 285 (W.D. Okla. 1957), remanded for further proceedings on joint motion of the parties, 249 F.2d 318 (10th Cir. 1957) holding that a pooling order was void for lack of notice and thus subject to collateral attack. The order showed on its face that notice was not given to a party who was record owner of leases. The want of notice resulted directly from the default of the applicant in failing to comply with Corporation Commission rules. "The failure to file the required affidavit with the application (the instrument filed lacking both signature of the applicant and acknowledgment) appears on the face of the record of the proceedings. This defect was jurisdictional and rendered the order entered at the conclusion of such proceedings subject to collateral attack." 150 F.Supp. at 260.

18/ Carlile Trust v. Cotton Petroleum Corporation, 732 P.2d 438, 91 O.&G.R. 294 (Okla. 1986).

spacing area, but the well was not on the Carlile lease land. Carlile brought a suit to quiet title claiming that the spacing order was invalid because of lack of notice and that the lease had thus lapsed. While the court here reversed the trial court's summary judgment for Carlile, the court announced a new rule regarding notice. Stated the court: "When a party's name and address are reasonably ascertainable from sources available at hand, communication by mail or other means certain to insure actual notice is deemed to be a constitutional prerequisite in every proceeding which affects either a person's liberty or property interest." [19] The court went on to specify the constitutional minimum:

> At a minimum, well spacing procedures should include (a) the filing by Commission officials of an affidavit for publication service which reflects the identity of the parties whose whereabouts are unknown for service of process and cannot be ascertained with due diligence, (b) an adjudicative inquiry by the Commission into the sufficiency of the search to ascertain the whereabouts of parties served solely by publication and (c) a recitation in the Commission well spacing order that [1] upon an examination of the record and proof of publication, the Commission found the process to be proper and [2] upon an adjudicative inquiry into the factual issue of due diligence, the Commission found that its officials conducted a meaningful search of all reasonably available sources at hand to ascertain the whereabouts of those entitled to notice but who were served solely by publication. A like procedure should be followed in a pooling application. [20]

The court contrasted the standards of notice for rulemaking and adjudication: "Because spacing clearly calls for a factual finding and affects the proprietary incidents of the mineral estate of every owner sought to be brought within the new unit, we conclude that a quest for the formation of a drilling and spacing unit calls for adjudication rather than rulemaking." [21] The new standard applied to pending matters and those presently on appeal.

19/ 732 P.2d 438 at 444, 91 O.&G.R. 294 at 304 (emphasis in original).

20/ 732 P.2d 438 at 444, 91 O.&G.R. 294 at 305-006 (emphasis in original).

21/ 732 P.2d at 442, 91 O.&G.R. at 301.

New notice must be given when change of relief sought in application by intervenor - In Carpenter v. Powel Briscoe, Inc., [22] the Oklahoma court affirmed a Corporation Commission denial of relief to parties intervening in a proceeding to clarify a previous order. The Commission lacked jurisdiction where proper notice of the change in relief sought by the intervenors was not given. Powel Briscoe, Inc. drilled a well in an area with 160-acre spacing with provision that wells should be in center of each unit (any point within a square 10 acres in the center of the unit). In issuing this order, the Commission overlooked the fact that the well here was not in the center of the spacing unit thus established. It issued a clarifying order granting an exception location in accordance with regular principle that exception location be given. Intervenors objected to the clarifying order and sought to change the spacing pattern so that their land was in the spacing unit for this well. In affirming the Commission denial, the court said: "We are not going to hold that a different relief can never be sought in an intervening petition, but we believe and hold Section 112, Title 52 O.S. 1961 applicable to such a situation if a change of relief sought is permissible." [23] Notice, said the court, is jurisdictional: "We therefore hold that where the issues raised in the original application are changed by an intervening application that to vest the Corporation Commission with jurisdiction to hear such new issue, notice must be given as required by Section 112, supra." [24]

No necessity to check records while proceeding is pending - What must an applicant do with respect to possible title changes after an application has been filed? Due diligence probably does not encompass searching the records anew to notify persons who acquire interests subsequent to the previous notice. At issue in Chancellor v. Tenneco Oil Company [25] was the notice or lack of it given with respect to a certain leasehold interest in a pooling proceeding. Tenneco here had filed an application for pooling and sent notice to the record owner of the mineral interest, Mason (through her agent). Two days after this mailing, Chancellor took a lease from Mason. It was not recorded for three weeks, about one week after the hearing of

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22/ Carpenter v. Powel Briscoe, Inc., 380 P.2d 245, 18 O.&G.R. 635 (Okla. 1963).

23/ 380 P.2d at 247.

24/ 380 P.2d at 247-48.

25/ Chancellor v. Tenneco Oil Company, 653 P.2d 204, 75 O.&G.R. 341 (Okla. 1982).

the pooling application. The Commission issued a pooling order requiring an election within 10 days of whether to participate in the well costs or take a bonus or overriding royalty instead; failure to elect would result in the owner being entitled only to the bonus amount. This order was also mailed to Mason's agent. After the 10 days were up and with no election having been made by Mason or Chancellor, Tenneco got a title opinion that now showed the lease. Tenneco sent a check for bonus to Chancellor on the same day that it brought in a producing well. Chancellor then notified Tenneco it wished to participate in the well. When Tenneco declined, he filed a suit to quiet title. The Oklahoma Supreme Court ruled that the notice given to the record owner was adequate to comply with Oklahoma law and Commission rules. It observed that a contrary decision "would require an applicant before the Corporation Commission who seeks to pool interests within a drilling and spacing unit to daily check county records from the day of application until the Commission's order. . . . Also, such a holding would permit parties adverse to the pooling application to defeat it by simply transferring their property to another at or about the time the pooling hearing was held and/or to stand by and, if the well be a producer, elect to participate." 26/

Emergency Exceptions - Each state will make an exception as to notice and hearing requirements in "emergency" situations. In such matters as when a blowout or pollution is threatened, it is necessary for the agency to take swift action. Both the specific legislation of the agency and the state administrative procedure act will authorize the agency to act without prior notice and opportunity for hearing, though there may be a time limit as to the effectiveness of the agency action without a subsequent hearing. There will be no occasion for "emergency" action with respect to spacing, pooling and unitization.

Effect of failure to give proper notice of a hearing - It is often said that proper notice is jurisdictional. But the meaning of this is not always understood correctly. Here one must distinguish between subject matter jurisdiction of the agency and personal jurisdiction. It is the statute itself which grants and delimits the subject matter jurisdiction of the agency, such as the power to space, to pool and to unitize. The statute may make publication of the proceeding a requirement to vest the agency with subject matter jurisdiction. The statute, or the state or federal constitution, may also require notice to the individual as a matter of gaining personal jurisdiction over an individual in order to affect the person's

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26/ 653 P.2d at 206, 75 O.&G.R. at 345-46.

property rights. A failure to give notice to the individual does not deprive the agency of subject matter jurisdiction. It follows, therefore, that where the agency has subject matter jurisdiction an order will be effective to those who had notice of the proceeding even though it may be ineffective as to those who were not given proper notice. That is to say, the order itself is not void in such a circumstance; it is simply not binding on one who was not given notice. The proper distinction is made by the South Dakota court in the case of Application of Koch Exploration.

Notice not necessary to give agency subject matter jurisdiction, and notice may be waived - The case of Application of Koch Exploration [27] involved a proceeding in which Koch Exploration sought to unitize part of an oil field for secondary and tertiary recovery. The South Dakota Board of Minerals scheduled a hearing and gave notice by publication. All but two of the affected mineral and royalty owners showed up for the hearing, and they objected to the allocation formula as unfair and as including barren acreage. The Board approved the unitization plan. When the Board refused to grant a rehearing, the plaintiffs brought suit. The trial court affirmed the Board, but remanded to see if there was anyone with interests who was not present at the hearing. There were two, but they were apparently not among the plaintiffs. The Board tried to hold a hearing for the two others, but this was held in abeyance pending the decision on appeal; the Board lost jurisdiction pending the outcome of the appeal. The Supreme Court upheld the unitization order of the Board, making the distinction between subject matter jurisdiction and personal jurisdiction. Although statutory notice alone may not have been sufficient notice as a matter of constitutional law (but the court did not expressly say this), a failure to give personal notice did not deprive the Board of subject matter jurisdiction. In any event, the appellants made a general appearance and did not object to lack of personal jurisdiction; they participated fully. Personal jurisdiction can be and was waived. Even with respect to the possibility of persons without notice and who had not waived notice, the order would not be void in toto but only as to those persons who had not waived notice.

A couple of general observations can be made of other cases that may be noted. What is required constitutionally is reasonable notice. Most of the cases discussed hold that where notice has not been given, the order is not void but only invalid as to the person not given notice. These cases include, in addition to Application

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27/ Application of Koch Exploration, 387 N.W.2d 530, 89 O.&G.R. 549 (S.D. 1986).

of Koch Exploration, [28] Walker v. Cleary Petroleum Corp., [29] Carlile Trust v. Cotton Petroleum Corporation, [30] and Louthan v. Amoco Production Co. [31] Several cases may be taken to indicate that an order without proper notice being given to a person is a void order. These are Moore Oil, Inc. v. Snakard [32] and Day v. State Corporation Commission. [33] Actual notice is generally found to cure any failure to provide notice in the manner prescribed by statute or regulation. [34] These cases include: Brown v. Sutton, [35] Application of Koch Exploration, Superior Oil v. Beery, [36] Ohio Oil Company v. Porter, [37] Ranola Oil Co. v. Corporation Commission, [38]

28/ Application of Koch Exploration, 387 N.W.2d 530, 89 O.&G.R. 549 (S.D. 1986).

29/ Walker v. Cleary Petroleum Corp., 421 So.2d 85, 76 O.&G.R. 433 (Ala. 1982).

30/ Carlile Trust v. Cotton Petroleum Corporation, 732 P.2d 438, 91 O.&G.R. 294 (Okla. 1986).

31/ Louthan v. Amoco Production Co., 652 P.2d 308, 74 O.&G.R. 334 (Okla. App. 1982).

32/ Moore Oil, Inc. v. Snakard, 150 F.Supp. 250, 8 O.&G.R. 285 (W.D. Okla. 1957), remanded for further proceedings on joint motion of the parties, 249 F.2d 318 (10th Cir. 1957).

33/ Day v. State Corporation Commission, 185 Kan. 165, 185 Kan. 382, 341 P.2d 1028, 345 P.2d 651, 11 O.&G.R. 795, 799 (Kan. 1959).

34/ This does not mean the party who appears at a hearing and protests lack of notice is doing an ineffectual act. The agency may continue the hearing to give additional time, and there is the indication in Mullane that due process requires a reasonable time to prepare.

35/ Brown v. Sutton, 356 So.2d 965, 60 O.&G.R. 29 (La. 1978).

36/ Superior Oil v. Beery, 64 So.2d 357, 2 O.&G.R. 1094 (Miss. 1953).

37/ The Ohio Oil Company v. Porter, 82 So.2d 636, 4 O.&G.R. 1898 (Miss. 1955).

38/ Ranola Oil Co. v. Corporation Commission, 460 P.2d 415, 35 O.&G.R. 215 (Okla. 1969).

Hladik v. Lee, [39] and Railroad Commission v. Graford Oil. [40] The defenses of estoppel or laches may be asserted in appropriate circumstances against a party complaining of lack of notice: Tara Oil Company v. Kennedy & Mitchell, Inc., [41] Thompson v. Johnson-Kemnitz Drilling Co. [42] and Katter v. Arkansas Louisiana Gas Co. [43] Likewise, the failure to raise the issue of notice timely may cause it to be lost, as the court held in Hutchison v. Pan American Petroleum Corporation. [44]

Who should be allowed to participate at a hearing - The issue of notice should be separated from the issue of who should be allowed to participate at a hearing. The nature of the participation, like the nature of the notice, will depend on the nature of the proceeding. In rulemaking proceedings, participation will be limited to making a statement or presentation. In quasi-judicial proceedings, such as pooling and unitization hearings, the rights of participants will be more extensive. Parties to a proceeding will have the opportunity to put on evidence and take part in giving testimony and

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39/ Hladik v. Lee, 541 P.2d 196, 53 O.&G.R. 45 (Okla. 1975).

40/ Railroad Commission v. Graford Oil Corp., 557 S.W.2d 946, 59 O.&G.R. 338 (Tex. 1977).

41/ Tara Oil Company v. Kennedy & Mitchell, Inc., 622 P.2d 1076, 70 O.&G.R. 323 (Okla. 1981).

42/ Thompson v. Johnson-Kemnitz Drilling Co., 145 P.2d 422 (Okla. 1943).

43/ Katter v. Arkansas Louisiana Gas Co., 765 F.2d 730, 85 O.&G.R. 443 (8th Cir. 1985).

44/ Hutchison v. Pan American Petroleum Corporation, 388 F.2d 111, 28 O.&G.R. 421 (10th Cir. 1968). The Federal court did not rule on the substance of the notice claim raised in this case because the complaining parties had failed to exhaust their administrative remedy. Notice was given only by publication of the hearing to extend a spacing order area. The appellants filed an application with the Commission then to exempt or exclude their mineral interests from the proceeding. The Commission denied their petition, and they did not appeal. They brought this suit then, contending the original order extending the spacing deprived them of property without due process since they were not given actual notice. They had failed to raise the notice issue in their application to the Commission, and they had failed to seek judicial review.

in examining or cross-examining witnesses. To be a party, one must usually give notice of the intention to take part in the hearing so that others may prepare appropriately. But others who simply show up at the hearing are likely to be given the opportunity to speak even if they are not afforded the opportunity to put on a case. Generally, such statements will be in support of or in opposition to one of the parties who has put on a case.

4. Conduct of Hearing

Conservation agency hearings, such as those for pooling and unitization, are quasi-judicial in character. They are adjudications, but they generally do not have the same formality as judicial proceedings. The same rules of procedure do not obtain; hearsay, for example, will be admissible in most agencies. While agency proceedings are informal, they are similar in format to a trial before a judge. In an uncontested proceeding, the applicant makes its presentation and may have questions directed at its witnesses by agency personnel. In a contested case, the applicant will present its case first, with the opposition having an opportunity to cross-examine the applicant's witnesses. Cross-examination may be conducted by the attorney or by a witness for the contesting parties or by both. The opponents will then have the opportunity to present an opposing plan of spacing or pooling or to put on evidence to contradict the applicant's evidence. The applicant or other parties will have the opportunity to cross-examine the opposing party's witness(es). The applicant may then have the opportunity to put on rebuttal evidence and opponents may be given the opportunity to put on surrebuttal testimony. The parties will be allowed to make closing arguments. Other interested persons will be given an opportunity to be heard although they probably will not be allowed to put on technical evidence if they have not become parties to the proceeding.

In some states, there may be a requirement that an attorney be admitted to practice in the state or upon motion accompanied by an attorney admitted in the state. There will often be three witnesses in agency hearings, a landman, a geologist and a petroleum engineer, with an attorney presenting the case and conducting the testimony of the witnesses. But it is not uncommon to have a single witness presenting much the same information as described below. The geologist and the engineer may have to qualify as experts prior to giving expert testimony. The landman will testify as to ownership of interests and steps taken to provide notice of the proceedings to persons entitled to notice. The landman or other company personnel may testify as to the making of an offer to pool voluntarily before seeking compulsory pooling. The geologist will testify as to the area underlain by a common pool, establishing matters such as subsurface contours, water levels and faulting, making use of well logs and

seismic data. An engineer will testify as to the area economically and efficiently drained by a single well using data such as porosity and permeability, gas-oil ratios and reservoir pressure. In some types of proceedings it will be necessary to go over the economics of drilling or production. For example, approval of a reservoir-wide unitization will often require a demonstration that the proposal will be profitable. Generally a petroleum engineer will be able to testify to this and will not have to qualify as an expert in the subject of economics.

The rules of procedure will normally spell out the number of copies of exhibits that must be provided. A properly prepared set of exhibits will clearly show the docket number, the title, the date, the identity of the company, a legend for each exhibit, and the name of the witness testifying as to each exhibit on that exhibit. All wells and other points on the exhibit should be marked with correct nomenclature. The person responsible for presenting the case should tell each witness the importance in testimony of identifying the exhibit, bearing in mind that the agency in preparation of a decision and a reviewing court will have before it only a transcript and the exhibits and will not be able to ask questions of the witness such as where the witness was pointing. For example, the witness should say, "Exhibit 5 of Acme Oil shows . . ." instead of saying "this page shows."

The person responsible for presenting the case must likewise bear in mind the standard of review that a court will give an agency determination and the degree of specificity of findings that will be necessary to sustain an agency decision. That is to say, the decision of the agency must be supported by substantial evidence. The person preparing the case needs to determine in advance what will constitute a prima facie case for, say, an exception well location or an increased drilling density order and then see to it that the standards of substantial evidence are met by the evidence he or she puts on at the hearing. Likewise, the courts in some states are more stringent than in others about what findings will have to be made by the agency to satisfy the requirements of the statute or the reviewing court. 45/

Some agencies follow a practice of allowing the parties to submit suggested forms of orders. These proposed orders should be distributed to all parties at the hearing and entered into the record

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45/ The findings that must be incorporated in an order are discussed below.

to avoid the possibility of such a submission being characterized as an ex parte communication.

The hearing proceedings may take place in a matter of a few minutes or they may take days. The proceedings can be discontinuous; that is, they may begin on one hearing day and then be continued over to another hearing date later. This allows the parties to prepare additional evidence should this be necessary or desirable. There has been very little litigation over the conduct of conservation hearings by agencies. I should mention, however, the subject of "official notice."

Official notice - Issue may arise as to the power of the agency to take "judicial notice" or "official notice" of facts. Statute may authorize the agency to take such notice provided that the agency states it is taking notice and allowing an opportunity for a party to contradict the appropriateness of taking judicial notice. In an Oklahoma case, [46] the Oklahoma Supreme Court reversed the Corporation Commission as to a cost formula it had employed in an order establishing a participation election because of the manner in which the Commission had taken judicial notice; it had not relied on any specific evidence. The court observed that an agency can take judicial notice, but indicated that the agency must make the basis for its actions clear for the parties to comply with due process. The court queried: "How is it possible for this Court to review the law and facts and intelligently decide that the findings and conclusions of the Commission are supported by substantial evidence when the evidence upon which the findings and conclusions are based are not in the record and unknown." [47] Without the Commission stating the basis for the formula, the order was not supported by substantial evidence.

Issue arose about "judicial notice" of Rule 37 exceptions that the Railroad Commission considered as a basis for its findings in a subsequent proceeding in Imperial American Resources Fund v. Railroad Commission, [48] The court ruled that the law and the Commission's own rules required notice so that any party could contest the material, but that there would be no remand for this

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46/ C.F.Braun & Co. v. Corporation Commission, 609 P.2d 1268, 65 O.&G.R. 391 (Okla. 1980).

47/ 609 P.2d at 1272, 65 O.&G.R. at 399.

48/ Imperial American Resources Fund v. Railroad Commission, 557 S.W.2d 280, 59 O.&G.R. 553 (Tex. 1977).

where there was no showing of harm from failure to give notice of the material to be judicially noticed.

The court in Imperial American Resources Fund stated that before the Texas Administrative Procedure Act the Railroad Commission could use data in its own records, but that after the Act this would be considered as ex parte procedure. The provision noted by the court stated: "Parties shall be notified . . . of the material officially noticed, including any staff memoranda or data, and they must be afforded an opportunity to contest the material so noticed." [49/] It is submitted that the ruling of the court misconceives "staff data." The prior Commission rulings in Texas and in other states are public records that are judicial in character. They are binding on the parties and on the agency, and they are freely available to the parties in subsequent proceedings in all or virtually all states under the conservation statutes or under public records statutes. Staff memoranda and data would be internal communications and information gathered by the staff as opposed to the staff making use of prior decisions. At the time of a hearing and receipt of the evidence of the parties, the agency will not know what prior rulings of the agency may have a bearing on the decision. If the agency must recall the parties and reopen a hearing to inform the parties that it will make use of certain of its prior public decisions, the agency will be subject to endless and futile procedures. Likewise, the agency should not be required to reexamine prior determinations as the Texas court's approach seems to suggest. For example, where an agency has defined a field and subjected it to 160-acre spacing, the agency should not be required to announce it will take judicial notice of this order and its underlying findings when a new party in the field comes in and applies for a well on an 80-acre spacing basis; nor should the agency be precluded from considering, without informing the applicant in a new field, that it has spaced similar fields on a 160-acre spacing pattern. A contrary approach leaves the door open to rulings that are inconsistent, and it virtually requires the state agency to become a party to a proceeding by having to inform the parties what prior rulings of the agency that the agency may consider significant to a decision where one of the parties has failed itself to take note of the precedent(s) of the agency. An agency should no more have to take official notice of specific prior rulings than a court should have to announce to the parties in litigation that it will look to prior judicial decisions.

49/ Section 14(q) of the Texas Administrative Procedure Act, as quoted 557 S.W.2d 280, 288.

5. Discovery

In many states there will be the possibility of discovery procedures being used under the conservation statute or the state administrative procedure act.[50] Questions may arise at this stage about confidentiality of data. There are few cases from the courts that indicate problems with pre-hearing procedures. Most of the problems are cured by the time an order is issued. The applicant will have the burden of making out his case before the agency. In order for the applicant or an opponent to prevail at the agency level and then be upheld by a court, there must be substantial evidence in the record supporting the decision. If the applicant or opponent fails to put on the evidence because of confidentiality claims, then it is as though such information does not exist. A party cannot have it both ways. Either evidence will be put on and subjected to scrutiny, or it cannot be relied on as the basis for an expert opinion.

There will be judgment calls as to putting on some evidence. One generally does not get "two bites at the apple" in putting on evidence before an administrative agency. In Texas Oil and Gas Corporation v. Railroad Commission,[51] the appellant had sought to get the trial court to remand to the Commission for reopening the record for the introduction of additional evidence. To get such a remand, it was necessary to show that the evidence was material and that there were good reasons for the failure of the party to present the evidence before the agency. In this instance, the additional evidence was seismic data that was available at the time of the hearing. The testifying engineer made a judgment call not to put on the seismic evidence. But the court concluded that errors in judgment made during the agency hearing cannot constitute good reason for ordering the Commission to consider additional evidence. Failure of the Commission to grant a rehearing for receipt of this evidence was not a denial of procedural due process. Similarly, the court in

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50/ All or virtually all the states with conservation agencies provide that the agency has subpoena power for documents and to summon witnesses. E.g., Utah Stat. Section 40-6-11; Wyo. Section 30-5-112. Such statutes may be implemented by further regulations of the agency. E.g., Kansas Corporation Commission, Rules of Practice and Procedure, Rule 82-1-227; Oklahoma Corporation Commission, Rules of Practice, Rule 21.

51/ Texas Oil and Gas Corporation v. Railroad Commission, 575 S.W.2d 348, 62 O.&G.R. 254 (Tex. Civ. App., 1978).

Price v. Corporation Commission [52] upheld a Commission denial of an application to reopen a proceeding for introduction of additional evidence on an issue already decided. There was no showing the protestants had used due diligence to have such evidence available at the earlier hearings.

Should differences in the pre-hearing stage emerge that threaten the conduct of a hearing, a party or the agency can call for a pre-hearing conference. Just as a judge can exercise authority to get the parties to work together to have an orderly hearing, so too can the agency use a pre-hearing conference to facilitate proceedings. The emerging difficulty in this area, though, is the problem of ex parte communications. A pre-hearing conference that may affect the conduct of the hearing is probably subject to the same standards of notice and opportunity to participate as any hearing. Failure to give notice and afford an opportunity of participation to all who may be affected can well lead to a claim that some of the parties had ex parte communications with the agency. This could be fatal to an order that is subsequently issued by the agency.

Any person involved in agency proceedings must be aware of one troublesome development in connection with judicial proceedings challenging agency action. This is the use of discovery against the agency personnel. Now we have had judicial review of agency decisions for many years. This has in the past generally been confined to the record of the proceeding itself, and thus there has been no discovery, such as depositions or the answering of interrogatories, of individual agency officials. Increasingly, however, parties are bringing suit before an agency decision has been reduced to a decision and are bringing personal actions against the agency personnel. When such suits are permitted to go forward, parties are perhaps able to get discovery of agency decision processes.

A recent example of this use of discovery is the Mississippi case of State Oil & Gas Board v. McGowan. [53] In this case the Mississippi Supreme Court held that deposition of the Oil and Gas Board's supervisor could be taken under common law bill of discovery, even though the remedy was not provided for under the Mississippi Rules of Procedure. While there was no statutory right to utilize discovery against administrative agency, a pure bill of discovery and

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52/ Price v. Corporation Commission, 382 P.2d 425, 18 O.&G.R. 1051 (Okla. 1963).

53/ State Oil & Gas Board v. McGowan, 542 So.2d 244 (Miss. 1989).

chancery was available to compel the testimony of Oil and Gas Board's supervisor.

A party named McGowan had a proceeding pending before the State Oil and Gas Board, and he wanted certain information from the Board in order to prepare for the hearing on the merits of the pending matter. The Board denied McGowan's request for pre-hearing discovery. McGowan then filed a complaint against the Board in the Chancery Court of the First Judicial District of Hinds County, Mississippi, requesting (1) the Board to respond to all discovery in accordance with the Mississippi Rules of Civil Procedure, and (2) seeking a temporary injunction against the Board from proceeding to hear matters pending before the Board until a reasonable time after the conclusion of discovery. The general rule in other jurisdictions is that rules of civil procedure do not apply to administrative proceedings unless the rules specifically so provide. A number of state courts have applied this rule. 54/ The chancellor held that the scope of the rules of civil procedure do not apply to proceedings before the Board and the Mississippi Supreme Court affirmed this. The court also concluded that neither the Administrative Procedures Act, nor the Rules of Procedure of the State Oil and Gas Board, provide for any discovery procedure. Since this controversy was within the original administrative jurisdiction of the Oil and Gas Board, McGowan was subject to hearing under the rules and regulations of that Board. Since the rules did not authorize administrative discovery, he was not entitled to such discovery. But discovery was available for protection of due process. The court stated:

> Prior to an appeal from a final rule, regulation, or order, as contemplated by the statute, the Chancery Court has no jurisdiction to participate in the administrative process and it was error to do so when the effect amounted to an intervention in the pending proceeding. However, a litigant is not shut off from all remedies for discovery merely because the rules of civil procedure do not apply or because the roles of the administrative agency do not promote it. In appropriate cases a

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54/ The Mississippi court cited the following: Georgia State Board of Dental Examiners v. Daniels, 137 Ga. App. 706, 224 S.E.2d 820 (1976); International Ass'n of Firefighters, Local 2287, Montpelier v. City of Montpelier, 133 Vt. 175, 332 A.2d 795 (1975), Clary v. National Friction Products, Inc., 259 Ind. 581, 290 N.E.2d 53, 55 (1972); Quaker Oats Co. v. Cedar Rapids Human Rights Com'n, 268 N.W.2d 862, 868 (Iowa 1978); Colgate-Palmolive Co. v. Dorgan, 225 N.W.2d, 278, 282 (N.D. 1974).

"pure bill for discovery" will lie and statutory remedies may be available to the end that due process be afforded. [55]

The problem is that one does not know whether discovery is necessary to protect due process until one has had the discovery. It is a simple matter to allege denial of due process, such as through an ex parte communication, and thereby gain discovery. This can be used to harass and intimidate agency officials. Unfortunately, the Mississippi Supreme Court gave no discussion of the underlying controversy in McGowan. One should anticipate a great deal more such litigation in the future.

6. Contempt Power

Generally, agency hearing officers lack contempt power. There are occasional exceptions where statute or state constitution has granted such power to an agency. The case of Stamford Energy Cos., Inc. v. Corporation Commission [56] illustrates a case in which the court held that the Oklahoma Corporation Commission has the authority to hold an operator in civil contempt for violation of a Corporation Commission order because of unlawful acts of service contractors hired by operator.

7. Internal Appeal

Internal appeals - There may be one or more layers of internal appeal within an agency. It is necessary to exhaust all such internal appeals or other administrative remedies before seeking judicial review. I will not go over the exhaustion doctrine, but mention it simply as a prelude to observing that there is question raised as to the deference that the administrative body must give to the findings or decision of a hearing examiner or administrative law judge. While some Federal courts and some state administrative procedures acts have raised the status of the hearing officer's findings to about the same level as a trial court's findings on appeal, [57] this has not appeared in conservation matters. That is,

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55/ 542 So.2d at 249.

56/ Stamford Energy Cos., Inc. v. Corporation Commission, 764 P.2d 880 (Okla. 1988).

57/ E.g., see Ferris v. Austin, 487 So.2d 1163 (Fla. App., 1986), cause dismissed by Austin v. Ferris, 492 So.2d 1330 (Fla., 1986).

the courts which have taken up the issue thus far have held that the commission is not required to give any particular weight to the hearing officer's report. [58]

In Cameron v. Corporation Commission, [59] Cameron filed an application seeking to delete land from a 20-acre Rowe Zone spacing on the ground that a vertical fault was now known to separate the land from the remainder of the spaced area, creating a separate source of supply. The hearing examiner recommended that the application be granted, but the Commission denied the application. The court held the Commission decision was supported by substantial evidence and stated:

> Title 17 O.S. 1961, Sec. 162, authorizes the Commission, inter alia, to assign persons in its regular employ as examiners, conduct hearings and receive evidence and report the same to the Commission. The statute, supra, does not attach any particular weight or significance to the Examiner's report. Regardless of whatever weight the Commission may attach to the report, the Commission is the final arbiter of the issues. It is our opinion that, under these circumstances, the report of the Examiner is entitled to no special weight in this court in determining whether the order of the Commission is supported by substantial evidence. [60]

In the case of Van Horn Oil Co. v. Corporation Commission, [61] the Oklahoma court ruled that the commission could overturn the decision of a hearing officer to grant a continuance of a hearing even though the hearing officer did not err in reaching the decision for continuance.

The Oklahoma court's approach is the proper one in the absence of legislation to the contrary. The hearing officer is a

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58/ W.L. Kirkman, Inc. v. Oklahoma Corporation Commission, 676 P.2d 283, 79 O.&G.R. 305 (Okla. App. 1983); Cameron v. Corporation Commission, 414 P.2d 266, 24 O.&G.R. 444 (Okla. 1966).

59/ Cameron v. Corporation Commission, 414 P.2d 266, 24 O.&G.R. 444 (Okla. 1966).

60/ 414 P.2d at 272.

61/ Van Horn Oil Co. v. Corporation Commission, 753 P.2d 1359 (Okla. 1988).

civil servant. While the conservation agencies have very competent staff, it is the agency board or commission itself which possesses and exercises statutory authority and is responsible to the public, directly to the voters or indirectly through the elected official appointing the members of the board. The agency must consider policy matters that go beyond the immediate concerns of a hearing official. Generally, too, the reasons for deference by an appellate court to a trial court are not present in the administrative context. Although the expert witness's testimony is crucial to a proceeding, the demeanor of the witness in the typical oil and gas proceeding is not much of a factor in evaluating his or her testimony, and the credibility can be assessed as easily from the transcript and exhibits as by personally hearing the witness.

Failure to appeal to Corporation Commission from Review Panel - In Sooner Oil & Gas Corp. v. State [62/] a party sought review by the Oklahoma Supreme Court of an order of an Administrative Review Panel within the Corporation Commission. The party had not sought review by the Corporation Commission of the order, presumably because the party had failed to seek a rehearing from the Administrative Review Panel within the 10-day period allowed by regulation, and appeal to the Corporation Commission was conditioned on a filing for rehearing by the Administrative Review Panel. The Oklahoma Supreme Court refused to allow the appeal because no appeal to the Commission had been taken first.

8. Issuance of Order or Decision within Specified Time

Commonly the act authorizing pooling by the conservation agency will specify the time within which the order or decision of the agency must be rendered. But the statute in all likelihood will not state the consequence of the agency's failure to comply with the deadline. Of course, the failure of the agency to render the decision when it is due may give one the basis for instituting an action in court for issuance of a mandate to the agency to render the decision, but such an act would cause the party seeking a mandamus to wonder if he were not inviting an unfavorable decision. The courts which have

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62/ Sooner Oil & Gas Corp. v. State, 635 P.2d 599, 71 O.&G.R. 551 (Okla. 1981). The Corporation Commission's Administrative Review Panel, which made the initial decision that the appellant failed to seek rehearing in Sooner Oil & Gas was declared unconstitutional in Hair v. Corporation Commission, 740 P.2d 134, 96 O.&G.R. 333 (Okla. 1987).

examined the issue of a late decision or order have said that the order is not made invalid by its tardiness.

Decision not issued within 30 days upheld - The Alabama Oil and Gas Board held its hearing on the proceeding at issue in State Oil and Gas Board of Alabama v. Seaman Paper Company [63] on October 15, 1965, and stated they would take the matter under advisement. The statute provided that the Board would hear the matter "and in any event within thirty (30) days after the conclusion of such hearing, shall take such action with regard to the subject matter as it may deem appropriate." [64] The Board met again on December 17, 1965, and took additional evidence and issued an order of that date. The party challenging the order was present on December 17, 1965, and "made no point of the fact that additional testimony could not be heard or that the Board's right to enter an order . . . had expired because no such order had been entered within thirty days from October 15, 1965, nor an order of continuance during that thirty-day period." [65] Nor was the point raised in the initial filings of the claim in equity. In other words, the court seemed to say that the plaintiff had waived the claim.

Order not issued within 30 days upheld - In State Oil and Gas Board v. Brinkley, [66] the Mississippi Supreme Court affirmed an Oil and Gas Board decision denying an application for the establishment of a drilling unit. The court rejected the claim that the Board's failure to act within thirty days after the conclusion of the hearing invalidated the order. The court cited Superior Oil Co. v. Foote, [67] to the effect that the statute requiring action within thirty days of hearing does not effect an invalidation of an order that is rendered after this; the purpose of the statute was to place on the Board a responsibility to act expeditiously.

63/ State Oil and Gas Board of Alabama v. Seaman Paper Company, 235 So.2d 860, 36 O.&G.R. 1 (Ala. 1970).

64/ Code of Ala., 26:Section 179(33)(F), as quoted 235 So.2d at 875.

65/ 235 So.2d at 875.

66/ State Oil and Gas Board v. Brinkley, 329 So.2d 512, 54 O.&G.R. 59 (Miss. 1976).

67/ Superior Oil Co. v. Foote, 214 Miss. 857, 59 So.2d 85, 1 O.&G.R. 1239 (Miss. 1952).

Order not issued within 30 days upheld - In Ohmart v. Dennis, [68] the court ruled that where more than 30 days elapsed between submission of the controversy to the commission and the entry of the commission order, the order was not invalid. The court said: "The 30-day requirement is directory, a rule of practice, and not mandatory. The delay did not constitute prejudicial error." [69]

9. Form of Order - Findings

A problem increasingly raised as more state courts become concerned about procedural due process in administrative law is whether the form of the order or decision meets statutory criteria and judicial standards. The statute may be the conservation statute or the state administrative procedures act. The source of the judicial standards may be constitutional concern for due process or it may be a view that detailed findings are required of the agency to facilitate judicial review and are implicit in the fact that judicial review is provided for by statute.

The form of the order, particularly in the specificity of its findings and conclusions, is significant as it relates to the ability of a reviewing court to determine if the agency has acted within the statutory authority it has been granted and if the agency has fulfilled its statutory duties. A distinction may be made between findings of fact and conclusions of law. A distinction may also be made between basic facts and ultimate facts (sometimes spoken of as a mixed question of law and fact). These distinctions and their consequences will be brought out in the discussions of the individual cases. While these distinctions are a common feature of administrative law, it is best to look at them in the context of a court's specific application of the principles to conservation matters.

Some courts demand a greater degree of specificity than others, perhaps unreasonably so. Geology is an inexact science, and agencies must make decisions with limited data. Where expert witnesses disagree, as for example over the placement of a fault or the location of a water level, the fairest solution may well be to take a compromise approach that does not exactly correspond to the data of either expert witness. But a candid statement of finding that the

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68/ Ohmart v. Dennis, 188 Neb. 260, 196 N.W.2d 181, 42 O.&G.R. 621 (1972).

69/ 196 N.W.2d at 184.

agency is splitting a difference between experts down the middle might well prove unacceptable as a rationale to a court. Perhaps like statutes and sausages it is better not to examine too closely the manner in which the result is reached, so long as the result is acceptable. Perhaps, too, this is why other courts will not demand a high degree of specificity and will instead emphasize that the agency must work with limited data and exercise discretion.

The cases on the form of order do not lend themselves to doctrinal analysis or grouping by topic. Hence, I will simply organize the decisions by state for the guidance they may give as to the standards under which one will practice.

A. Kansas

The Kansas court found the commission's findings adequate in the case of Southwest Kansas Royalty Owners v. State Corporation Commission, [70] where it reviewed an order of the Kansas Corporation Commission amending the basic proration order for the Hugoton Gas Field to allow infill drilling. Appellants contended that the commission did not give a concise and specific statement of the relevant law and basic facts which persuaded it that an adequate market existed for infill gas as required by its own rules. While failure by the commission to follow its own rules is error, and while the commission is required to give clear and complete findings of essential facts on which its orders rest, the court said the Commission is not, however, required to explain why it did not accept every piece of evidence presented. The commission adequately explained its findings that a market existed for infill gas.

The Kansas Supreme Court has relied on the agency's own rules to impose a requirement of more detailed findings. But the court went on to indicate that the requirement was also part of a broader principle of administrative law. The case of Cities Service Gas Company v. State Corporation Commission [71] involved an order of the Commission to assert jurisdiction over all interstate natural gas pipelines operating within Kansas that made direct mainline sales to Kansas industrial customers. The Commission made findings and

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70/ Southwest Kansas Royalty Owners v. State Corporation Commission, 769 P.2d 1 (Kan. 1989).

71/ Cities Service Gas Company v. State Corporation Commission, 440 P.2d 660, 31 O.&G.R. 491 (Kan. 1968).

entered an order on which it based jurisdiction, requiring a certificate of public convenience and necessity for direct sales by such pipelines within Kansas. The trial court set the order aside. Under the Commission's own Rule No. 82-1-232, the order of the Commission had to, inter alia, summarize the evidence, list all findings of fact and list all conclusions of law. The Commission, said the Kansas Supreme Court, violated its own rule. The order failed to contain a summary of the evidence introduced by the companies and did not contain basic findings of fact on which the Commission relied. "An undigested transcript," declared the court, "is not a substitute for basic findings of fact." [72/] At best the order only contained findings of ultimate fact, [73/] most of which were expressed in the language of the statute. That was not enough, in the absence of basic findings, to support it. The court said that it "must be possible for the reviewing court to measure the findings against the evidence from which they were educed. Findings not based on evidence, but on suspicion and conjecture, are arbitrary and baseless . . . Moreover, it is equally well settled that the lack of express findings of fact by an administrative agency may not be supplied by implication . . ." [74/] The court indicated it would not search the record to ascertain whether there was evidence from which ultimate findings could be made. Detailed findings were required to facilitate judicial review, avoid judicial usurpation of administrative functions, assure more careful administrative consideration to protect against careless and arbitrary actions, assist the parties in planning their cases for rehearing the judicial review, and keep such agencies within their jurisdiction as prescribed by the Legislature.

To the Commission's assertion that the order merely set forth policy, the court replied that the Commission could not issue a valid order without following the agency's rule and the basic principles of administrative law. The Public Utility Act, it was said, imposed the specific requirement of making specific findings: "Where legislative power is delegated subject to a condition, it is a requirement of constitutional government that the conditions be fulfilled. . . . In default of such fulfillment, there is no official

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72/ 440 P.2d 668.

73/ "An ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the basic findings of primary, evidentiary or circumstantial facts." 440 P.2d 668.

74/ 440 P.2d 668.

action - only the vain show of it." [75] So it set aside the order. The trial court had made its own findings, but this was a usurpation of the Commission's function.

The Kansas court has also had occasion to concern itself with the form of a Commission order in determining when the order was made for purposes of a party's right to seek rehearing. This was in Cities Service Gas Company v. State Corporation Commission. [76] The Corporation Commission approved a water-flood project on April 25, 1962. The order was mailed on April 30. Cities Service received notice by mail on May 2, 1962 and filed a petition for rehearing on May 9, 1962. The petition was overruled by the Commission and Cities Service sued to overturn the order. But the district court said the rehearing petition, a filing required in order to preserve a right to seek judicial review was not timely filed; it was not filed within 10 days of the "making" of the order. The Kansas Supreme Court reversed. An order cannot be deemed made while it is in the bosom of the Commission. [77] The opinion syllabus stated: "Where no express provision for notice is made in a statute, if there be nothing in the statute which prevents notice from being given, the requirement of reasonable notice will be implied." [78]

B. Louisiana

The Louisiana courts have expected the Commissioner of Conservation to make findings which are necessary to support an order on judicial review. But they have been more realistic than the courts of several of the other producing states about the degree of specificity that can or must be achieved in an order. The courts have been willing to let the record support the findings rather than imposing a rigid duty on the agency to demonstrate the decisional process in the order itself.

75/ 440 P.2d 669.

76/ Cities Service Gas Company v. State Corporation Commission, 192 Kan. 707, 391 P.2d 74, 21 O.&G.R. 282 (Kan. 1964).

77/ The court relied on the agency's regulations which looked to the date of service as constituting the effective date. The court took note of statistics showing that 738 out of 1600 orders of the Commission became final before they were even mailed out under the district court's construction of the statute.

78/ 391 P.2d 74, 75.

In Brown v. Sutton, [79] the plaintiff claimed that the four requirements for creation of a field-wide unit were not set forth as explicit findings in the order and the order was thus void. These were, he asserted, mandatory findings of jurisdictional facts upon which the order's issuance was conditioned. The Court of Appeals had agreed with this position, but the Louisiana Supreme Court disagreed after examining the record:

> Although some of the evidence which supports all four of the mandatory conditions which must be satisfied for issuance of a valid order are not contained in the order itself, the conditions are in fact supported by the record. Due to the fact that none of these mandatory conditions were contested at the hearing, except notice, failure to include some of the findings in the order itself involves no prejudice to Brown, the only party complaining of the order's invalidity. . . . Principally the findings are articulated in the order itself. [80]

The court went on to observe that a contrary decision might follow in respect to a mandatory condition which had been contested and where the Commissioner's expertise should have been employed in a finding. The court also made it clear that the state's power should be exercised only "where the statutory authority affirmatively appears." [81] The purposes of such concern are that the Commissioner give proper regard for valuable property rights and to give the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.

The case of Summers v. Sutton [82] involved a revision of a unit based on new data from a second well drilled within the confines of the existing unit. The size of the unit was reduced from 231 acres to 161 acres, relying on geological data showing that the sand had shaled out in the area of the second well. The plaintiffs founded many of their claims of the invalidity of the revision of the unit on violations of the state administrative procedure act. The plaintiffs urged, for example, that the order did not contain a concise and explicit statement of the underlying facts supporting the

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79/ Brown v. Sutton, 356, So.2d 965, 60 O.&G.R. 29 (La. 1978).

80/ 356 So. 2d at 973, 60 O.&G.R. at 43.

81/ 356 So.2d at 973, 60 O.&G.R. at 44.

82/ Summers v. Sutton, 428 So.2d 1121, 78 O.&G.R. 41 (La. App. 1983).

findings or the reasons therefor; instead, it contained only conclusionary statements. [83] The court held that the act was satisfied:

> While the administrative agency must articulate the basis for its decision, where the findings and reasons therefor are necessarily implicit in the record and the record readily yields substantial evidence to support the administrative determination, the administrative order is not invalid merely because of the agency's failure to make explicit its finding which was already self evident. [84]

C. Mississippi

Effect of use of non-statutory terminology in a finding - In Stacy v. Tomlinson Interests, Inc., [85] the Mississippi Oil and Gas Board had entered an order with a finding that the "rights of all parties owning an interest in said proposed unit will be protected." (Emphasis added.) Reversing a trial court judgment that the order was void because it referred to unit rather than the statutory word "pool," the Mississippi Supreme Court held that the substance of the Board's finding was that the co-equal and correlative rights of the owners in the common pool of oil would be protected in accordance with the statutory policy, and that it "would be promoting form over substance to find that the magic word 'pool' had to be used . . ." [86]

D. New Mexico

The New Mexico Supreme Court has gone about as far as any producing state has gone in demanding findings of a conservation agency. It has found the findings inadequate in several cases. The first of these was Continental Oil Company v. Oil Conservation Commission, [87] the first case to reach the New Mexico Supreme Court

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83/ La. R.S. 49:958.

84/ 428 So.2d at 1128, 78 O.&G.R. 54.

85/ Stacy v. Tomlinson Interests, Inc., 405 So.2d 93, 71 O.&G.R. 519 (Miss. 1981).

86/ 405 So.2d at 95, 71 O.&G.R. at 519.

87/ Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809, 18 O.&G.R. 69 (1962).

concerning the merits of any controversy determined by the Commission. [88]

Continental involved the Jalmat Pool which the Commission in 1954 prorated on a "pure acreage" formula. In 1958 the Commission changed the formula to 25% acreage/75% deliverability. In a challenge to the order, the court found the findings of the agency inadequate. The court set forth its standard as follows:

> 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. That the extent of the correlative rights must first be determined before the commission can act to protect them is manifest. [89]

The findings and conclusions of the Commission contained in the order lacked any mention of the above factors. The commission, said the court, made no finding as to the amounts of recoverable gas in the pool, or under the various tracts; it 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 was no indication that the commission attempted to do any of these things, even to the extent of 'insofar as is practicable.'

The former pure acreage formula was valid until successfully attacked, but the attack had failed. The Commission's finding that the order would result in a more equitable allocation of the gas production than under the present formula was not a substitute for or equivalent of a finding that the present formula did not protect correlative rights. The order was thus void for lacking the basic findings necessary to and upon which jurisdiction depended. The

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88/ In Oil Conservation Commission v. Brand, 65 N.M. 384, 338 P.2d 113 (1959) the court had ruled on procedural matter in this same case.

89/ 373 P.2d at 814-15.

matter was not remanded since the order would be void based on the record of the Commission. This leads one to suspect that the concern over the specificity of the findings was really a concern over the substance of the decision.

The New Mexico court found the agency's findings adequate to satisfy the standards of Continental in El Paso Natural Gas Company v. Oil Conservation Commission of New Mexico.[90] The applicant sought change in proration formula in the Basin-Dakota gas pool from the existing 25-75 (25% acreage plus 75% acreage, times deliverability) to a 60-40 formula. The Commission granted the application. Under Continental, the Commission had to find four things: 1) the amount of recoverable gas under each producer's tract; 2) the 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. The complaining party claimed that all four were jurisdictional, and, absent any one of them, the Commission lacked authority to consider or change any production formula. Only number 4 was said to be missing. The court said its "review of the Commission's findings reveals that it did make the requested findings in language equivalent to that required by Continental and did adopt a formula in compliance with statutory requirements."[91]

The New Mexico court returned its strict requirements in a 1975 case in which the agency did not specify why it was not persuaded by one party's evidence.[92] In Fasken v. Oil Conservation Commission, the Commission had rejected an application for a determination that the applicant's leased property was in a separate and distinct pool from that with which it had been pooled. The Commission made no specific finding as to why it disregarded the evidence presented by the applicant. Because the Commission had failed to make specific findings as to the reasons for its ultimate fact determination that the lands involved constituted a single source of supply, the court remanded to the Commission for such findings. Stated the court: "The theories [as to what the subsurface geologic conditions were] of each party sound equally logical and reasonable and each is diametrically opposed to those of the other party. The difficulty with them is that they emanate from the lips and pens of counsel and are not

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90/ El Paso Natural Gas Company v. Oil Conservation Commission of New Mexico, 76 N.M. 268, 414 P.2d 496, 25 O.&G.R. 676 (1966).

91/ 414 P.2d at 499.

92/ Fasken v. Oil Conservation Commission, 87 N.M. 292, 532 P.2d 588, 50 O.&G.R. 483 (1975).

bolstered by the expertise of the Commission to which we give special weight and credence . . ., nor included in its findings." [93] The thrust of the opinion was that without the requisite findings, the court could not determine if they were supported by substantial evidence. [94] The court spelled out the requirements as follows:

> In cases where the sufficiency of the Commission's findings is in issue or their substantial support is questioned, after the dust of the Commission hearing has settled, the following must appear:
>
> A. Findings of ultimate facts which are material to the issues. Such findings were characterized as 'foundationary matters,' 'basic conclusions of fact' and 'basic findings' in Continental Oil v. Oil Conservation Com'n, 70 N.M. 310, 373 P.2d 809 (1962). These findings have to do with such ultimate factors as whether a common source of supply exists, the prevention of waste, the protection of correlative rights and matters relative to net drainage. . . .
>
> B. Sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings. In Continental, it was said that although elaborate findings are not necessary, nevertheless: ". . . Administrative findings by an expert administrative commission should be sufficiently extensive to show . . . the basis of the commission's order."
>
> The findings must have substantial support in the record.

While the court's standard certainly reflects an ideal for a decisional process, it simply fails to give appropriate recognition to the difficulties of issuance of an order. Not only will the experts before the agency disagree, so too will the members of a staff of an agency, and so too will the different members of the agency. The determination of an ultimate question, such as whether a particular sharing formula is just and reasonable, will not depend on a particular fact capable of being found, but on the lack of proof of a fact or lack of agreement on proof of a fact. Where the agency members (or staff) agree upon a conclusion but do not necessarily agree upon a particular underlying fact, the court should not overturn the decision.

93/ 532 P.2d at 589.

94/ 532 P.2d at 590.

E. North Dakota

The North Dakota Supreme Court held that the findings of the Industrial Commission were inadequate to sustain the order in Hystad v. Industrial Commission. 95/ The statute at issue required units of uniform size and shape for the entire pool, though exceptions could be granted. A deviation from the standard of uniform size and shape to protect correlative rights had to be explained, the court held, and remanded the case for further findings from the Commission. While recognizing findings on such factual questions may not be practicable in the early stages of development for a pool, the Commission had to elaborate on how correlative rights were being protected. The Commission, said the court, "must explain why the deviation is necessary within the context of the right of each owner to a just and equitable share of the common source of supply and the duty to other owners not to damage or take an undue proportion of oil or gas from that common source of supply." 96/ The findings did not elaborate on whose correlative rights were being protected or how they were being protected. The reasons given did not enable the court to understand the basis of the Commission's decision. A concurring justice thought that the basis of the Commission's decision was clear, but he simply did not agree that correlative rights were being protected by the order.

F. Oklahoma

Despite the extensive litigation over orders entered by the Corporation Commission in Oklahoma, one does not find that the Oklahoma Supreme Court has imposed strict requirements on the Commission as to the specificity of its findings. There are probably several reasons for this. One is that the Commission is subject only to the rulemaking provisions of the state administrative procedures act, not the adjudicatory provisions. 97/ The second reason is

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95/ Hystad v. Industrial Commission, 389 N.W.2d 590, 90 O.&G.R. 260 (N.D. 1986).

96/ 389 N.W.2d at 597, 90 O.&G.R. at 273.

97/ See Cameron v. Corporation Commission, 414 P.2d 266, 24 O.&G.R. 444 (Okla. 1966) where the court in response to a claim of insufficiency of the Commission's statement of reasons for its actions in a ruling stated: "We point out that the Corporation Commission is not subject to the Administrative Procedures Act of

(Footnote Continued)

related to the first: the Commission is a court of record when it acts in its judicial capacity. [98] Just as a reviewing court will look to the record of a trial court proceeding without imposing exacting requirements for detailed findings and an explanation of the reasoning on a trial court judge rendering a decision, so too does the Oklahoma court approach the decisions of the Corporation Commission. But there have been several cases which have taken up issues relating to the form of an order or decision.

Order may permit, rather than require, drilling of unit well - In Sellers v. Corporation Commission [99] the plaintiff owner of 2.5 acres of minerals in a 40-acre spacing unit sought to vacate a pooling order of the Commission on the ground that the applicant for the order did not unconditionally propose to drill a well and the Commission did not enter an order requiring the drilling of a well. The Oklahoma Supreme Court held that there is no constitutional or statutory requirement for the applicant to commit to drilling a well or that the order require this.

(Footnote Continued)
1963, 75 O.S. Supp. 1963, Sec. 301, et seq., except Sec. 304(a) thereof, relative to the filing of rules." 414 P.2d at 271. The Oklahoma legislature amended the Administrative Procedures Act in 1987 to provide that, effective July 1, 1988, the Corporation Commission would be required to comply with most provisions of Article I of the Act, which primarily concern rulemaking. Okla. Stat. Ann., tit. 75, Section 250.4(A)(2). The Corporation Commission is still exempt from Article II of the Administrative Procedures Act, which pertains to adjudications and judicial review.

98/ Art. 7, Section 1 of the Oklahoma Constitution provides: "The judicial power of this State shall be vested in . . . a Supreme Court . . . and such Boards, Agencies and Commissions created by Constitution or established by statute as exercise adjudicative authority or render decisions in individual proceedings." Art. 9, Section 19 of the Oklahoma Constitution provides: "In all matters pertaining to public visitation, regulation or control of corporations, and within the jurisdiction of the Commission, it shall have powers and authority of a court of record." See Monson v. State ex rel. Oklahoma Corporation Commission, 673 P.2d 839, 78 O.&G.R. 353 (Okla. 1983).

99/ Sellers v. Corporation Commission, 624 P.2d 1061, 69 O.&G.R. 292 (Okla. 1981).

Necessity of transcript - In Bray v. Cap Corp., [100] the owner of minerals who was force pooled sought review of the Corporation Commission's treatment of a hearing examiner's recommendations where there was no transcript made of the examiner's hearing. The court noted that under the Oklahoma Corporation Commission's Rules of Practice the party taking exceptions to the examiner's summary of evidence is the one to furnish the Commission with a transcript. The court ruled also that the Commission is not required to rule separately on each exception taken by a party.

A similar issue had arisen in Halpin v. Corporation Commission. [101] The court said that the Commission had chosen not to look behind a trial examiner's summation of the evidence unless an adversely affected litigant demonstrated a need for such inquiry. The court believed that there were sound reasons for such a policy. Here the complainants failed to specify in what respect the trial examiner's summary was deficient. In the absence of a showing why a transcript was necessary, denial of a continuance pending completion of a transcript was not a denial of due process under the circumstances where the parties had available a full sound transcription of the proceedings before the trial examiner.

G. South Dakota

The South Dakota court found the findings of fact were adequate in Application of Koch Exploration. [102] Koch sought to unitize part of an oil field for secondary and tertiary recovery. The order of the agency had incorporated the Unit Agreement by reference and coupled it with a concise statement of the underlying facts. Stated the court: "The Board weighed the expert opinion evidence presented to it; its decision finds ample support in the record." [103]

100/ Bray v. Cap Corp., 571 P.2d 1224, 60 O.&G.R. 198 (Okla. 1977).

101/ Halpin v. Corporation Commission, 575 P.2d 109, 59 O.&G.R. 314 (Okla. 1977).

102/ Application of Koch Exploration, 387 N.W.2d 530, 89 O.&G.R. 549 (S.D. 1986). In addition, the parties had not preserved the issue on appeal by timely raising their objection.

103/ 387 N.W.2d at 538, 89 O.&G.R. at 563.

H. Texas

In Musick v. Railroad Commission, [104] the Texas court found the final order denying an exception well permit did set forth sufficient findings of fact and conclusions of law, demonstrating the basis of the agency's decision, for the various purposes that underlie the requirements of the Texas Administrative Procedure and Texas Register Act. In addition, the parties agreed that the facts were undisputed and the court could not, in consequence, conceive that Musick had been prejudiced by the omission of which she complained.

Conclusion of law did not have to be accompanied by findings of fact - The applicant for pooling in Buttes Resources Company v. Railroad Commission [105] was the lessee of 55 acres adjacent to a voluntary unit of 179 acres. The operator of the unit was Buttes, which had formerly held leases on the 55 acres. The applicant made an offer to Buttes to pool all 55 acres. Buttes contended the offer was not fair, but the Railroad Commission found it was fair and entered a pooling order. The court took up an issue of the findings made by the Commission. The Commission's conclusion that the pooling applicant's offer was fair and reasonable was couched in statutory language. The court observed that there was a distinction between findings of fact and findings of law under the Texas administrative procedure act. The court concluded that the statement that the offer was fair and reasonable was a conclusion of law and did not have to be accompanied by underlying findings of fact.

Necessity of specific findings of fact by Railroad Commission - In Railroad Commission v. Palmer, [106] the Texas Railroad Commission had ordered Palmer in 1977 to plug an abandoned well which had originally been abandoned and plugged in August 1963. The Railroad Commission contended that Palmer had reentered the well in September 1963. The Commission order was based on an adoption of the findings of report of a hearing examiner, but the Commission order itself did not state findings or conclusions. Palmer appealed, and the trial court ruled that the Railroad Commission had to make

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104/ Musick v. Railroad Commission, 747 S.W.2d 892 (Tex. App. 1988), error denied.

105/ Buttes Resources Company v. Railroad Commission, 732 S.W.2d 675 (Tex. App., 1987), writ ref'd n.r.e.

106/ Railroad Commission v. Palmer, 586 S.W.2d 934, 64 O.&G.R. 348 (Tex. Civ. App. 1979).

findings on specified facts in order to justify its order. The Railroad Commission appealed this, contending that the findings of the Commission were sufficient to inform Palmer of the reasons for the Commission's decision ordering him to plug the well. The court of appeals held for Palmer, restating the principles set forth by the Texas Supreme Court in Miller v. Railroad Commission. [107] These were first, to restrain any disposition on the part of the Commission to enter its order without full consideration of the evidence and a serious appraisal of the facts; secondly, to inform persons opposing the order of the facts found so that they may intelligibly prepare and present an appeal to the courts; and thirdly, to assist the courts in properly exercising their functions of reviewing the order. In another case, the Texas Supreme Court has stated: "The findings should be such that a court, on reading them, could fairly and reasonably say that they support the ultimate findings of fact required for its decision." [108] It was not clear to the court in Palmer what the findings of the Railroad Commission actually were, so the court remanded for further findings.

Findings found to be adequate - It was urged in Imperial American Resources Fund v. Railroad Commission [109] that the findings of fact in an order granting an application for a Rule 37 exception location well were not sufficient under the Texas Administrative Procedure And Texas Register Act. But the court found the "findings are clear and explicit. They were not couched in terms other than as findings; neither are they mere conclusions, references to, recitals or summations of the evidence, or otherwise insufficient. . . . On the contrary, they are findings upon the material issues to be reviewed and tested under the substantial evidence rule." [110] Because the findings were not set forth in statutory language, it was not required that they be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

No judicial review of individual findings without review of order - One should note also the case Champlin Exploration, Inc. v.

107/ Miller v. Railroad Commission, 363 S.W.2d 244, 245-6 (Tex. 1962).

108/ Railroad Commission v. Graford Oil Corporation, 557 S.W.2d 946, 950, 59 O.&G.R. 338, 342-43 (Tex. 1977).

109/ Imperial American Resources Fund v. Railroad Commission, 557 S.W.2d 280, 59 O.&G.R. 553 (Tex. 1977).

110/ 557 S.W.2d at 286, 59 O.&G.R. at 562.

Railroad Commission of Texas, [111] where the court held that the administrative procedures act's provision for judicial review for one "who is aggrieved by a final decision in a contested case" [112] did not furnish a basis for review to a party who agreed with the order, but not one of the findings on which the order was based. The party was afraid the finding would be detrimental to it in another judicial proceeding. The statutory provision was held to refer to the final order of the agency, not to individual findings and conclusions with which a claimant disagrees.

I. Wyoming

Necessity of specific findings of fact - The Wyoming Supreme Court has required very detailed findings of the state's conservation commission, albeit recognizing that there are practical limits to what the agency can determine as to geological and engineering facts. The case in which the court set forth its standards and the rationale of such requirements, Pan American Petroleum Corporation v. Wyoming Oil and Gas Conservation Commission, [113] grew out of an application for a permit for a well at an exception location by Pan American. The reservoir involved had first been discovered in 1914, and drilling took place over the years without spacing rules. The passage of the Wyoming Oil and Gas Conservation Act was in 1951. In 1965 the Commission adopted Rule 302, which was a statewide 40-acre spacing rule. The well was to be in the center of the 40 acres with a 200-foot tolerance and a requirement that the well be 920 feet or more from any other well location in that pool. Rule 303 provided a method to obtain exceptions to 302. Marathon opposed Pan American's application. The Commission denied the application on the basis that Pan American's existing wells would adequately drain the tracts. In 1967 the Wyoming legislature amended the Act to include a provision for protection of correlative rights in the exercise of the power to establish drilling units. Pan American again sought an exception well permit. The Commission again denied the application, entering certain findings, including one that the evidence submitted "does not, without undue speculation,

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111/ Champlin Exploration, Inc. v. Railroad Commission of Texas, 627 S.W.2d 250, 73 O.&G.R. 81 (Tex. App. 1982) writ ref. n.r.e.

112/ Tex. Rev. Civ. Stat. Ann. art. 6252-13a Section 19(e) (Supp. 1981).

113/ Pan American Petroleum Corporation v. Wyoming Oil and Gas Conservation Commission, 446 P.2d 550, 32 O.&G.R. 501 (Wyo. 1968).

establish sufficient cause for the granting of an exception to Rule 302 [114]/ for the protection of applicant's correlative rights." The court observed that agencies must resort to the testimony of experts, and it is for the commission as trier of fact to determine the weight of the evidence. It is for the courts "to see to it that the acceptance or rejection of such evidence, in whole or in part, is on a reasonable and proper basis." [115]/

To aid the court, the state administrative procedure act requires the agency in a contested case to include "findings of fact and conclusions of law separately stated." The court said that such requirement imposes upon an agency the duty to make findings of basic facts upon all of the material issues in the proceeding and upon which its ultimate findings of fact or conclusions of law are based. Unless that were done there could be no rational basis for judicial review. The court had to be shown what underlying evidentiary facts the agency relied upon. Findings of those basic facts would not be implied from ultimate findings. Without this, "there could be no assurance that an agency has made a 'reasoned analysis' of all the material evidence." [116]/ Furthermore, "orderly review requires that the primary basic facts must be settled before it can be determined that ultimate facts found by an agency conform to law. Failure of an agency to meet its responsibilities in the premises makes its determination susceptible to the charge that the order entered is contrary to law." [117]/ Here the Commission gave only ultimate facts or conclusions of law and not basic facts. The court set forth the following standard:

> All of the material evidence offered by the parties must be carefully weighed by the agency as the trier of the facts; conflicts in the evidence must be resolved, and the underlying or basic facts which prompt the ultimate conclusion on issues of fact drawn by the agency in sustaining the prima facie case made, or in rejecting it for the reason it has been satisfactorily met or rebutted by countervailing evidence, must be suffi-

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114/ 446 P.2d at 553.

115/ 446 P.2d at 555.

116/ 446 P.2d at 555.

117/ 446 P.2d at 555.

ciently set forth in the decision rendered. Otherwise the proceeding is not ripe for review. [118]

The matter was remanded to the Commission for further consideration. [119]

In Larsen v. Oil and Gas Conservation Commission, [120] the Wyoming Supreme Court vacated an order of the Commission for an 80-acre spacing because the Commission had apparently failed to make administrative findings required of it by law and further that the Commission had considered economic waste in establishing the unit, something not permitted by the Wyoming statute. The court ruled that before a drilling unit could be established the Commission must find that such a unit was necessary to protect correlative rights or to prevent waste. The Commission was required by the state administrative procedures act to make findings of basic facts upon which its ultimate findings of fact or conclusions were based, without which there could be no rational basis for judicial review. [121] The court went on to state: "It is impossible for this court to discharge its appellate obligation of determining whether or not findings of fact are supported by the evidence, and lawful, logical and reasonable conclusions have been drawn, unless a detailed finding of fact on all the material issues is made by the administrative agency." [122] The Commission's findings of fact here made no mention of the correlative rights of the appellant royalty and overriding royalty owners. Also, the findings did not indicate the amount of oil that could be recovered "without waste" as that phrase was defined by the statutes.

118/ 446 P.2d at 557.

119/ On remand, the Commission entered additional findings. But the court still did not consider these sufficient to support the Commission's denial of the permit application. Accordingly, the decision was arbitrary, and the district court's direction to the Commission for the issuance of the permit was affirmed. Marathon Oil Company v. Pan American Petroleum Corporation, 473 P.2d 575, 38 O.&G.R. 77 (Wyo. 1970).

120/ Larsen v. Oil and Gas Conservation Commission, 569 P.2d 87, 61 O.&G.R. 246 (Wyo. 1977).

121/ The court looked to Pan American Petroleum Corporation v. Wyoming Oil and Gas Conservation Commission, 446 P.2d 550, 32 O.&G.R. 501 (Wy. 1968).

122/ 569 P.2d at 91, 61 O.&G.R. at 252.

The court remanded to the Commission for further proceedings. It stated: "At a minimum, in order to determine the extent of the correlative rights in question, the Commission must establish: (1) the amount of recoverable oil in the pool; (2) the amount of recoverable oil under the various tracts; (3) the proportion that 1 bears to 2; and (4) the amount of oil that can be recovered without waste." 123/ It added that the Commission had to make this finding "insofar as it is reasonably practicable to do so." 124/

123/ 569 P.2d 92, 61 O.&G.R. 255. The court was adopting the standard of the case of Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809, 18 O.&G.R. 69 (N. Mex. 1962).

124/ 569 P.2d at 92, 61 O.&G.R. at 255. See Big Piney Oil and Gas Company v. Wyoming Oil and Gas Conservation Commission, 715 P.2d 557, 91 O.&G.R. 620 (Wyo. 1986) for a case in which the test of Larsen was met.