Opinion No. 51-5397

August 9, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. R. R. Spurrier, State Geologist Secretary and Director New Mexico Oil Conservation Commission Santa Fe, New Mexico

*{*90}* Recently you requested an opinion from this office as to the constitutionality of the New Mexico Oil Conservation Act of 1935, as amended, being Chapter 69, 203 et seq., N.M.S.A. In that request you asked that we consider objections as to its constitutionality stemming from the contention that the act constitutes an unlawful encroachment upon the appointive power of the Governor and unlawfully delegates legislative and judicial power to the executive branch of the Government, namely the Oil Conservation Commission itself, in violation of Article 3 of the Constitution of the State of New Mexico providing for the separation of the three branches of government. You also requested that we consider the contention that certain provisions of the act are void for the reason that they are not clearly expressed in the title of the Act as required by Section 16 of Article IV of the Constitution of the State of New Mexico.

It appears from this request that these are the precise points of inquiry made of you by the United States District Attorney and that the reason for his inquiry is the fact that these questions have arisen in a matter pending in the United States District Court for the District of New Mexico in which the validity of the Oil Conservation Act of New Mexico and the rules and regulations issued thereunder are being considered.

It appears further that a contention has been made that general orders made by the Commission and monthly proration orders as to allowable oil production are void for the reason that no public hearing was had, as required by statute, and pursuant to notice. It is further contended that the Oil Conservation Act of New Mexico and all rules, regulations and orders are unconstitutional upon the grounds as hereinbefore set forth. A further reason advanced in support of the contention that these orders are void is the alleged failure of the Commission to comply with provisions of the Statute requiring filing of such orders, etc., with the librarian of the State Supreme Court.

In order to enable this office to consider the various problems presented, you have requested us to *{*91}* provide you with an opinion as to the constitutionality of both the act itself and the orders issued by the Commission.

I will endeavor to discuss the several contentions made as to the asserted unconstitutionality of the Oil Act and the alleged invalidity of the rules, regulations, and orders issued by the Commission to the extent possible as inquired into by the U. S. District Attorney.

In general, where two constructions of the statute are possible, and the determination of the question of constitutionality is necessary, the court is bound to construe the statute so as to avoid the conclusion of unconstitutionality. In Gamble v. Velarde, 36 N.M. 262, the court said, quoting in part from 31 N.M. 254:

"The Legislature is a coordinate branch of our state government. Its prerogative in the matter of legislation is to be construed solely from the standpoint of our federal or state constitutional limits * * * The Legislature possessing the sole power of making law, it will not be presumed that the people have intended to limit its power or practice by unreasonable or arbitrary restrictions. * * * A reasonable construction of a constitutional limitation on legislative power or practice requires the court to keep in mind the sound purpose of the provision and the existing or anticipated evil to be overcome or avoided."

In my opinion, there is no merit to the contention that the act is unconstitutional on the grounds that since the Legislature has named the members who constitute the Commission, there has been an invasion of the executive power of appointment in violation of Art III. Art. III reads as follows:

"The powers of the government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted."

It has long been recognized that separation of powers does not mean an entire and complete separation of powers. The true meaning of the principle seems to be that the whole power of one department should not be exercised by the same hands which possess the whole power of either of the other departments. See 42 Am. Jur. 320. But aside from this, what is the nature of the power of appointment? Although the power of appointment is not essentially a legislative function, neither is it inherent in, nor does it belong to, the executive or the judicial. The power of appointment to public office belongs where the people have chosen to place it by their Constitution or laws. See 42 Am. Jur. 950. In respect to offices which are created by the Legislature, the Legislature can select the persons to be appointed unless restricted by the Constitution. 42 Am. Jur. 952.

Is there any such restriction in the New Mexico Constitution which would prevent the Legislature from designating appointees to an office or commission which it has created? Art. V. § 5 provides, in part:

"The Governor shall nominate and, by and with the consent of the Senate, appoint all officers whose appointment or election is **not otherwise provided for,** * * * *."

In my opinion, the appointments contemplated in the Act we are considering are appointments "otherwise provided for", as those words are used in Art. V, § 5. Therefore, the act does not invade the Governor's power of appointment. In this

connection it is important *{*92}* to note that the corresponding sections of many other state Constitutions carry the language "not otherwise provided for **in this constitution."** This, in my opinion, is most persuasive to the view that the language of our § 5 can only mean "not otherwise provided for in this Constitution, **or by statute."** In 36 N.M. 362 the court said:

"It will be well to remember that our Constitution is one of the newest. It will be judged not only by what it says, but by what it omits to say -- what it might have adopted from other Constitutions and did not."

Although the point has not been specifically raised by defendant in his motion, it is possible that the validity of the Oil Conservation Act may be attacked on the ground that it seeks to confer, or impose, upon the Governor, State Geologist, and Commissioner of Public Lands duties in addition to, and perhaps inconsistent with, those which they are required by the Constitution and the Statutes to perform. In 23 So. 2d 855 the Supreme Court of Florida was presented with a similar question and said:

"The Legislature may impose additional powers and duties on both constitutional and statutory officers so long as such duties are not inconsistent with their duties imposed by the Constitution. This court has accordingly approved the rule that the legislature may make an existing officer the member of another and different board by enlarging his duties."

Similarly, in Taylor v. Davis, 102 So. 133, 48 A.L.R. 1052, the Supreme Court of Alabama was considering a statute which required the governor to secure the introduction into the legislature of budget bills presented by the budget commission, and cause amendments to be presented, if desirable, during the passage of the bill. The validity of the statute was attacked on the ground that it sought to confer power on the governor and budget commission to dictate the introduction of bills in the legislature and amendments thereto while pending. The court said, in upholding the validity of the statute:

"The direction to the Governor to secure the introduction of such bills is entirely compatible with the constitutional duty of the Governor to recommend for the consideration of the legislature such measures as he may deem expedient, and the duty of the Governor, auditor and attorney general to prepare a general revenue bill to be presented to the House of Representatives by the governor."

In New Mexico, Art. 5. § 4 of the Constitution states that the governor "shall take care that the laws are faithfully executed." The Commissioner of Public Lands is charged in N.M.S.A., § 8-103, with making "rules and regulations for the control, management, disposition, lease and sale of state lands and perform such other duties as may be prescribed by law." Under N.M.S.A., § 69-201 the State Geologist shall "collect and compile information relative to oil and gas development and production within the state which may affect state lands, * * *."

In my opinion, therefore, it is indisputable that whereas the Oil Conservation Act may well enlarge the duties of these executive officers, none of the functions outlined therein for the members of the Commission to perform are inconsistent with their already-existing duties. Any attack on the validity of the act on the above mentioned grounds must, therefore, fail.

The act is also attacked as unconstitutional because it delegates to the executive department powers which are essentially legislative, i.e., powers to restrict production of oil when the commission determines this necessary to prevent waste, and the power to make *{*93}* rules and regulations to prevent waste.

Are these powers essentially legislative, or are they in reality administrative? It is my opinion and contention that they are the latter. It is clear that a state legislature may not delegate to administrative offices the legislative powers vested in itself. But while the legislature cannot abdicate its general law-making powers, it may authorize others to do things which it might properly do, but which it cannot conveniently or efficiently perform. The distinction between the legislative and the administrative function is fundamental. The authority to make rules and regulations to carry out a **policy declared by the lawmaker** is administrative and may be delegated. See 42 Am. Jur. 330. In the Oil Conservation Act, this policy, or purpose, is clearly set out in § 1:

"The production or handling of crude petroleum oil or natural gas of any type or in any form, or the handling of products thereof, in such manner or under such conditions or in such amounts as to constitute or result in waste is each hereby prohibited."

In further distinguishing between the delegation of legislative and administrative powers, 40 Am. Jur. 336 says:

"In considering the true test as to whether a power is strictly legislative or whether it is administrative and merely relates to the execution of the law, the true distinction is between the delegation of **power to make the law,** which necessarily involves a discretion as to what it shall be, and the conferring of authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

In the act we are considering, there is no delegation to the Commission of the power to make the law or determine what it shall be. The law is, in effect, a prohibition against waste, and it is the duty and power of the Commission to prevent the waste prohibited by the act. See § 9 of the Act.

The contention is also made that the Act is unconstitutional in that it delegates to the Commission judicial powers. In answer to this argument it is only necessary to state that it is axiomatic in administrative law that it is not only convenient, but necessary, for administrative and executive officers to be vested with some judicial power. See 125 A.L.R. 736.

The doctrine of separation of the powers of government does operate to restrict the exercise of judicial powers by administrative authorities. But it is my opinion that such powers delegated to the Oil Conservation Commission are, at most, of a quasi-judicial **nature.** The power of the Commission in this regard is limited to the hearing and consideration of evidence and to the ascertainment of certain facts in the performance of its statutory duties. In 42 Am. Jur. 370, we read:

"Administrative officers may hear and determine, or ascertain facts and decide by the application of rules of law to the ascertained facts, and the power exercised by them is administrative, or quasi-judicial, and not judicial, at least in the sense of a violation of the principle of separation of powers."

This brings us to the contention that the act is unconstitutional because it does not establish a comprehensive standard defining and prescribing the conditions and circumstances under which the Commission can exercise the delegated powers. It is my opinion that adequate standards are contained in the Act. It is true that as a general rule, to avoid an unlawful delegation of power, the legislature must declare the policy and purpose of the law and fix the legal principles which are to control by *{*94}* setting up standards or guides to indicate the extent of the discretion which may be exercised under the statute. As I have indicated previously, the purpose and policy of this Act are clearly set out. It is likewise my opinion that the extent of the Commission's discretionary power is defined and the standards by which it is to act are clearly delineated. Sec. 9 of the act reads as follows:

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

It is inescapable, from a reading of this section, that the Commission has been granted no summary power to regulate oil and gas production but is empowered only "to prevent waste prohibited by this act and to protect correlative rights." Moreover, "waste" is defined explicitly in § 2 of the Act. In this connection, I have learned that the concept of "waste" is set out with much more particularity in § 2 of our Act than it is in corresponding sections of the statutes of other oil producing states.

Sections 11 and 12 of the act further limit the power granted the Commission in § 9, by requiring that any allocation, distribution, or proration made by the Commission must be done on a **reasonable** basis. In some cases, courts have even inferred that a standard of reasonableness is to be applied where it can take its meaning from the expressed policy of the statute. See 42 Am. Jur. 345. In our Oil Conservation Act the standard of reasonableness is explicitly required.

It is indisputable, in my opinion, that sections 9, 11 and 12 of the act clearly limit the power of the Commission and set up a comprehensive standard for the exercise of that

power. The objection will undoubtedly be made that the standards of this act are so broad and vague as to be ineffective. I do not agree that the standards are of this character, but even if this contention be conceded for the purpose of argument, on this precise point I find the following language in 42 Am. Jur. 346:

"The policy of the law-making body and the standards to guide the administrative agency may be laid down in very broad and general terms, which get precision from the technical knowledge or sense and experience of men and thereby become reasonably certain."

It is my opinion that the Oil Conservation Commission of New Mexico is of such a nature as to impart this "technical knowledge or sense."

In considering the constitutionality of the act itself, we come finally to the point of inquiry made by the U.S. District Attorney under (e), as follows: "The Act is unconstitutional as violative of Article 4, Section 16 of the New Mexico Constitution, because the delegated power, by issuance of orders, to limit production of oil in the state when it determines this to be necessary to prevent waste is not clearly expressed in the title of the Act."

There is no merit to this contention. The original title to the Act, passed as Chapter 72, Laws of 1935, provides as follows: "An Act to prevent waste of crude petroleum oil, natural gas, and products thereof, as defined in this Act and in furtherance thereof, creating an Oil Conservation Commission; defining the powers and duties of such commission; authorizing it to prescribe rules, regulations and orders; providing penalties for the violation of the provisions of this Act, and of the Rules, Regulations and Orders of the Commission; levying a tax on the proceeds of *{*95}* oil and gas to pay the cost of the administration and enforcement of this Act; and repealing Sections 97-201 to 97-204, inclusive, of the New Mexico Statutes, Annotated, Compilation of 1929, and Sections 97-601 and 97-602 of the New Mexico Statutes, Annotated, Compilation of 1929, and Sections 97-102 to 97-109, inclusive, of the New Mexico Statutes, annotated, Compilation of 1929."

This is a rather broad, inclusive title. The Act was amended by Chapter 193 of the Laws of 1937. The title to the amendment concerned itself principally with Dioxide Gas but declared it to be amendatory of Chapter 72 of the Laws of 1935. The act was further amended by Chapter 166, Laws of 1941. The title to that amendment indicated that the amendments concerned themselves with additions to the original and amended Act, and clearly referred to the original and amended Act. The act was further amended by Chapter 168, Laws of 1949. The title to that act indicated that it was amendatory of the original Act as amended.

In determining whether any act meets the test of constitutionality requiring that the subject matter of the act be clearly expressed in the title, one is not permitted to single out the titles to amendments alone to determine if the title provisions have been complied with. There must be a reference to the original act itself when the title of amending acts clearly indicate that they are amendatory of such original act. If the title

to the original act is sufficiently descriptive of the subject matter of the act, the test has been met. It is safe to say that titles to amendments would be sufficient if they included nothing more than language indicating that the amendments modified the particular act. Of course, this is not true if a title indicates an act is being amended only in certain respects but additional amendments are included. That is not the case with this particular Act.

In determining whether there has been sufficient compliance with the constitutional requirements as to title of acts, the Supreme Court of the State of New Mexico in the recent case of State v. Aragon Et Al., No. 5278, Supreme Court (opinion published but not appearing in Reporter system as yet) stated: "In our opinion, the true test of the validity of a statute under this constitutional provision is: Does the title fairly give such reasonable notice of the subject matter of the statute itself as to prevent the mischief intended to be guarded against? If so, the act should be sustained. The reason of the rule not applying to such cases the rule itself does not apply (quoting from State v. Ingalls, 18 N.M. 211, 135 P. 1177)."

In a subsequent case, State ex rel Salazar v. Humble Oil & Refining Company, et al., No. 5383 (opinion published but not appearing in Reporter system as yet) the Supreme Court, in discussing the constitutional provision that the title of an act must embrace the subject matter of the act, stated:

"The title of the act plays a very important part therein for without some title there can be no valid legislation. The scope of the title is within the discretion of the legislature; it may be made broad and comprehensive, and in this case the legislation under such title may be equally broad; or, the legislature, if it so desires, may make the title narrow and restricted in its nature, and in such case the body of the act must likewise be narrow and restricted. * * * *."

A reference to the title of the original act indicates that it is broad and comprehensive so far as it relates to the powers and duties to be performed by the Oil Conservation Commission. While the act was amended, it appears that the title to every amendment complied with the constitutional requirement so far as the matters embraced within the amendment are concerned. In State v. Sifford, 51 N.M. 430, the Supreme Court of *{*96}* the State of New Mexico stated, in disposing of a challenge to the constitutionality of an act arising out of an alleged title defect in the act: "This being an amendment we must look to the original Act to determine whether there is a compliance with constitutional provisions."

The next point of inquiry concerns itself with the validity of the rules, regulations and orders adopted by the Commission. The point is made that all rules, regulations and orders adopted by the Commission under the Act are invalid for the reason that the Act itself is unconstitutional upon the grounds set forth hereinbefore. I feel that what has been said hereinbefore as to the constitutionality of the act against the challenges made against it under the various headings is a sufficient answer to this contention. There is

no merit to the contention that the rules, regulations and orders of the Commission adopted under the Act are invalid because the act itself is unconstitutional.

A further point of inquiry asserts the contention that the orders of the Commission setting monthly allowables are invalid for the reason that no hearing was had in connection with the adoption of such rules, regulations or orders, pursuant to statutory notice.

Section 17 of the Act provides that before any rule, regulation or order, including revocation, change, renewal or extension thereof shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescribed by the Commission. The Commission is required to give reasonable notice of such hearing (not less than 10 days) except in case of emergency.

Section 5 of the Act provides for the manner of giving notice. In brief, it provides that notice may be served personally or by publication in a newspaper of general circulation published at Santa Fe and in a newspaper of general circulation in the county, or counties, in which oil or gas or other property affected may be situate.

In connection with this it is necessary to allude to the historical development of the rules and orders of the Commission. From what I have been able to ascertain it appears that Original Order No. 1 was adopted on or about June 28, 1935. This order provided the original formula for determining the amount of total monthly allowable oil production and allocating monthly production to oil wells. It appears that this order was adopted after compliance with the statutory directive as to hearing pursuant to notice.

Order No. 235 was adopted on January 13, 1940, pursuant to compliance with the statutory directive as to hearing pursuant to notice, setting the original hearing on July 21, 1939, at Santa Fe. The pertinent features of that order are as follows: "1. The New Mexico Oil Conservation Commission will meet monthly, as soon as practicable after the announcement of the Bureau of Mines of of the latest market demand for New Mexico, and at such meeting will consider the announcement of the Bureau of Mines and other evidence of market demand, and will determine the amount of oil to be produced from all pools in the State of New Mexico during the following calendar month. The amount so determined will be allocated among the various pools in the State in accordance with existing regulations and among the various units in each pool, in accordance with the regulations governing each pool. The Commission will thereupon issue a proration schedule which will specify the amount of oil each unit in the State may produce each day during the following calendar month, including shortages which may be made up and lawful averages. Allowables for wells completed between the first and sixteenth of each month shall be included in a supplementary proration schedule to the current monthly proration *{*97}* schedule. This supplement shall be issued on the sixteenth of each month. Such monthly proration schedule and such supplementary proration schedule shall each constitute the certificate of the Commission authorizing thereunder:

(1) the production of oil from the various units in accordance with such respective schedules.

(2) the purchase of oil so produced by the purchasing companies; and

(3) the transportation of oil so produced by the various pipe line companies."

The order was signed by two members of the Commission.

The general order provides a means for monthly ascertainment by the Commission of monthly market demand and state allowables. It provided further that the Commission would then prorate by schedule allowable production as to pools and as to wells. The ministerial task of preparing the schedule was done by a deputy of the Commission, acting under its direction, in the field, whose salary, except for $ 1.00 per year, was paid by the producers under their proration agreements. This schedule was forwarded to each producer each month.

I am told that each and every monthly schedule of state allowable production and pool and well allowable production, up to January 1, 1950, was prepared according to the provisions of Order No. 235 and that each monthly schedule of proration referred directly to Order No. 235, with an appropriate sub-heading for the particular monthly proration schedule, which latter, for the sake of convenience in identification, was designated Proration Order No. 738, No. 739, etc. as appropriate.

The general order was superseded in 1950 by General Order No. 850, adopted pursuant to statutory notice of hearing. I am informed that the 1949 amendment to the Act provided for allocating monthly allowables based upon corelative rights and that this, together with the fact that the industry had grown, persuaded the Commission to adopt Order 830 which provides that the Commission will determine the monthly proration through its staff at Santa Fe. I am told that the change was made for these reasons only and not because there was any feeling upon the part of the Commission that there had been anything defective about the manner of determining monthly allowables prior to that time.

I am informed that since January 1, 1950, every monthly schedule of state allowable production and pool and well allowable production, has been prepared according to the provisions of this order. Each monthly proration schedule carried a reference to this Order No. 850, with an appropriate sub-reference for the particular monthly proration schedule, which latter for the sake of identification is designated Proration Order No. 1-A, 1-B, etc.

It is not necessary to discuss all orders of the Commission. Order No. 329 was adopted, according to the information available, on or about October 1, 1941. It was adopted for the Hobbs pool and set up specifications and methods for ascertaining pool and well allotments for the Hobbs field. It was adopted after notice and hearing pursuant to statute.

Order No. 398, I am informed, was a modification of the previous order concerning allotments for the Hobbs field. It was adopted after notice and hearing pursuant to statute. Order No. 538 was adopted on or about July 1, 1943, I am told. It was a general statewide proration order, adopted after notice and hearing pursuant to statute. Order No. 637 was adopted on or about March 1, 1946, I am told. It modifies Order No. 538 and adopted the deep pool theory of production. It was adopted after notice and hearing pursuant to statute. Order No. 798 was adopted on or about November 19, 1948, I am told. It *{*98}* modified Order No. 637 and provided for gas and oil ratios. It was adopted pursuant to notice and hearing according to statute.

It appears therefore that all monthly schedules or state wide allowables and pool and well allowables since 1940 have been set under the provisions of either Order No. 235 or Order No. 850, modified in each case by the provisions of the other orders herein referred to.

The principal bone of contention is apparently that the monthly allowable schedules are orders and the objection may be raised that being orders, these orders were not adopted pursuant to notice and hearing, each month, as required by statute. At least this objection might be raised as to such schedules, if they be in truth orders, adopted prior to Order No. 850. I am told that all monthly schedules for production since January, 1950, have been adopted pursuant to hearing and notice and that notice of such meetings has been given setting out the dates of each monthly meeting.

It is my opinion that the monthly proration schedule, even though it may be termed a monthly proration order, is not an order of the Commission. An order presupposes that one is thereby compelled to perform some act or to desist from performing some act. General Order No. 235, adopted by the Commission, compelled the Commission to act according to a certain fixed standard in determining the monthly state wide allowable. It was binding upon the Commission. But it could not bind the State of New Mexico to produce one barrel of oil. Neither could it prohibit the State of New Mexico from producing oil in excess of the monthly state wide allowable production because the State of New Mexico is not engaged in oil production. Order No. 850 falls into the same category.

Can it be said that the monthly proration schedules compelled any pool or well to produce a given amount of oil? The answer is obviously no. Does the monthly proration schedule prohibit any pool or well from producing oil in excess of the schedule? The act of alloting monthly allowable production to wells and pools is a strictly ministerial task. Perhaps the word is more correctly, a mere mechanical, mathematical task. Sections 11 and 12 of the Act provide that when the Commission limits the total amount or oil or gas to be produced, it shall allocate or distribute the allowable productions accordingly. These sections appear to be mandatory, compelling the Commission to prepare schedules. The schedules and their compilation are an integral part of the statute, involve nothing more than the application of precise mathematical formula to the determination the Commission has made in setting the monthly statewide allowable.

But it may be argued that the allocation by schedule of allowable production to a pool or well makes production in excess thereof illegal. The schedule has no such effect whatsoever. Section 15 of the Act provides that the sale or purchase or acquisition (which includes production) or the transportation, refining, processing, or handling in any other way, of crude petroleum oil or natural gas in whole or in part produced in excess of the amount allowed by any statute of this state, or by any provision of this act, or by any rule, regulation or order of the Commission made thereunder, is hereby prohibited, and such oil or commodity is hereby referred to as "illegal oil" or "illegal gas," as the case may be. Sections 11 and 12 compel the Commission to set schedules for pool and well production. Production in excess thereof in excess of the amount allowed by schedule is made illegal by the very provisions of the Act itself, not by the schedules themselves.

There is a further argument to be advanced in favor of the contention that these monthly schedules are not orders.

It is found in 42 Am. Jur., at *{*99}* page 503, under the topic, "Public Administrative Law." In discussing the nature, operation and effect of public administrative law, this statement appears:

"There are many administrative determinations which can be broadly covered by no other designation. They are not coercive or directory and do not constitute orders."

The monthly determination by the Commission of the state wide allowable production is definitely not coercive upon anyone engaged in any phase of the oil industry. After the Commission has made this determination, it is compelled to prepare pool and well allowables, not by virtue of its determination, but by virtue of the Act itself.

In my opinion, no matter what the Commission may call these monthly allowable schedules, the matter of nomenclature is unimportant. The schedules are determinations, nothing more. It is the substance of what is contained in what may be called an order which determines whether it is in fact an order or not.

There may be a possible further objection to the validity of such orders based upon the contention that the Commission in determining monthly statewide allowable production may not have followed the rules it has laid upon itself to make such determination. The Commission is an administrative body. The general rule in administrative bodies is that unless required by statute to do otherwise, the Commission is free at any time to disregard any factors it might consider in making determinations, or to reject evidence completely, in arriving at such determinations. The rules the Commission laid upon itself are for its guidance only. With propriety the Commission could establish a monthly schedule allowing no state wide production or well or unit production, if, in its opinion, it deemed it necessary to prevent waste of oil or gas. Any aggrieved party would have the right to appeal from the decision of the Commission.

In this connection may it be noted that the Legislature itself must be presumed to have intended that the determinations of the Commission, with respect to certain phases of the Act, including, it must be presumed, the setting of state wide monthly allowables, was not to be deemed an order. Justification therefor is found in Section 19 of the Act providing for judicial review of any order or **decision** of the Commission.

While I am convinced that the foregoing is sufficient to establish that the monthly determination of state-wide allowable oil production by the Commission and the determination of monthly allowable production for pools and wells are not orders, it may not be amiss to mention one additional consideration.

"An order" essentially imputes deliberation of some matters by some tribunal or agency, the exercise of discretion and the issuance of the command. If the Commission has determined the state-wide monthly allowable oil production, there is nothing left for it to deliberate upon or upon which it can exercise any discretion whatsoever as to monthly allowable oil production for pools and wells. The fact that the Commission may deliberate or exercise its discretion in making its determination of the monthly state-wide allowable oil production does not make its determination an order, for again the question must be asked: Who is bound by the order other than the Commission itself?

In determining the state-wide allowable oil production the Commission is engaged in regulating the production of oil and gas in New Mexico, not in producing it. Orders that it enters are primarily intended to affect those engaged in the industry itself.

Lastly, objection may be made to the fact that the orders of the Commission are of no force and effect by virtue of the provisions of *{*100}* Chapter 154, Laws of 1931, making it the duty of the office head of every state office, commission, etc., to file three copies of any official report, pamphlet or publication relating to the affairs of the office with the Librarian of the State Supreme Court. There is no merit to this contention. An order is neither an official report, a pamphlet or a publication relating to the affairs of the office.

This is demonstrated further by the amendment to that law, being Chapter 139, Laws of 1947. This amendment required the filing of three copies of any official report, pamphlet, publication, etc., and in addition, copies of any **regulation, rule,** code of fair competition notice, proclamation, **order** or similar instrument issued by any state office or commission. The amendment clearly implies that up to 1947, copies of orders of commissions were not intended to be filed.

The amendment provided that by August 1, 1947, the head of any commission, etc., should file all rules, orders and regulations of the Commission, etc., of which he is the head, which, in his opinion, have general legal applicability and legal effect. Orders in effect at that time, not so filed, are made void until filed.

I am told that the head of the Oil Conservation Commission felt that all orders, in his opinion, had no general applicability and were of interest only to those engaged in producing oil and gas or buying or transporting the same. Therefore the failure to file

any such orders, etc., would be of no effect as to orders of the Commission issued prior to August 1, 1947. If ineffective as to orders, the statute is no less ineffectual as to the schedules. As a matter of fact, I am told, that the Commission did file general Circular No. 6, although not required so to do, which contained general information upon the industry and operations under the Act.

Section 4 of the amendment provides that orders of Commissions, etc., not filed as required, shall be invalid except as to persons having actual knowledge of the order. It is inescapable that anyone engaged in oil production or in any activity covered by the Act had actual notice of all orders and all monthly schedules.

Actually I am told that Order No. 850, adopted in January, 1950, has been filed as required by Statute.

I realize this opinion has been lengthy. It has been impossible to treat the matters you raise in any other fashion. In conclusion and to summarize what has been said previously, may I state:

It is my opinion that the Oil Conservation Act of New Mexico is constitutional and does not invade the executive power of appointment and does not delegate to the executive department powers essentially legislative or judicial, in violation of Article 3 of the Constitution. It is my further opinion that the Act establishes a comprehensive standard for the Commission to follow; that its provisions authorizing the Commission to make rules, regulations and orders for the prevention of waste are definite and certain and establish a reasonable standard governing the exercise of the powers delegated to the Commission. It is my opinion that the Act does not violate Section 16 of Article IV of the Constitution.

It is my further opinion that the orders adopted by the Commission have been validly adopted and are in full force and effect and that the monthly determination of statewide allowable oil and gas production and monthly determination of pool and well allowable production are not orders but are determinations only and that in making such determination no hearing or statutory notice is required except as may be required by the rule or order of the Commission itself, which rule or order is binding upon the Commission until it may be modified or changed appropriately.