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THE ADMINISTRATION OF THE TEXAS AND COLORADO OIL AND GAS CONSERVATION STATUTES

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INTRODUCTION

Oil and gas are natural resources which cannot be replaced, and the power of the state to impose reasonable regulations to prevent waste in the production, handling, and marketing thereof, is undoubted.[1]

Oil does not produce itself. Crude oil, as it exists at the surface, possesses no energy with which to expel itself from the pores of a rock. It is necessary that crude oil be associated with an energy source before it can be moved into the bottom of a well and raised to the surface of the earth. The two chief sources of energy found in most petroleum reservoirs are gas expansion and water encroachment.[2]

One of the main problems of conservation is to apply remedies or measures to maintain, as far as possible, reservoir energy. Failure to do so, leaves a greater part of the oil in formation, for which there is no recovery.[3] Other ways from which waste may result are evaporation, seepage, fire, damage to underground formations due to improper methods, premature abandonment of stripper wells, loss of gas to the air by flaring, and an unwillingness on the part of the companies to trade information. Most of the Commission's regulations are directed to the prevention of physical waste, e.g., open pit storage of oil, damage to mineral deposits, pollution and surface damage, open flows and control of wild wells, gas-oil ratios, and many more.[4]

The main controversy about objectives of regulation concerns the extent to which proration, i.e., the assignment to each well of a rate of flow less than its capacity, is attributable to conservation motives, and the extent to which it is designed to maintain prices. The title of one of the many books on the subject, aptly puts the question: "Oil. Stabilization or Conservation?" It seems apparent that proration has helped to maintain the price of oil.

THE COMMISSIONS AND THEIR STAFFS

The Railroad Commission of Texas was created in 1891 by constitutional amendment. It is composed of three members with six-year overlapping terms, at first appointed by the Governor, but since the Constitutional Amendment of 1894, elected by the people.

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[1] Champlin Refining Co. v. Corporation (Okla.) 51 Fed. 2d 823 (1931).

[2] Interstate Oil Compact Commission, Oil and Gas Production.

[3] Some of the oil may be produced by secondary recovery methods.

[4] The Oil and Gas Conservation Commission of the State of Colorado. Rules 201-341.

The chairmanship is rotated in such a way that each commissioner is chairman for the two years immediately preceding time for re-election. Apart from the chairmanship, there is no significant division of duties among commissioners.

Control of oil and gas production and pipe lines is handled through the Oil and Gas Division, for whose activities the Commission spends about seventy per cent of its annual funds. The division had 265 employees in January, 1943, of whom about half were stationed in Austin, and about half in the offices of the ten districts. Most staff positions are filled on a political patronage basis. Commissioners have frankly declared that appointments are rationed, one-third to each commissioner.[5]

In 1927, the Colorado Legislature passed an Act forbidding the waste or wasteful use of natural gas, creating the Colorado Gas Conservation Commission. Since that time, the Gas Conservation Commission has endeavored to secure the passage of a better conservation law.[6] After many attempts and frustrations, and being opposed by a strong oil lobby, the gas Conservation Commission, in 1951, finally got the present conservation law enacted.[7]

The Act provides for a Commission of five members, four of whom shall be appointed by the Governor. Those appointed must have at least five years experience in the production of oil and gas, and be at least thirty years of age. All members appointed by the Governor, shall serve for a period of four years without compensation. The fifth member of the Commission is the State Oil Inspector, who is the only paid member of the Commission.[8]

The employees of the Commission vary from time to time, according to the needs of the Commission. The office staff consists of two or three secretaries, and the field force consists of one to three engineers. The employees of the Commission are not picked on a political patronage basis, as is the case in Texas.

INFORMAL PROCESSES

A very large part of the Railroad Commission's business is handled without hearings of any kind, formal or informal. The statute, however, provides that no rule, regulation, or order shall be adopted by the Commission, except after hearing, upon at least ten days notice.[9] Nevertheless, hearings are dispensed with in certain situations.

If the question is whether or not a well has been properly completed and equipped, the way for the Commission to discover the facts, is to have its agent examine the well, not to hold a hearing. If the question is whether or not a well should be classified

[5] Kenneth Culp Davis and York Y. Willbern, Administrative Control of Oil Production in Texas (1944) 22 Texas Law Review 152.

[6] Warwick M. Downing, Conservation of Oil Resources—Colorado's Position Today (1950), Rocky Mountain Law Review, Symposium on Natural Resources Law.

[7] Colorado Oil and Gas Conservation Act of 1951.

[8] *Ibid.* See 2.

[9] Texas Stat. (Vernon, 1936) art. 6036a.

as marginal, the way to ascertain the well's productive capacity, is for the Commission to accept without question, the statements of the operator, or require the operator to run a production test, or have the Commission's own engineers run a production test.

In a system of administration of this character, decisions by the Commission and staff, even where discretion is wide, will naturally or normally be made in many instances without any proceeding that can be characterized a hearing.

Substantive rights hinge, in large measure, on informal investigations and inspections of many kinds. The Commission's engineers in the field may be lenient or strict, fair or unfair. Before issuance of formal rules, the Commission holds hearings; yet the operator may be as vitally affected by statements of Commission policy, in letters to supervisors, concerning the standards they are to require in the supervision of, say, casing and plugging practices.

From the practical standpoint of getting the Commission's work done as efficiently as is consistent with private interests, it is difficult to see how hearings on such matters of administrative detail could be held.[10]

The Colorado Oil and Gas Conservation Act of 1951, provides that no rule, regulation, or order, or amendment shall be made by the Commission without a hearing, upon at least ten days notice.[11] The Colorado Statute wording is very similar to the Texas Statute.

The Conservation Commission has, up to now, strictly adhered to the statutory requirement of a hearing, but it is submitted that if Colorado becomes a major oil producing state, such as Texas, the procedure may become burdensome.

THE REQUIREMENT OF OPPORTUNITY TO BE HEARD

Whether or not a hearing should precede particular administrative action, depends upon statutory and constitutional requirements.

Both the Texas statute and the Colorado statute provide that "no rule, regulation, or order shall be made by the Commission without a hearing", with certain exceptions.

Literal interpretation of the term "order", in these statutes, would be intolerable if not absurd. The statute, thus construed, would require hearings to precede each "order", the implication being that no hearing is required when the Commission takes no action. This requires both too little and too much, for it is probably the opposite of what good sense would require with respect to most of the Commission's activities having to do with permits, certificates of compliance, exemptions and exceptions to rules.

To construe the statutes literally would render them capricious and unreasonable and that is not what the legislatures could have intended. So long as the statutes stand, the term "order" should

[10] Kenneth Culp Davis and York Y. Willbern, Administrative Control of Oil Production in Texas (1944) 22 Texas Law Review 152.

[11] Colorado Oil and Gas Conservation Act of 1951, Sec. 8 (b).

be broadly interpreted to cover the adjudication of all disputes of fact where the hearing process is the appropriate method for settling the controversy, and the term "order" should be narrowly construed so as to exclude action which may appropriately rest upon inspections or examinations or tests, or upon conversations or correspondence.

Of course, whatever the statute may provide, a party with a substantial property interest at stake is constitutionally entitled to hearing on any disputed questions of fact concerning him or his property which may be appropriately resolved by the process of hearing testimony or taking other evidence.[12]

The Texas statute requiring hearings, expressly provides two exceptions:[13] In emergency situations the Commission can issue emergency rules, regulations, and orders, but the rule or order shall remain in effect no longer than fifteen (15) days from its effective date. The provision for emergency rules is desirable and wise and has occasionally been invoked by the Commission.

The other exception provides that the Commission may, without prior notice, revoke any rule, regulation, or order promulgated by it and it may amend any regulation, rule or order, provided the subject matter of the amendment was considered at the original hearing. The seeming authorization for revocation or amendment of rules or orders without hearing is ill-considered and badly drafted. Revocation of a rule or order may affect private rights just as seriously as promulgation of a rule or order. For example, a certificate of compliance permits the production of oil, and the issuance of a certificate is in the nature of an order. The Commission is specifically empowered to cancel such a certificate. If the issuance is an order, the cancellation is a revocation of an order. But if facts concerning the legality of an operator's acts are disputed, it would be unfair to cancel his certificate without opportunity for hearing. The provision for amendment of rules or orders without a hearing seems just as strange. Because of changing conditions, even though the subject matter of the amendment was considered in the first hearing, a hearing should be had before the amendment becomes effective.

Since most matters concerning rules are considered in some degree at the original hearing, the statute seems to confer a great deal of liberty to the Commission to change rules without a hearing. In practice, however, the Commission usually holds hearings before making significant changes, even when the subject has been previously considered.

The corresponding provision in the Colorado Oil and Gas Conservation Act has been more intelligently drafted.[14] It provides that the Commission can issue emergency orders without notice

[12] Kenneth Culp Davis, The Requirement of Opportunity to be Heard in the Administrative Process (1942) 51 Yale L. J. 1093.

[13] Tex. Stat. (Vernon, L936) art. 6036 a.

[14] Colorado Oil and Gas Conservation Act of 1951, Sec. 8 (b).

of hearing, but it does not allow the Commission to revoke any orders or regulations or amend them without a hearing. It reads, "No rule, regulation, order, or amendment thereof, shall be made by the Commission without a hearing . . ." This provision adequately provides for the requirement of opportunity to be heard, not only where a substantive right is involved, but also where one may be involved.

TYPES OF HEARINGS

The Railroad Commission properly recognizes that adjudication is different from rule making and calls for a different procedure. Adjudication is the determination of controversies between parties, one of whom may be the Commission. Rule-making is a distinctive function which consists in formulating regulations having general application, not limited to named parties.[15]

The procedure pattern for adjudication is that of taking evidence subject to cross-examination; a rule-making hearing may properly be nothing more than a mass meeting at which speeches are made and motions or resolutions are adopted by parliamentary methods. The most important difference is that in an adjudication, findings must be based upon evidence in a formal record, so that full rights of rebuttal, explanation, and cross-examination are provided, whereas in a rule-making proceeding the tribunal may properly regard the record of the hearing as only supplementing information which the tribunal secures elsewhere.[16]

Probably no one within the Commission has specifically adverted to the need for distinctive hearing procedures for adjudication and for rule-making. It is therefore interesting and significant that the Commission, by and large, has intuitively felt the need for different types of proceedings for the performance of the different functions, the result being the evolution of two types of proceedings, often called "statewide hearings" and "special hearings".

STATEWIDE HEARINGS

For adoption of general rules and regulations, field rules, and monthly proration schedules, so-called statewide or general hearings are customarily held. They are usually attended by several hundred. They are decidedly not like trials but more like mass meetings or conventions. They serve as a forum at which any problems of general interest to the oil industry may be considered.

Although some statewide hearings are called for business other than proration, most statewide hearings are regular monthly meetings, in which all matters of general interest may be considered, but which are devoted primarily to the adoption of proration schedules.

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[15] Fuchs, Procedure in Administrative Rule-Making (1938) 52 Harvard Law Review 259.

[16] Sometimes denominated quasi-judicial and quasi-legislative.

A mere description of the prominent characteristics of the statewide hearings should be enough to show that they are not trials. The purpose is not to make a decision on the record of the evidence. Statewide hearings are public meetings at which all points of view may be freely expressed, in order that the Commission's policies and rules may be guided in part by the desires of those affected. Speeches made at the meetings are not and ought not to be considered as evidence. Rules and policies adopted are not and cannot be supported by substantial evidence, because evidence has to do with questions of fact, and usually the questions dealt with at the statewide hearings are questions, not of fact, but of judgment or discretion.

The nature of statewide hearings is too much misunderstood. Lawyers here and there who are accustomed to courtroom proceedings seem to think that the forms of the courtroom should be carried into the statewide hearings.

Rightly understood, the system of statewide hearings is an outstanding achievement in government. It is fair and efficient. The proration task is an especially formidable one. The Commission must fix the state allowable, divide the allowable among the various fields, and fix the allowable of each well in the various fields. Yet the Commission has succeeded in developing a procedure whereby every interest not only has full opportunity to be heard, but is even positively encouraged to examine and criticize the Commission's materials and methods.

The system proves that government by bureaucracy can still be government with the consent of the governed, that is, regulation with the approval and assistance of the regulated.

Since the Colorado Oil and Gas Conservation Act does not provide for proration, the problem of statewide hearings is not involved. The statute provides that the Commission shall prescribe rules and regulations governing the practice and procedure before it.[17] The Commission could, if the necessity arose, carry on hearings equally as efficient and democratic as the statewide hearings in Texas.

Notice of Hearings

The Texas statute provides that no rule, regulation, or order shall be adopted except after hearing upon at least ten (10) days notice given in the manner and form prescribed by the Commission.[18]

The chief reliance in letting the public know of statewide hearings is upon the daily press and trade journals, which are wholly adequate for that purpose. It is generally known that the regular proration hearing is held between the 15th and 20th of each month, and extraordinary statewide hearings are always featured in the trade news.

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[17] Colorado Oil and Gas Conservation Act of 1951, Sec. 8 (a).

[18] Tex. Stat. (Vernon, 1936) art. 6036 a.

Notice of proposals for changes in field rules or in the rules for an area are sent to all operators in the field or area. If a proposal concerns a single well or wells on a single lease, notice is sent to all adjoining operators or to all owners or operators for a considerable distance. Doubts about what parties are entitled to notice are resolved in favor of giving notice. Announcements of special hearings are also frequently published as news items.

The Colorado statute assures that adequate notice shall be given, that is, sufficient notice of the subject matter involved to enable the party to formulate a defense.

The statute provides that there shall be at least ten (10) days notice and that notice shall be given either by publication or by personal service, and in addition, notice by publication must be made in a newspaper of general circulation in the county in which the land is affected. If the Commission decides to give notice by personal service, the service may be made in the same manner as that provided for in civil actions in the District Courts of this state. The notice shall issue in the name of the state, shall be signed by the Commission, shall specify the time and the place, and briefly state the purpose of the hearing. In cases of violations of rules, regulations or orders, notice must be served on the interested parties in the same manner as is provided in the rules of civil procedure for the service of process in civil actions in the District Court of this state.[19]

Any person desiring notification of hearings can file with the Secretary his name and address and the areas he is interested in, and receive notice of all hearings relative to his interests.[20]

PARTIES AND THEIR REPRESENTATIVES

Anyone who cares to do so may participate in the statewide hearing, even though no interest is shown. Participation in special hearings is limited to interested parties, although no definition of this term is given.

Parties are usually represented by attorneys in important hearings. Some lawyers make a specialty of practice before the Commission. Attorneys employed by the major companies spend a large part of their time before the Commission and its examiners. The Commission and its staff express no preference for representation of parties by attorneys; on the contrary, those with training or experience in engineering or operating are often favored.

Since the Colorado Oil and Gas Conservation Commission is not concerned with proration, the problem of who is an interested party in a statewide hearing is not involved.

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[19] Colorado Oil and Gas Conservation Act of 1951, Sec. (c) and (d).

[20] The Oil and Gas Conservation Commission of the State of Colorado, Rules and Regulations, Rule 517.

The Commission does state, in its rules of practice and procedure, certain situations in which a party will be considered an interested party.[21]

The Commission has no preference as to who should represent parties before it. Heretofore, those appearing before the Commission have been exclusively represented by lawyers. The Commission is not interested in who appears as council, so long as the elements of fair play are complied with.

EXAMINERS

Although the three commissioners usually conduct statewide hearings, it is very seldom that one commissioner is present at a special hearing. Occasionally requests are made for rehearing before the Railroad Commission itself, and such requests are usually granted.

The usual presiding officers in a special hearing are two examiners of the staff of the Oil and Gas Division. These two examiners usually hear the cases together. One, a lawyer, presides and questions witnesses. The other, an engineer, asks some questions and later assists in the preparation of the examiner's report.

In few cases do examiners make any pre-hearing study or other preparation, and even then, the amount of effort expended in advance of the hearing is usually slight. The initiative is usually supplied by the applicant.

Hearings are quite informal, usually more nearly resembling round table conferences than trials. Examiners grant or deny motions or informal requests for postponements or continuances, entertain objections of procedural points, pass upon admission of evidence, and otherwise manage the hearing process. The examiners assume the affirmative responsibility of building a complete and clear record, often asking questions for the sole purpose of getting answers in the record.

The Colorado Oil and Gas Conservation Commission does not make use of trial examiners. The need has not yet arisen.

Three members of the Commission constitute a quorum for the transaction of business, and for the holding of hearings.[22]

At the hearing before the Commission, an attorney for the Commission, and an engineer of the Commission are always present. There is really no need for the Commission to have their experts present, since each commissioner is either a lawyer or an engineer with years of experience.

Most of the witnesses who testify before the Commission are experts. To save time and operate more efficiently the Commission assumes that they qualify as experts unless challenged by one of the parties. To avoid voluminous records, to save money and time,

[21] The Oil and Gas Conservation Commission of the State of Colorado, Rules and Regulations, Rule 515.

[22] The Oil and Gas Conservation Commission of the State of Colorado, Rules and Regulations, Rule 520.

the Commission usually has each expert briefly but concisely state his position, and the conclusion he has reached. The Commission recently saved much valuable time by use of this method.

Hearings before the Commission are conducted without rigid formality.[23] Emphasis is placed on a fair and speedy hearing.

SUBPOENAS AND PUNISHMENT FOR CONTEMPT

In Texas, subpoena provisions are of little practical importance, because needed information is almost always either supplied voluntarily at hearings, or contained in the reports required by the Commission, or secured by the Commission's almost unlimited power of inspection.[24]

The statutory power of the Railroad Commission to "punish for contempt or disobedience of its orders as the district court may do" arrests attention.[25] This is contrary to the concept of separation of powers. Only a judicial officer may commit for contempt. The general practice throughout the country has been to provide that administrative agencies may apply to a court for an order requiring a reluctant witness to testify, disobedience then being contempt of court.

Although the Colorado Oil and Gas Conservation Act does not give such sweeping powers as does the Texas statute, it does not provide the Commission with the power to require the making and filing of reports and the inspection by the Commission of the producer's records.[26]

The Act also provides the Commission with the power to summon witnesses and require production of records. Any district court within the state can compel the witness to attend a hearing and produce his records. The district court shall have the power to punish for contempt, for failure to comply with the court's order.[27]

As in Texas the provision for subpoena is of little practical importance since the Commission has in its files almost every record upon which an issue would be raised.

RULES OF EVIDENCE

The Railroad Commission and its examiners neither apply or purport to apply the rules of evidence. Any information anyone wants to offer at a hearing will be admitted, the only limitations being considerations for relevancy or usefulness and the needless cluttering of the record. Letting everything in for what it is worth may have its disadvantages, for records are unduly lengthened and unreliable information may occasionally influence a decision.

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[23] *Ibid*, Rule 519.
[24] Tex. Stat. (Vernon, 1936) art. 6008.
[25] Tex. Stat. (Vernon, 1936) art. 6024 and 6025.
[26] Colorado Oil and Gas Conservation Act of 1951, Sec. 11.
[27] *Ibid*. Sec. 9 (a) and (b).

The Conservation Commission of Colorado conducts its hearings without rigid formality. In general, the rules of evidence applicable before a trial court without a jury shall be applicable, providing that such rules may be relaxed, where, by so doing, the ends of justice will be better served.

Any person testifying in support of or in opposition to a rule, petition, or complaint, or motion shall be required to do so under oath or affirmation. Full opportunity shall be afforded all interested parties at a hearing to present evidence and to cross-examine witnesses.[28]

BRIEFS AND ORAL ARGUMENTS

Attorneys before the Railroad Commission usually file briefs. Briefs are considered part of this record. Oral arguments are made before examiners. A good deal of the testimony is argument. Little attempt is made to limit argument to facts and to reserve a time when argument as such may be presented. Arguments, at whatever stage of the hearings they may be made, form a part of the record unless they are expressly made off the record.

Usually, there is no oral argument made before the commissioners unless the Commission grants special permission for oral argument. All hearings before the Colorado Conservation Commission are conducted before at least three commissioners, and oral argument is permitted. The filing of briefs is encouraged.

TRANSCRIPTS

Most of the records taken before the Railroad Commission are taken in shorthand, and never transcribed. Records are available to any parties who are willing to pay the cost of transcribing them. Whenever the record is not transcribed, the memories and the notes of the staff members who have attended the hearing afford the basis for decision.

Proceedings before the Colorado Conservation Commission are transcribed and made a permanent record. The records are placed in the Commission's files and are made a matter of public record.

OFFICIAL NOTICE

Just as a court takes judicial notice of what is common knowledge and of general information bearing on questions of law and policy, so the Commissions take official notice of what to them and their staffs is common knowledge. One of the purposes of the administrative process is to gain the advantages of special knowledge and this special knowledge or expertness should be utilized to the full.

The crucial problem concerning official notice is the extent to which the Commissions can resort to their files to secure specific information which is not part of the record of the particular

[28] The Oil and Gas Conservation Commission of the State of Colorado, Rules and Regulations, Rules 519 and 521.

adjudication. In quasi-legislative proceedings, the Commissions can usually seek information from all sources whatsoever, without limitations. But in quasi-judicial proceedings there should be an opportunity for each party to meet and rebut the evidence, and test it with cross-examination.

The Railroad Commission, in the past, has failed to recognize the distinction between the two types of hearings and considers all previous records incorporated in the record before it. In quasi-judicial proceedings, failure to incorporate the past records by specific reference, may be a denial of procedural due process of law because the parties may not have a chance to rebut the secret evidence used against them.

The Supreme Court of Texas, in the past, has refused to enforce the requirements of procedural due process and has encouraged the Commission in using extra record information.[29] That court has held: "It would be placing a useless and intolerable burden on the Commission to require it to make an appeal proof record in every instance." Is it useless to give an opposing party a chance to meet evidence which influences a tribunal to make an adverse decision? What the Texas court must have had in mind is that the procedural protection should be afforded at the judicial stage of a proceeding rather than at the administrative stage.

One of two alternatives must be chosen to meet the due process demands of the Federal Constitution. There must be either a hearing before the Commission which will assure opportunity to meet all opposing evidence on disputed questions of fact, or there must be a completely *de novo* judicial hearing.

The Colorado Oil and Gas Conservation Act of 1951 provides that anybody adversely affected by any rule, regulation, or order may bring an action against the Commission or the State Oil Inspector or both.[30] The trial shall consider all the evidence—shall hold a trial *de novo*—.[31]

A District Court of Colorado has said, "While it is true that the proceedings in review must be conducted as a trial *de novo*, the issue at the trial *de novo* is whether or not the orders of the Commission complained of are valid . . . All the court can say here is that the orders complained of are valid and should be enforced, or that they are not valid and should not be enforced . . . The test to be used by this court is whether or not the evidence before the court will sustain the orders of the Commission . . ."[32]

It is submitted that if the Commission found disputed facts from extra record material and the district court found that the

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[29] Cook Drilling Co. v. Gulf Oil Corp., 139 Tex. 80, 161 S.W. (2d) 1035 (1942).

[30] Colorado Oil and Gas Conservation Act of 1951, Sec. 10 (a).

[31] *Ibid.* Sec. 10 (c).

[32] Sharples Oil Corp., Union Pacific R.R. Co., Texas Co., v. Oil and Gas Conservation Commission of the State of Colorado, Phillips Petroleum Co., California Co., Stanolind Oil and Gas Co.

evidence would sustain the order of the Commission, there would be a denial of due process.

Under this system, the aggrieved party never does get a fair hearing on the merits of his case. He is given no such hearing before the Commission because he has no chance to rebut the secret evidence used against him. He gets no hearing on the merits in the district court, because the court does not decide on the merits but limits itself to the question of whether or not the evidence before the court will sustain the orders of the Commission.

It should be noted that it is permissible for the Commission to go beyond the record to get undisputed facts. If this were not so, it would unduly limit the appropriate scope of official notice. But it would be a denial of due process for the Commission to find disputed facts from extra record sources.

EXAMINERS REPORTS

The responsibility for preparing the examiner's report is primarily that of the examiner who has presided at the hearing, but the report is by no means that of one individual. At least two examiners usually collaborate on the report and sign it, but others who may or may not have been present at the hearing often participate. Recommendations on engineering problems are considered to be those of the engineering department, not those of any individual.

Intermediate reports should be submitted to the parties. Letting the parties know what materials have come to the attention of those who make the final decision is of considerable consequence in satisfying the parties that they have had a fair hearing. One of the ingredients of many of the Commission's decisions is the expert judgment of an officer who has not attended the hearing, and unless an intermediate report is served on the parties, they may be permanently deprived of opportunity to meet the materials which become decisive.

The Oil and Gas Conservation Commission does not use trial examiners. We are therefore not concerned with examiners' reports to the commissioners.

DECISION MAKING

One day each week, the Railroad Commission holds a conference to make decisions. The Director of Production usually attends, as well as the examiners who heard the case. The group considers each file as well as the examiners' report, pertinent exhibits, and sometimes record information.

The Colorado Oil and Gas Conservation Commission meets after each hearing to make their decision. The Commission goes over the evidence and briefs if any have been filed. The commissioners do not have to go over a trial examiner's report because no trial examiner is used. The findings and order of the Commission must be unanimous.

CONFERENCES BETWEEN COMMISSIONERS AND PARTIES

It is the general practice of the commissioners to consult with the parties affected both before and after a hearing. Effective regulation with the consent and cooperation of the regulated, demands that the commissioners should maintain contacts with those affected. The life of the legislative process lies largely in informal pressures, and that is as true when an administrative agency is exercising the legislative function as it is when the legislature itself is doing so.

But the Commission should designate which proceedings are in the nature of adjudications and that with respect to those proceedings would take great care to refrain from consulting with any party about the particular case in the absence of opposing parties. The objective should be to permit, even encourage, informal consultation with parties concerning the Commission's legislative activities, but at the same time to protect against extra-record influences when the Commission is performing a judicial function. To permit a party to an adjudication to talk *ex parte* to the man who decides, is to violate the elementary requirements of procedural fairness.

FINDINGS

The findings of the Colorado Oil and Gas Conservation Commission are in writing and are a matter of public record. The findings of the Commission must be based on findings of fact.[33]

There is a strong tendency on the part of state courts, and an almost universal practice in the Federal Courts, to require that an order or decision of an agency be accompanied with a statement by the agency of the mental processes of the agency by which the evidence was weighed and added up to a finding of ultimate fact. This requirement is not predicated on any constitutional ground, but seems rather to be deemed a matter of administrative morality by the Courts.[34]

Whether the Conservation Commission would be required to give the reasoning behind their findings, in the light of the trial *de novo* provision in the conservation act, is questionable.

CONCLUSIONS

(1) Colorado's non-political Conservation Commission can probably operate more fairly and efficiently than can the political Railroad Commission of Texas.
(2) The term "order" as used in the statute should be construed, for the sake of efficiency, to exclude reports and engineering tests.
(3) The provision in the Texas statute for amendment and cancellation of rules and orders without a hearing may be a denial of due process.

[33] Oil and Gas Conservation Commission of the State of Colorado, Rules and Regulations, Sec. 8 (b).
[34] Hurst, Administrative Law Outline, Spring Quarter, 1950.

(4) The "statewide" hearing seems to be a very democratic means for the purpose it serves.
(5) The provision for notice in the Colorado Conservation Act more than meets every element of notice and adequacy thereof.
(6) The requirement of the Conservation Act that a transcript of the hearing and the findings of the Commission be made a matter of public record, makes it easier to determine if the Commission has used outside evidence on which they based their findings.
(7) The issues at the trial *de novo* should not be whether the evidence will support the order of the Commission, but, (1) was there waste? (thus eliminating the problem of denial of due process by the Commission's use of secret evidence) and, (2) Is the Commission's order reasonable?
(8) The requirement that the commissioners must preside at the hearing more adequately satisfies one that he will get a fair hearing, and assures that the one who hears will be the one that decides.
(9) Either the Commission should include more of their reasoning in their findings or the trial *de novo* provision of the statute should be rewritten.

SUPREME COURT WARNS LAWYERS

In *Fraka v. Malernee* decided by the Colorado Supreme Court on February 15, 1954, Justice O. Otto Moore used the following language which should be carefully noted by every member of the Bar.

> The foregoing facts point out the necessity for this court to command the attention of members of the bar, and to sound a warning that failure of a lawyer to observe and comply with our Rules of Civil Procedure may result in disaster to the cause of his client.
>
> Because the writ of error in the instant cause must be dismissed, and for the reason that there seems to be a growing tendency among members of the bar to believe that briefs can be filed whenever it is convenient, and that the Rules of Civil Procedure relating to proceedings before this court can be ignored or violated without serious consequences, we feel compelled to say that failure to follow the established rules of appellate practice may be fatal to a cause. Our court intends to enforce the Rules of Civil Procedure, and we solicit the co-operation of members of the bar, with the firm belief that they will approve an orderly procedure in appellate practice which can only be brought about by the observance of the rules which must govern that practice.