

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

4910

HRES

HB 41

82

My name is Stephen Ellis. I am an attorney with the Anchorage law firm of Delaney, Wiles, Hayes, Reitman & Brubaker, Inc. I am appearing here today on behalf of Chevron U.S.A. Inc. Our firm has represented Chevron for the past three decades. We have represented the Company legislatively in Juneau for the past thirteen years.

Chevron is proud of its long presence in Alaska. It continues to be the only major oil company performing all facets of the industry's operations in Alaska: exploration, production, manufacturing, distribution and marketing. Chevron has been doing business in Alaska for approximately 100 years.

As the largest oil and gas leaseholder in Alaska, Chevron thanks the Committee for this opportunity to express its concern with HB-41. We believe the current extended confidentiality provisions of Title 31 are in the best interests of both the State of Alaska and the industry. The State benefits because the existing provisions encourage the drilling of exploratory wells in the frontier areas of Alaska. The risk takers of the industry, who are willing to commit and expend their exploration dollars in Alaska, are rewarded because their data remains confidential.

Chevron opposes HB-41 because it would discourage drilling in frontier areas. The drilling of such a well is an

extremely expensive proposition. For example, drawing from Chevron's experience, Chevron and partners have drilled eleven exploratory wells in Alaska in the past ten years at a total cost of \$291 million. The incentive to drill these wells is greatly reduced where the company is required to share its confidential well data with all of its competitors --- competitors who have not made any expenditure of their own.

Alaska is a difficult frontier for oil and gas exploration. Direct comparison to any of the other forty-nine states' provisions for confidentiality is thus not appropriate for Alaska's unique situation which requires a five-year sale schedule and a long lead time for exploration. Moreover, past experience demonstrates that it is impossible to schedule state sales with five-year reliability. The new 1987 Five-Year Leasing Plan contains ten sales. This represents a reduction of nine sales from last year's plan. Eliminated sales include: Icy Cape, Holitna, Cook Inlet #62, Offshore Icy Cape, Point Franklin, White Hills, and Hope Basin. There are also significant delays in the new schedule. For example, the Nechelik sale has been delayed one year and three months, the Beaufort Sea #52 - two years and three months, the Alaska Peninsula sale - nine months, and North Slope #57 - one and one-half years. Since there is no guarantee that a sale will be held as scheduled, existing law provides a fair means of encouraging exploration and allows a

company to develop an exploration program based on constant guidelines and regulations.

I believe two examples will demonstrate the advantage of the extended confidentiality provisions of the current law. The first example is from the State-Federal joint sale, BF-79 in the Point Thomson Area. At the time of the sale, Point Thomson was a proven gas-condensate field. Two groups that participated at that sale are of particular interest. One group had all of the confidential well information that was available. It acquired two leases for relatively low bonuses. Another bidding group did not have access to any of the confidential information. That group acquired six leases for large bonus bids. Five wells were ultimately drilled in the sale area by companies who did not possess all of the confidential information. Thus, the extended confidentiality provisions of AS 31.05.035(c) resulted in both higher bonus bids for the State and the drilling of additional exploratory wells.

The second example involved a similar situation in the Cape Halkett Area. Chevron and its partners had drilled a well on private land prior to OCS Sale #71, held in 1982 and State Sale #43, held in 1984. Chevron did not participate in the bidding on nearby tracts in either sale. However, all the tracts were leased. Thereafter, one of the successful bidders did drill another exploratory well in the area. Thus, again the extended

confidentiality provisions of AS 31.05.035(c) resulted in additional bonuses to the State and the drilling of an exploratory well.

We believe a two year confidentiality period is inadequate because of the vastness of Alaska. Chevron has drilled in some areas of the State where even today, almost ten years after the well was drilled, no sale of adjoining public lands is scheduled. Therefore, to be meaningful, extended confidentiality provisions must remain open-ended.

In sum, HB-41 discourages exploration in those situations where a company has an existing right to drill. Drilling is a necessary condition for a discovery of oil or gas. Each exploratory well generates significant employment for approximately 400 individuals.

Accordingly, we believe a number of policy considerations suggest that HB-41 is not in the State's best interest. Chevron recognizes that not everyone may agree with its policy analysis. However, Chevron's opposition to HB-41 has an independent legal basis as well. We believe HB-41, if applied to private lands in the State, would be unlawful. This conclusion is particularly true with respect to a retrospective application. We define a retrospective application as any

application to lands where a company had acquired the oil and gas rights to that land prior to the effective date of HB-41.

One commentator has explained the general aversion to retrospective legislation as follows:

Perhaps the most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences. Thus, The Federalist stressed the desirability of protecting the people from the "fluctuating policy" of the legislature. Closely allied to this factor is man's desire for stability with respect to past transactions. Moreover, to the extent that a statutory law should serve as a guide to individual conduct, this purpose is thwarted by retroactive enactments. Still another reason underlying the hostility to retroactive legislation is that such a statute may be passed with an exact knowledge of who will benefit from it. Finally, there is the strong common-law tradition that although a court's pronouncements may apply to past conduct, a legislature's function is to declare law for the future.

This same commentator concludes that in analyzing retroactive legislation, the courts generally balance three factors in determining whether the legislation is lawful:

1. The nature and strength of the public interest served by the statute. We believe this factor favors a finding of invalidity because in our judgment, disclosure serves no apparent conservation purpose.

2. The extent to which the statute modifies or abrogates the asserted preenactment right. This factor also favors a finding of invalidity. It is well established that

confidential well data such as involved here constitutes a trade secret. Disclosure of that data obviously destroys the confidentiality of the data. As a result, the owner of the data loses a real competitive advantage. Courts have held that type of loss to be compensable.

3. The third factor to be considered is the nature of the right which the State alters. This factor also favors a finding of unlawfulness. A company drilling a well subsequent to 1978 had a reasonable investment-backed expectation that the data would remain confidential. Given this assurance, we believe the Alaska Supreme Court would readily find a retrospective application of HB-41 to be unlawful.

We also believe a prospective application of HB-41, particularly as to private lands, would be unlawful. In discussing this point, it is perhaps helpful to examine the basis of the State's right to require the filing of well data. That right stems from the State's police power which is defined as the State's authority to promulgate reasonable regulations necessary to preserve the public order, health and safety, and to promote the general welfare. However, the courts have set limitations on unlawful exercise of police power. Again, three factors are involved:

1. The public interest must require the regulation. We believe it apparent that conservation principles do not require the disclosure of this type of data.

2. The legislation must be reasonable. We believe disclosure is not reasonable because no valid public purpose is served, particularly when compared with the tremendous economic loss disclosure works on the affected oil companies.

3. The means selected must have a real and substantial relation to the object sought to be obtained. The Alaska Oil and Gas Conservation Commission serves the functions of preventing waste of oil and gas resources, and protecting the rights of oil and gas interest holders. The Department of Natural Resources is the proprietor of the State's mineral interest. DNR has the same standing (no more or less) before the Alaska Oil and Gas Conservation Commission as any other oil company. Thus, the State may not make proprietary use of confidential information acquired under a law purporting to "regulate" the oil and gas industry. That is, the State may not exercise a governmental function for a proprietary purpose.

Moreover, even assuming this compelled disclosure of well data does constitute a valid exercise of the police power, courts have held that a regulation can be so complete as to constitute a taking. Again, three factors are considered:

1. The character of the government action,
2. The economic impact, and
3. The reliance of the affected individuals.

While it is true that the reliance factor would not be involved with respect to a prospective application, we believe

the first two factors would warrant a finding that a taking has occurred. As I have discussed, the character of the government action with respect to disclosure is a proprietary action and not for a governmental purpose. Further, the economic impact of the disclosure works a tremendous disadvantage to the companies as they lose their competitive advantage.

A Wisconsin Supreme Court decision decided in 1983 involving Noranda Exploration, Inc. perhaps best illustrates these points. The State of Wisconsin had adopted mining regulations which provided for the public disclosure of data following a three year confidentiality period. The state argued that since any drilling undertaken subsequent to the effective date of the Wisconsin Act was conducted on a voluntary basis, the resulting data did not constitute a protected property right. However, the Wisconsin Supreme Court disagreed. The court relied upon the fact that the exploration was done on private lands rather than State-owned land. The court found that the right to exclude others was a traditional attribute of property and accordingly found that that right was protectable. The court further found that public disclosure of the data did not bear a reasonable relationship to informed decision-making by the state agencies. Accordingly, the court found that the Wisconsin statute constituted an unconstitutional taking of private property without just compensation. We believe the Alaska

Supreme Court would reach a similar conclusion with respect to a prospective application of HB-41.

Thank you for your consideration of Chevron's comments.

REPRESENTATIVE
SAM COTTEN
DISTRICT 15



P.O. BOX 296, EAGLE RIVER, AK 99577
P.O. BOX V, JUNEAU, AK 99811

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

March 6, 1987

Mr. Tom Gallagher
Chevron U.S.A. Inc
3001 C Street
Anchorage, AK 99503

Dear Mr. Gallagher:

Thank you for your letter of March 4 offering to bring Dr. Sorenson before the Resources Committee on the topic of HB 41, the confidentiality of oil and gas data.

As I discussed with Mr. Ray Plummer after the House Resources Committee meeting on Wednesday, March 4, I appreciate the offer by Chevron but would prefer to see the bill move on to the next committee (Finance), where I believe that Dr. Sorenson's presentation would probably be welcome. As you know, the sponsor of the bill, Rep. Brown, sits on the Finance Committee.

Thank you for your letter.

Sincerely,

A handwritten signature in cursive script that reads "Sam Cotten".

Rep. Sam Cotten
Co-Chair
House Resources Committee

cc: Rep. Brown
Rep. Adams
Committee members



Chevron U.S.A. Inc.
3001 C Street, Anchorage, AK 99503 • Phone (907) 563-2556

T. P. Gallagher
Public Affairs Manager

March 4, 1986

Representative Sam Cotten, Co-Chair
Representative Adelheid Herrmann, Co-Chair
House Resources Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

RE: House Bill 41

Dear Representatives:

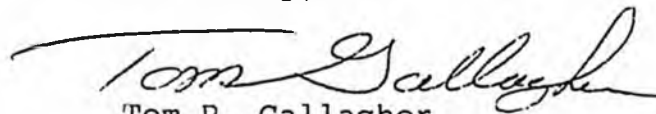
This will serve to confirm a request made on behalf of Chevron U.S.A., Inc., by Ray Plummer, to the House Resource Committee staff on March 3, 1987.

Chevron has requested the House Resource Committee hear testimony from Dr. Phil Sorenson, Professor of Economics from University of California-Santa Barbara. Dr. Sorenson has an extensive published background on oil and gas economics and has been called upon by both private and public entities. Dr. Sorenson has performed original research on the subject of the economic impact of confidentiality of well data, upon leasing, drilling and the oil and gas industry in general.

Chevron would greatly appreciate the opportunity for Dr. Sorenson to address the Committee on the merits of House Bill 41 as the Committee was the original committee of reference.

Chevron, of course, will bear the expenses of Dr. Sorenson's visit to Alaska and testimony before your committee.

Sincerely,


Tom P. Gallagher

TPG:ph

cc: Representative Kay Brown
House Resource Committee Members

EXXON COMPANY U.S.A. Comments
HOUSE BILL 41 - Well Data Confidentiality
House Resources Committee
February 18, 1987

Exxon appreciates the opportunity to present comments in opposition to HB-41. We believe that passage of this bill would slow oil and gas leasing and exploration activity in Alaska by significantly reducing the value of any well data obtained. Exploration budgets are already sharply reduced throughout the industry as companies work to cope with today's crude market. Since HB-41 would make it even more difficult for oil and gas operators to justify taking on the high cost and high risk of exploration in Alaska, we oppose the bill and ask you to carefully weigh our arguments.

In comparison to opportunities elsewhere, Alaska is characterized by harsh climate, remoteness and unexplored geologic prospects. Such high cost/high risk environments are significantly more attractive to explore with extended well confidentiality. For example, an operator may have a geologic concept for an area, but that concept, until tested by drilling, does not economically justify acquiring a large acreage position. Most often, several concepts must be studied and tested over a long period of time if any are to prove successful. If operators know they will have to give up all well data after only two years, often with limited drilling seasons, they will be less likely to pursue novel concepts in new areas.

For those leases that have already been acquired, operators will be encouraged to delay exploration drilling to plan around the confidentiality limitation. If a subsequent lease sale is not scheduled in the next two years, there would be a significant incentive for a lessee to defer drilling so that he does not lose a competitive advantage. If a lessee knew that a nearby leaseholder was about to drill, he would naturally be tempted to wait until that data became available before taking the risk himself. In other words, drilling decisions would be made based partly on the need to ensure confidentiality rather than on the most effective schedule.

This bill would be especially discouraging towards exploration of the least understood areas such as Interior geologic basins. The currently reduced rate of wildcat drilling in Alaska testifies to the cost/risk barriers being faced today. If well confidentiality could not be maintained, many such basins would likely continue to remain unexplored.

As these examples illustrate, we are convinced that lost well confidentiality would serve to slow oil and gas exploration in Alaska. Certainly, there are wells drilled by others with confidential data of great interest to Exxon. But the long-term downside impact on future exploration in Alaska strongly outweighs the short-term gain of such data access.

JDH/3295:dag

2/17/87

?

Standard Alaska
Production Company
900 East Benson Boulevard
P.O. Box 196612
Anchorage, Alaska 99519-6612
(907) 561-5111

STANDARD
ALASKA PRODUCTION

TESTIMONY OF STANDARD ALASKA PRODUCTION COMPANY ON H.B. 41,
CONFIDENTIALITY OF EXPLORATORY WELL INFORMATION.

Standard Alaska Production Company vigorously opposes the amendments to the existing section 31.05.035(c). The extended confidentiality provisions of this section are an important incentive to continued exploration in Alaska. Premature disclosure of exploratory drilling results, in the advance of any lease sale, would effectively deprive an aggressive exploring oil company of valuable proprietary information without any corresponding benefit to the State of Alaska. The amendment would allow companies who have not made any investment in exploration to unfairly reap the benefits of that exploration by premature disclosure of the information. The statute as proposed would deny any discretion in the Commissioner of Natural Resources to continue to hold information confidential and would explicitly require all information submitted to the Oil and Gas Conservation Commission be considered public information.

The proposed legislation would allow only a 25 month confidentiality period (thirty days between completion of the well and filing of the data and the 24 month confidentiality period). The revised time frame would be much too short to protect an exploratory company's proprietary information given the necessity to operate during winter drilling seasons. The present statute is permissive in that it allows the Commissioner of Natural Resources to extend the confidentiality period only when the information is significant to the valuation of unleased lands. The State of Alaska benefits from this confidentiality

to the extent that negative information does not prematurely depress lease prices in an area. The operator benefits from this provision in that this information which he has invested large amounts of money to acquire is protected from unfair disclosure while the State retains access to the data. The only possible beneficiary of the proposed legislation will be those companies who have not made an investment in the development of natural resources in Alaska.

As section 31.05.027 gives the Commission the authority to require reports from wells located on all land in the state lawfully subject to the Commission's police powers, there are wells which have already been drilled, in reliance upon the confidentiality provisions, whose reports would now be made public. Such an amendment to the law could constitute an "ex post facto" law and represent an unlawful conversion of a company's proprietary information. In addition, for wells drilling on private lands the disclosure of that information, we believe, would be a "taking" of private property by the government.

For the reasons stated, Standard Alaska Production Company opposes the adoption of HB 41.

TESTIMONY OF CHEVRON U.S.A. INC.

RE: HB 41

STATE OF ALASKA

FIFTEENTH LEGISLATURE-FIRST SESSION

HOUSE RESOURCE COMMITTEE HEARING

JANUARY 30, 1987

Chevron U.S.A., Inc. (Chevron) appreciates the opportunity to provide this committee with its comments and concerns regarding HB 41, "An Act relating to the confidentiality of certain oil and gas information." My name is Jim Arlington and I am a Land Representative for Chevron, located in Anchorage, involved with administration of Chevron's land and lease interests in Alaska.

There has been concern among industry and the Department of Natural Resources over how AS 31.05.035(c) (as amended by HB 815) should be applied. These concerns involved questions such as, When does the Commissioner make her findings?; What is "significant information"?; What is "unleased land in the same vicinity"?; What is "a reasonable time"?; What is "disposition of all affected lands"? The Department has since adopted regulations which in large measure implement the provisions of AS 31.05.035(c) in a fair and understandable way.

Chevron's position is that HB 41 in its present form is not in the best interest of Alaska. I would like to point out six reasons why this is the case.

1. HB 41 will penalize those companies willing to undertake exploratory drilling.

The data that are released from an exploratory well are much more valuable and have a greater impact on geologic interpretations than do data from a production well. Further, companies have relied on extended confidentiality periods in drilling exploratory wells since 1978 to establish and maintain a competitive position regarding lease sales. The elimination of the extended confidentiality provision will diminish any advantage to drilling for exploratory well data if there is a substantial probability such data must be made public prior to a sale covering that area.

2. HB 41 would reward companies for not drilling.

If companies can obtain for themselves another company's

valuable well and geologic data simply by waiting 24 months themselves they may well do so.

3. The state should actively encourage exploration rather than instituting disincentives such as removal of the extended confidentiality period for well data.

Because of the short drilling seasons, there are significantly long lead times in Alaska in permitting and drilling an exploratory well.

The decline in oil prices has caused companies to drastically reduce exploration programs.

4. HB 41 will discourage drilling on leases adjacent to unleased lands, especially state lands on which scheduled lease sales may be delayed.

The current provisions of AS 31.05.035, are fair and protect a company that has relied upon a leasing schedule and drilled an expensive well to improve its competitive position. Companies should not be penalized if the sale is subsequently delayed beyond the 24 month period required for data confidentiality by having its data made available to its competitors.

5. HB 41 will allow well data from dry holes to be made public which may substantially diminish the lease value of adjacent unleased land.

Since the large majority of wells that are drilled are non-productive, data from dry wells may diminish the value of adjacent lands.

6. HB 41 will discourage drilling in frontier areas.

Most of the frontier oil and gas areas yet to be explored are in Alaska. There are significant environmental considerations that delay drilling in Alaska that are not present in other states. These considerations were taken into account when the 10th Legislature provided for an extended confidentiality period, still present in the current law.

Conclusion

Most of this country's frontier oil and gas areas yet to be explored are in Alaska. We believe it is unwise to significantly alter statutory provisions that have recently been rewritten as recently as 1978. This is especially true where the state's major industry has made enormous capital expenditures in reliance upon those provisions. The potential application of HB 41 to data currently held by the Oil and Gas Conservation Commission is of grave concern to Chevron. Our attorneys have advised us that

Page 5

a retrospective application of this legislation would be unlawful under the Alaska Constitution.

We believe the current law providing for extended confidentiality, where appropriate, has been a successful policy providing incentive to industry and revenue to the people and to the State of Alaska, and should be continued.

Thank you for your attention and consideration of Chevron's concerns.

STANDARD
ALASKA PRODUCTION

TESTIMONY OF STANDARD ALASKA PRODUCTION COMPANY
ON HB 41, CONFIDENTIALITY OF
EXPLORATORY WELL INFORMATION - FEBRUARY 18, 1987

My name is John A. Reeder and I am employed as Senior Counsel for Standard Alaska Production Company in Anchorage. I have been employed in this capacity by Standard or its affiliate, BP Alaska, Inc., since 1974 and served in the Department of Law as an Assistant Attorney General from 1971 to 1974. During this time, I have been almost exclusively involved in natural resource law in Alaska. My purpose in testifying today is to discuss the constitutional limitations in making public data from wells drilled on private or native land. Previously, Standard has indicated to this Committee that it does not favor HB 41 on policy grounds.

HB 41 seeks to repeal provisions of AS 31.05.035(c) which were adopted in 1978, and which now permit the Commissioner, Department of Natural Resources (DNR) to determine if information from oil and gas wells drilled in Alaska should be held by the Alaska Oil and Gas Conservation Commission (AOGCC) on a confidential basis, rather than released to the public after two years as would otherwise be provided under that section.

In the process of reviewing HB 41, I have come to the conclusion that the present structure of AS 31.05.035(c) may have significant constitutional flaws as it would be required to be applied to private (Native) lands regardless of the policy questions presented by HB 41. Removal of the

Commissioner's discretion would almost certainly cause the provision to be administered contrary to constitutional limitations.

While the AOGCC, in the exercise of its statutory oil and gas conservation responsibilities, clearly has authority to require the submission of data from wells drilled on private lands, the public release of economically valuable data from private lands (which some authorities have called the "speculative value" of land) is difficult to support as a valid exercise of the State's police power, and this is particularly true in the context of Alaska's difficult and time-consuming exploration environment. Premature release of such data destroys its commercial value to the landowner, and may subject the State to liability for an unpermitted "taking" of that value without compensation. Retroactive application of HB 41 also destroys the priority value of data from wells drilled on private lands.

Private ownership of the mineral estate in Alaska was virtually unknown prior to the implementation of the Alaska Native Claims Settlement Act and the acquisition by Regional Corporations of mineral rights in the subsurface of Native lands. The lack of private lands is one of the unique aspects of land management in Alaska.

As originally enacted in 1960, the confidentiality provision provided an automatic two-year period of confidentiality for data submitted from wells drilled in Alaska. This section was amended in 1970 to establish a separate section, AS 31.05.035, and provided that certain information be made immediately available to the public. In 1978, the section was again amended to its present form to provide a means of holding data confidential beyond the 24-month automatic period where the value of unleased lands might be affected by the information.

While this was a recognition of the commercial value of confidential data obtained by the State's oil and gas lessees, it is important to understand that, as applied to State lands, no real constitutional issue was or is presented by the prospective application of the submittal requirements. As applied to State lands, the issue of the duration of a confidentiality requirement, and the conditions under which it can be extended, is a policy matter to be decided by the legislature. As previously stated to this Committee, Standard feels a mechanism to extend the period of confidentiality on State lands is vital to the continued drilling of exploration wells in frontier areas, and should be retained as a matter of policy.

The issue is quite different with respect to private lands. As I will discuss later, the issue with respect to private lands concerns the exercise of the State's police power in the context of applicable constitutional limitations. The issue has rarely been raised in Alaska due to the manner in which the 1978 amendments to Section 35 have been implemented. Apparently the Commissioner, DNR, has made a determination with respect to private lands as well as State lands. In fact, of the 13 wells now assigned extended confidentiality status, eight are on Native lands.

Previously, this Committee has received a copy of a letter from former Commissioner Robert E. LeResche to Texaco, Inc. concerning a well drilled on Native lands in which he raised the issue of the applicability of the 1978 amendment to Section 35 to private lands. Commissioner LeResche decided to hold the data from the well confidential pending clarification of the law. No regulations were adopted concerning the applicability of Section 35(c) to private lands, and the DNR continued to deal with both private and State lands in the same manner.

Thus, to date the issue of a possible taking of the speculative value of private lands under these circumstances has been avoided.

The right of a landowner to keep information concerning his mineral estate confidential has been recognized in the United States for some time. Attached to my statement is a listing of material your staff may find useful which discusses this right. The property right has most often been examined in connection with a trespass committed by a third party in which geologic information affecting the value of the land was made public without the permission of the landowner. The trespass is said to have destroyed the speculative value of the land, the right of the landowner to hold such information confidential in the expectation of obtaining valuable consideration from others wishing to explore on his land.

Almost all oil-producing states recognize this right in requiring landowners to file information on oil and gas wells with conservation agencies, as almost all make some provisions for the landowner to automatically, or by application, protect the right of confidentiality.

At least one reported case involved the assertion by a lessee that the requirement to file such data was a taking of property without compensation, where, in the judgment of the lessee, an inadequate period was allowed in which the data was to be kept confidential. In this case, a copy of which is attached to my statement, the Kansas Corporation Commission (the equivalent of the AOGCC) had refused to grant an exemption to a two-year confidentiality provision on the grounds that the existing regulations adequately protected the speculative value of the lands held by the oil and gas lessee. The court upheld the Commission's decision. The importance of the case is the clear

recognition by both the Commission and the court of the existence of the speculative value of the lessee's lands. The Commission merely decided that in this instance a two-year period was adequate.

In Alaska, I believe the automatic two-year period of confidentiality which would remain in AS 31.05.035(c) if HB 41 is passed is not adequate to protect the speculative value of well data from private lands. The long development times, difficult environmental conditions and extreme distance from markets which impede oil and gas development in Alaska are well known to the Committee and need not be repeated here, but these obstructions to development usually result in geologic information retaining its commercial value for much longer times than in the rest of the United States. In practice, geologic data from wells drilled on private lands may remain valuable for commercial purposes for many years, and some mechanism needs to be included in AS 31.05.035(c) to extend the period of confidentiality to protect the speculative value of such lands. In this respect, Alaska has distinctly different requirements from other oil-producing states.

On the other hand, there seems to be little need to include development wells, wells drilled in producing reservoirs, (either on private or State land) in any system intended to protect the speculative value of private or State lands. Elimination of this requirement would ease a significant administrative burden on the AOGCC.

In conclusion, Standard, as previously stated to the Committee, feels the present provisions of AS 31.05.035(c) should be retained, both as a sound policy to encourage the drilling of exploration wells on State land and to protect the speculative value of private lands as required by Alaska's Constitution.

Authorities Discussing Description of Speculative Value

For general background see:

1. 1 H. Williams & C. Meyers, Oil and Gas Law §§ 229-230 (1986).
2. 1 W. Summers, The Law of Oil and Gas §§ 21-40 (2d ed. 1954 & Supp. 1986).

Concerning constitutional limitations see:

1. Retroactive application of HB 41. Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090 (Alaska 1985).
2. Unconstitutional taking of private property. Ruckelhaus v. Monsanto Co., 104 S. Ct. 2862 (1984); State v. Hammer, 550 P.2d 820 (Alaska 1976).

SUBSTANTIVE LAW CASES

HARTMAN v. STATE CORPORATION COMMISSION et al.

Kansas Supreme Court
December 7, 1974—No. 47420
529 P.2d 134

Government Regulation: Orders of Commissions—Filing of Drilling Information and Samples.

The Kansas State Corporation Commission duly promulgated Rule 82-2-125 which requires that certain information and samples obtained in drilling oil and gas wells be filed with the state geological survey. Provision was made for the granting of exceptions to the rule based upon a finding by the Commission that compliance would create an economic hardship, the information is not necessary for the specific area, or the length of confidential custody of the information is not sufficient to satisfy the needs of the developing operator. Appellant sought an exemption from the rule of some 4,600 acres in the Damme Pool area. The Commission denied Appellant's application generally on the grounds that he had not proven the need for an exception and that the provision for exceptions was not intended to allow mass exceptions. Upon judicial review, the district court adopted the facts and conclusions of law of the Commission, and it further held that the Commission had not exceeded its statutory power and the Commission's denial was not arbitrary, capricious, or unlawful. On appeal, held: Affirmed. The issuance of Rule 82-2-125 after conducting hearings does not preclude judicial review of the validity of the order, and it may be collaterally attacked upon an appeal from its application. In view of the broad authority and direction to the Corporation Commission to prevent waste and conserve natural resources, it appears that the power to enact the rule in question is necessarily implied and that the information required by the rule is reasonably related to the purposes of conservation statutes. Appellant failed to carry his burden of proof for an exception, and he sought no more than a blanket exemption from application of the rule. With regard to the assertion of the taking of

property without due compensation, the rule in question is a proper exercise of the state's police power and it is not an exercise of the power of eminent domain. Fatzner and Schroeder, dissenting.

SYLLABUS BY THE COURT

1. Rules and regulations made by an administrative agency are not res judicata.

2. In order to be valid, administrative regulations must be within the authority conferred by the legislature. An administrative regulation which goes beyond or conflicts with legislative authorization is void.

3. The responsibility for proper administration of the laws relating to the production and conservation of oil and gas rests primarily with the state corporation commission. The factors to be considered and their proper evaluation are matters exclusively within the commission's discretion and are not subject to judicial review so long as they bear a reasonable relation to the subject matter of the order.

4. In a proceeding wherein a driller sought exemption from filing certain material pursuant to a rule of the corporation commission (KAR 82-2-125) the record is examined and it is *held*: (1) The commission had statutory authority to adopt the rule; (2) the rule is reasonably related to the prevention of waste in the production of gas and oil and to the protection of usable water as it may be affected by such production; (3) the burden of proving entitlement to such exemption was on the applicant; (4) applicant failed to sustain this burden and the commission's order of denial was supported by substantial evidence and was not arbitrary or unreasonable; and (5) neither the rule nor the denial order violates the due process clause of the federal constitution.

Appeal from Finney district court; I. L. Morgan, judge assigned. Affirmed.

HARMAN, Commissioner.

The state corporation commission promulgated a regulation requiring certain information and samples obtained in drilling oil and gas wells to be filed with the state geological survey. Certain exceptions were provided. Applicant W. L. Hartman's request for exception from the provisions of the regulation was denied by the commission. Upon review the district court of Finney county upheld the commission's denial order and the matter is now here on applicant's appeal.

Following publication of notice and after holding hearings in which several oil producers, drillers and royalty owners or their representatives appeared, the corporation commission on August 19, 1971, promulgated a new regulation designated as rule 82-2-125, which became effective January 1, 1972. Applicant Hartman was present at the hearing and protested adoption of the regulation. KAR 82-2-125 provides:

"Preservation of well samples and logs. Every person, firm, association, or corporation drilling or responsible for drilling holes for the purpose of discovery or production of oil or gas (excluding seismic 'shotholes' and 'coreholes') shall preserve and have delivered at his expense (prepaid), the following samples and information to the Kansas geological survey, 4150 Monroe street, Wichita, Kansas 67209.

"(A) Formation samples (drill cuttings) normally saved in drilling operations shall be retained by the operator; and upon request of the Kansas geological survey, such samples shall be washed, cut into splits (sets) and one set placed in sample envelopes ready for repository when delivered to the above address. Notification to the operator that samples are required shall be made either by notice appended to or on a copy of the notice of intention to drill returned to the operator by the conservation division of the Kansas corporation commission. Delivery of the processed samples shall be made within 90 days of the com-

pletion of drilling operations. The survey may, on some bore holes, request shallow samples from portions of the hole that may not normally be saved in drilling operations. In this event, the saving, processing and delivery of such additional requested samples shall be a voluntary act on the part of the operator. The repository (sample library) shall accept all washed and cut samples whether or not requested.

“(B) A copy of electric logs, radioactivity logs, and similar wireline logs or surveys run by the operator on all boreholes (excluding seismic, ‘coreholes,’ and logs run for the purpose of obtaining geo-physical data) shall be delivered to the above address within 90 days following the running of such logs or surveys.

“(C) Copies of driller’s logs prepared on a form prescribed by the Kansas corporation commission shall be completed and filed with the Kansas geological survey within 90 days after completion of the well.

“(D) Upon receipt of a written request at the address listed herein, said request to be submitted either prior to or simultaneously with, any or all samples or information filed as required in items (A), (B) and (C) hereof shall be held in confidential custody by the survey for an initial period of one year from the date of receipt thereof, unless release of said samples or information is approved in writing prior to the expiration of the one year period:

Provided, however, The period of confidential custody may be extended for one additional year by written notice to the survey, such notice to be received at least 30 days prior to the expiration of the initial one year period.

“(E) In a like manner, samples, logs or surveys of wells completed prior to the effective date of this order may be submitted to the survey and will be maintained in confidential custody if requested in writing to do so.

“(F) It shall be the duty of each company performing

logging services within the state of Kansas to furnish each month, to the state geological survey at the address listed herein, a list of all holes logged.

"Exceptions to the provisions of this rule may be granted whenever the commission shall find that the granting of such exception is justified because of one of the following:

"(1) Compliance with this order will create an economic hardship.

"(2) Submitting the requested samples, logs and information is not necessary for a local or prescribed area.

"(3) The length of the period of confidential custody is not sufficient to satisfy the needs of the developing operator.

"Exceptions may be requested by affidavit setting forth supporting facts. In the event the requested exception is not fully supported, the commission may set the matter for hearing after giving notice thereof."

Applicant Hartman is an independent oil and gas operator with extensive lease holdings in the Damme field in Finney county, Kansas. In 1951 he discovered the Damme pool and has since drilled approximately fifty oil and gas wells in or near that area. Geological information is collected in connection with each well drilled. Electric logs are kept and seismographs are also utilized on the wells. The information acquired is helpful in determining what land to lease and where to drill. Upon occasion applicant had in the past entered into dry hole support agreements whereby in exchange for formation samples, electric log, drilling times and other information supplied by him to other operators holding leases in the field, the latter contribute money toward the drilling of a well (or acreage), to the mutual benefit of the parties.

On January 19, 1972, Hartman filed an application seeking exception from the provisions of rule 82-2-125. He

alleged he was the owner of leases covering twenty-one tracts aggregating about 4,600 acres in the Damme pool and he sought exemption from the rule of all of his acreage "and/or the Damme Pool generally". The application alleged the information required to be filed had substantial economic value and public disclosure would create an economic burden in that no dry hole support contributions would be available; further that the two year maximum period of confidentiality was insufficient in that the pool was still being developed and in any event the arrangements of the state geological survey for safeguarding the filed information were inadequate. Applicant also alleged compliance with the rule would result in confiscation of his property.

Hearing on Hartman's application was had before the corporation commission March 23, 1972. Four major oil producers also appeared at the hearing in opposition to the application. Applicant's evidence consisted of exhibits and the testimony of Robert L. Schmidlapp, his geologist, engineer and production manager. Schmidlapp testified he had supervised the drilling of each of Hartman's wells in the Damme field; the information collected during drilling is important to the leasing of acreage and to the drilling and completion of other wells; the average cost per well over the years spent by applicant in the running of electric logs had been \$2,500 but is now around \$3,400; applicant has thus spent about \$125,000 for the fifty wells drilled by him in the field; he has spent about \$200,000 in seismographs; he received contributions toward drilling expense in exchange for electric log information in the discovery well drilled in 1951 and from two others drilled in 1953; applicant has declined on occasions to enter into this type of arrangement because he did not want to disclose the information obtained in drilling; he has undeveloped acreage and leases adjacent to the present boundaries of the pool; other operators have leases around the perimeter of the pool; there is competition when these leases expire; the geological information obtained in drilling applicant's fifty wells is of

benefit to the general area and has been used by applicant in acquiring new leases; all types of information secured from drilling are used to evaluate seismograph data; the information obtained by applicant in drilling was paid for by him, it belongs to him, he expects to use it and does not want to give it to competitors in the area; to do so would be an economic disadvantage; applicant is not drilling any well at the present time but has drilled and completed two wells since the rule was adopted; no samples or logs from these two have been filed; the cost of filing is nominal; three presently contemplated locations remain to be drilled; applicant has drilled more wells in the Damme pool than any other operator. The witness also testified that in his opinion the two year period of confidentiality was not long enough to protect applicant's interest; he had examined the storage facilities of the state geological survey and did not believe they were adequate. He feared applicant's competitors might obtain the information. This same witness has also testified for applicant in opposition to the rule at the hearing held on its adoption.

The state geologist, Dr. William M. Hambleton, who is also director of the state geological survey, testified. Preliminarily, he stated rule 82-2-125 had been adopted after extensive hearings in order that significant and important information would not be lost; after considering all the testimony presented the rule adopted was an expression of the corporation commission's sensitivity to the testimony of all interested parties and an excellent compromise which satisfied the state's need for information and yet did not unduly add to the cost of doing business. More stringent rules have been established in other states where there is less confidence in the petroleum industry. Absence of adequate rules and regulations elsewhere, coupled with wilful practices, have caused agencies of the federal government to become interested in environmental protection as related to the petroleum industry. Some congressional action has already been taken, which if completed, would probably result

in more stringent measures than required by the rule under consideration. In carrying out the provisions of the rule the state geological survey has been careful not to request unneeded samples and information and has developed procedures adequate to safeguard the confidentiality of the information. A burglar and fire resistant file has been requisitioned for such purpose. The witness further testified granting Hartman's application under the circumstances would set a precedent which would emasculate the rule since his leases are little different from leases held elsewhere in the state; anyone who drills a well to extract minerals not only gains mineral resources and information, he also produces a hole which under certain circumstances can be detrimental to the public health and safety; blowouts related to the oil and gas industry have occurred in recent years in Kansas; information from holes in the particular areas was inadequate to determine the source of the problems or the solutions; at least seven major surface collapses have occurred which resulted from corrosion of casing caused by underlying salt solutions; where information is inadequate new holes have to be drilled in the area to secure adequate knowledge; such information is necessary for the protection of fresh water resources and for correction of and protection from blowouts and surface collapses; electric logs are used with other geological data to acquire knowledge of rock pathology and changes in fluids, which is essential in the study of blowouts.

Robert Dilts, manager of the Wichita well sample library of the state geological survey, testified requests for samples are generally limited to "wildcats" (wells drilled one mile or more away from production), wells drilled deeper than those nearby, wells that are one-half mile away from those from which samples are presently held, and wells wherein the survey has a special interest; logs are requested from each well; information in an area such as the Damme field where so many holes have been drilled is necessary; the survey is interested in the setting of surface pipe in the area to pro-

tect fresh water strata; electric logs would reveal information as to areas above the producing formation.

Other oil operators made statements at the hearing. Champlin Petroleum Company, which owns producing wells and has interests in about 3,200 acres of land in the area, stated that in the past in order to encourage cooperative testing by drilling, it had contributed acreage to applicant, reserving a minimum overriding royalty thereon. Its position was that for rule 82-2-125 to be of fruitful effect, it must be universally applied and the exception should be denied.

Mobil Oil Corporation objected to the granting of the application, its position being that its grant would be a serious deterrent to further drilling and development in the area. Mobil believed it will not be able to secure approval for drilling proposals unless and until the rule is complied with.

The position of Texaco, Inc., was the applicant is no different from anyone else in the Damme field and doesn't deserve the exception and granting it for the whole Damme pool would set a very bad precedent.

Cities Service Oil Company also opposed the granting of the application; to grant it would do away with the effectiveness of the rule. Cities also stated applicant's evidence was insufficient to bring him within any of the three exceptions to the rule.

In an order filed May 31, 1972, the corporation commission denied the application. After reviewing the evidence and making certain findings the order of denial contained these recitals:

"6. The Commission finds on the basis of evidence presented that the granting of the application for an exception is not justified under any of the three grounds for exceptions set out in Rule 82-2-125 (F). The Commission finds that the evidence presented by the Applicant relating to economic hardship, is based on their apprehension of the possibility of unauthorized disclosure of the

information filed and is speculative and conjectural in nature. It is noted by the Commission that evidence presented by the Applicant as to the quantity and value of geological data accumulated from the Damme Pool relates almost entirely to data which is not required to be filed with the Kansas Geological Survey as it was obtained before the effective date of Rule 82-2-125.

"7. The Commission finds that the Kansas Geological Survey has taken adequate and reasonable security precautions and has adopted reasonable procedures to protect geological data filed or to be filed with the Survey.

"8. The Commission, having considered the history, present stage of development and other factors and characteristics relating to the Damme Pool, finds that the two year confidential period provided under Rule 82-2-125 (D) is adequate and reasonable to protect operators in the said Pool.

"9. The Commission finds that the granting of the application for an exception would damage the effectiveness and purpose of the rule; that the information required to be filed is necessary in order to provide for prudent conservation practices and procedure including the protection of fresh water resources and the health, safety and well-being of Kansas citizens.

"10. The Commission finds that the purpose of providing for exceptions to the provisions of this rule was to provide for specific or special cases involving extraordinary circumstances, and not to allow mass exceptions of substantial portions of or entire pools from the rule."

Thereafter the corporation commission denied an amended application for rehearing filed by applicant. Hartman then petitioned the district court of Finney county for review of the order. That court adopted the corporation commission's findings of fact and conclusions of law but withheld judgment by reason of two further issues raised by the parties

in that court: Applicant's contention that the commission exceeded its statutory power in promulgation of the rule in question and the commission's contention that applicant could not collaterally attack the rule in his petition for judicial review. After receiving additional briefs on these two issues the trial court denied relief, holding that the commission's order of denial was not arbitrary, capricious or unlawful; it further held the rule in question was subject to attack by applicant upon his petition for judicial review but that the corporation commission did not exceed its statutory authority in promulgating the rule. The court noted the legislature had empowered the commission to promulgate rules for the exploration, drilling, production and conservation of oil and natural gas and that K.S.A. Chapter 55 sets out guidelines for such rules in the protection of the public interest, including the following:

Prevention of economic, underground and surface waste; protection of correlative rights; disposal of salt water; issuing of drilling permits; re-pressuring—by the injection of air, gas, water and other fluids; plugging of wells; and protection of fresh water.

Applicant Hartman now appeals.

We should first consider the corporation commission's renewed assertion that appellant Hartman may not now collaterally attack the validity of the rule. This contention is premised upon the fact appellant was present and participated in the hearing held by the commission to determine whether the rule should be adopted, appellant objected to its adoption but did not appeal from the order of promulgation. A number of oil producers appeared in opposition at the hearing but apparently none sought district court review of the order. Appellee's argument is that appellant may not now challenge the rule's validity, that matter has become *res judicata*, and appellee includes for good measure appellant is now estopped by laches and by the doctrine of election of remedies to assert his present position. In these

latter two contentions appellee seeks refuge in broad general statements of law not applicable here and which need not be further discussed. Essentially appellee says appellant should not have a second opportunity to contest the rule. The proceeding was not an adversary one in the judicial sense and the doctrine of res judicata, in any of its aspects, does not bar appellant.

In 2 Davis, Administrative Law, § 18:08, it is stated:

"In name and tradition 'res judicata' means thing adjudicated. Only what is adjudicated can be res judicata. Administrative action other than adjudication cannot be res judicata. Even if an exercise of the rule-making powers depends on a finding of facts, neither the rule nor the finding is regarded as res judicata." (p. 597.)

We have held the doctrine of res judicata does not ordinarily apply to the decisions of administrative tribunals (*Warburton v. Warkentin*, 185 Kan. 468, 345 P. 2d 992) and in *Aylward Production Corp. v. Corporation Commission*, 162 Kan. 428, 176 P. 2d 861, a proceeding in which the target was a commission order establishing a minimum allowable for oil for wells in prorated pools, this court said:

"Force is given this argument by the fact that rules and regulations of the commission are never res judicata. Should bad consequences follow from such an order being made the commission might change it to meet conditions as they exist." (p. 440.)

The rule appears clearly to be that regulations made by an administrative agency are not res judicata.

Appellant contends the appellee commission had no statutory authority to promulgate rule 82-2-125 and its act in doing so was an arbitrary and capricious exercise of power. He argues the regulation does not carry out any statutory objective. He asserts, and correctly so, that to be valid, administrative regulations must be within the authority con-

ferred, and further that an administrative regulation which goes beyond or conflicts with legislative authorization is void, citing *Amoco Production Co. v. Arnold, Director of Taxation*, 213 Kan. 636, 518 P. 2d 453. He argues our statutes give appellee only the authority to prevent waste in the *current production* of oil and gas and the rule in question has no reasonable relation to that end—its only purpose is to try to secure information helpful in knowing where to explore for *future* oil and gas wells. He points out that legislatures in many other oil producing states have expressly conferred upon their regulatory agencies authority to require the furnishing by drillers of the material encompassed here by the rule in question and argues this tends to show that without specific enabling authority a commission empowered only to prevent "waste" is not authorized to speculate on future discovery by requiring the filing of electric logs.

In 1 Summers, Oil and Gas, § 82, it is stated:

"There is a considerable variance in the extent of the control which the different oil and gas producing states exercise over the location, drilling, equipping and operating of oil and gas wells for the prevention of waste and the protection of correlative rights. . . . [pp. 269-270]

.

"Statutes or regulations commonly require that the operator keep at each well, while drilling, an accurate drilling record or log, showing all formations drilled through, method of casing, and other detailed information that may be required, and upon completion or abandonment of the well, require that copies of such record be filed with the conservation agency or other state or county officer." (pp. 274-275.)

Let us examine our own statutes pertaining to the corporation commission's powers and duties. K.S.A. 1973 Supp. 55-128 provides that anyone responsible for drilling seismic, core or exploratory holes for the purpose of ex-

ploration, discovery or production of oil and gas shall first give prior notice to the state corporation commission of intent to drill, such notice to include certain information pertaining to the proposed drilling; further that:

"The corporation commission shall determine the amount of pipe necessary to protect all usable water, and shall so notify the person, firm, association or corporation submitting the notice of intent to drill before said drilling is commenced.

.

"No person, firm, association, or corporation shall set pipe at any seismic, core or exploratory hole except with the approval of state corporation commission and in conformance with the rules and regulations of the corporation commission, except that additional pipe beyond the requirements of the corporation commission may be set by the driller. Before any such hole is abandoned, it shall be the duty of the party responsible for drilling such hole to plug the same in such manner as to properly protect all water-bearing formations and in conformance with the rules and regulations adopted by the corporation commission;

.

"It shall be the duty of the owner or operator of any well which is now drilling or drilled or that may hereafter be drilled for the purpose of discovery of oil and gas, before abandoning same, to shut off and exclude all water from entering oil-bearing or gas-bearing sand, strata or formation encountered in the well and to use every effort and endeavor to protect any usable underground or surface water from infiltration or addition of any detrimental substances, in accordance with methods, rules and regulations of the state corporation commission and under its direction. Before any work is commenced to abandon any well, the owner or operator thereof shall give written notice

to the state corporation commission or the agent of the commission as hereinafter designated, of his intention to abandon such well; the date upon which the work of abandonment shall begin, and that he will plug the well in accordance with the rules and regulations as prescribed by the commission. . . .

"Whenever operations shall cease for a period of ninety (90) days on any well which is now drilled, is being drilled or may hereafter be drilled in the future for the purpose of exploration, discovery or production of oil, gas or other minerals, the owner or operator of such well shall give notice thereof to the commission and, if the commission shall deem it necessary to prevent the pollution of any fresh water strata or supply, shall cause such well to be temporarily plugged in accordance with the rules and regulations of the commission and under its direction. . . .

"The state corporation commission is hereby authorized and directed to adopt rules and regulations necessary to carry out the provisions of this section. Prior to adopting any such rules and regulations, the commission shall take into consideration any recommendations of the state board of health, state geological survey and state water resources board with respect thereto. . . ."

K.S.A. 55-130 directs the commission to adopt such reasonable rules as may be necessary to provide the method by which oil and gas wells or holes may be plugged and abandoned. K.S.A. 55-601 prohibits and declares unlawful the production of crude oil or petroleum in such manner and under such conditions as to constitute waste. K.S.A. 55-602 provides:

"That the term 'waste' as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste, waste of reservoir energy, and the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands. The state corporation commission shall have

authority to make rules and regulations for the prevention of such waste and for the protection of all fresh-water strata, and oil- and gas-bearing strata encountered in any well drilled for, or producing, oil. . . ."

K.S.A. 1973 Supp. 55-604 provides:

"(A) The commission shall have and is hereby given jurisdiction and authority over all matters involving the application and enforcement of the act [act regulating production of petroleum oil, etc.], and shall have authority to make and enforce rules, regulations and orders for the prevention of waste as herein defined and for carrying out and enforcing each and all of the provisions of this act. . . ."

K.S.A. 55-704, relating to the production and conservation of natural gas, states:

"The commission shall promulgate such rules and regulations as may be necessary for the prevention of waste as defined by this act, the protection of all water, oil or gas-bearing strata encountered in any well drilled in such common source of supply . . . as the commission may find necessary and proper to carry out the spirit and the purpose of this act. . . ."

The foregoing statutes provide broad authority and direction to the corporation commission to prevent waste, including economic waste, in the production of oil and gas, to conserve these natural resources and to protect usable water as it may be affected by drilling for oil and gas. It has specific duties with respect to drilling, placement of pipe and abandonment and plugging of wells. To discharge all these responsibilities effectively the legislature must have been aware the commission would need certain information as to the holes drilled. Rule-making power was given the commission in carrying out its functions. Appellee asserts rule 82-2-125 was adopted to help prevent loss of ultimate re-

covery of this state's oil and gas reserves. Historically, powers granted to regulatory bodies under conservation statutes have been liberally construed by the courts. In *Aylward Production Corp.* the corporation commission took a restricted view of its own rule-making power with respect to fixing minimum allowables. In broadening the commission's narrow interpretation this court conceded that looking at the provisions of only one statute the commission's construction would be proper, then observed:

"But these provisions must be construed in connection with the whole purpose of the act and with the broad provisions with reference to the commission's power, all of which have been heretofore set out." (p. 441.)

In *Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704, the court was concerned with the corporation commission's authority to fix a minimum wellhead price for natural gas. These observations were made:

"The dominant purpose of this statute [55-704] is to prohibit waste of natural gas in Kansas, not only in the manner and under the conditions of its production, but for such purposes as would constitute waste. In order that the term 'waste' should not be narrowly construed the statute makes it clear that it is to include economic, underground and surface waste, and the term 'economic waste' is defined. These provisions were for the purpose, if necessary, of expanding the meaning of the term 'waste' and not for the purpose of limiting such meaning. The statute also deals with the rights of owners of property under which there is a common source of supply of natural gas. We think the statute is broad enough to authorize the commission to make any rule or order to prohibit waste of natural gas, upon proper application made to it. . . . It is true the statute did not specifically authorize the commission to fix a wellhead minimum price to be paid for gas produced. It did not forbid the commission to do so

if and when the evidence disclosed the fixing of such price would tend to prevent waste and the inequitable and unfair taking of gas from a common source of supply. Hence, the legal question presented by appellants, that the statute did not authorize the commission to make the interim order complained of, is not well taken." (p. 732.)

The court further held:

"In this state the production and distribution of natural gas for light, fuel and power is a business of a public nature, the control of which belongs to the state.

"The dominant purpose of our statutes pertaining to the production and conservation of natural gas [55-701, et seq.] is to prohibit waste of natural gas in Kansas, not only in the manner and under the conditions of its production, but for such purposes as would constitute waste." (Syl. ¶¶ 2 & 3.)

Appellant also contends the information required by the regulation bears no reasonable relation to the prevention of waste. We are aware of no case in any jurisdiction having either a rule or statute similar to 82-2-125 where such a challenge has been made. The evidence here on this point is somewhat vague due to the fact appellant raised the point collaterally before the district court on the hearing of its petition for review. The hearing before the corporation commission was to determine whether appellant should be granted an exception to the regulation. However, the record before us reveals that when the regulation was adopted the commission made the following findings:

"3. The evidence presented supporting the adoption of the proposed rule consisted of four (4) witnesses including members of the Kansas Geological Survey, the President and past President of the Kansas Geological Society, the Geologists active in the oil and gas industry. The substance of their testimony and evidence presented was that the present voluntary system, which relies on voluntary

contributions of samples and logs to the survey, is no longer adequate as evidenced by the marked decline in their receipt of such data in recent years. Additional testimony indicated that much information vital to future exploration for oil and gas in Kansas had been irretrievably lost.

"4. Additional evidence indicated that for the period from July 5, 1970, to December 31, 1970, samples were received from only 44% of the wells drilled in that period and that the receipt of samples from wildcat wells also showed a substantial decline. The evidence indicated that the conservation of well samples and log information and *the continued loss of such information could result in economic and physical waste.*" (Our emphasis.)

Appellee asserts that without reliable geological data such as that revealed by electric logs its conservation division cannot develop the expertise to require proper use of reservoir energy and achieve maximum recovery in the reserves; further that availability of logs can prevent unnecessary drilling. Upon the hearing of appellant's application for exception there was evidence blowouts can affect fresh water, that electric logs provide information relative to blowouts and that the information called for is also necessary for the design of appropriate practices in the interest of public health and safety.

We need not labor the matter. The legislature has authorized the commission to adopt regulations for the prevention of waste and for the protection of all fresh water strata and oil and gas-bearing strata encountered in any well drilled for oil. We think the power to enact the rule in question is necessarily implied within those broad grants and the information required by the rule is reasonably related to the prevention of waste in the production of oil and gas and to the protection of usable water as it may be affected by such production.

Appellant further contends his application for an exception to compliance with 82-2-125 was improperly denied because the findings upon which the denial order was based are unreasonable, arbitrary, capricious and not supported by substantial evidence. He says he should have had an exception under subsection 1 of the rule (economic hardship) and 3 (insufficient period of confidential custody) because he produced evidence of past sales of the information now required to be furnished by the rule and also his expert believed the two year period of confidentiality was insufficient due to appellant's unique position in the Damme field by reason of the large number of wells he already had with his mass of information on them, plus his undeveloped acreage.

It should be noted appellant was not seeking exception for one particular well nor one limited area—rather he sought exemption for all his acreage in the Damme pool and/or the Damme pool generally. Appellant's evidence respecting economic hardship did show that when the field was new he had received contributions under dry hole agreements and that he had a valuable mass of information accumulated from his drilling the fifty wells in the pool, which he says he would have to disgorge without recompense. But all this occurred prior to the adoption of the rule. Section (E) of the rule states that sample logs or surveys of wells completed prior to the effective date of the rule *may* be submitted to the survey for confidential custody. Such submission is not required but is wholly voluntary. Thus the material upon which appellant largely bases his contention of economic hardship is not required to be filed.

The burden of proof in bringing himself within the exceptions provided in the rule was, of course, on appellant. The commission specifically found that on the basis of the evidence presented the grant of an exception was not justified. Appellant presented no evidence with respect to problems encountered or likely to occur in any specific well or area. The request was simply for blanket exemption of appellant's entire holdings and/or the entire field. There was

no testimony concerning conditions or positions of the two wells completed after the adoption of the rule with relation to acreage owned by others or of the contemplated three locations or as to how they would be affected by the rule. There was no indication dry hole support money was sought and was unavailable. There was no testimony the rule would in fact deter future contributions. Other than the bare assertion of opinion by his expert, appellant made no showing that the one year period of confidentiality or the two year period (actually two years plus ninety days) would not be sufficient "to satisfy the needs of the developing operator". In denying the application the commission was aware the Damme field was then entering its twenty-second year of development. Except for the size of his holdings and number of wells appellant was not shown to be in any position different from others in the field. No evidence was offered respecting any "step-out" or other location proposed for exemption or what would happen under the rule. All the appellant offered must be regarded as merely conjecture. Conceivably he might make a factual case justifying exemption from the rule but he did not do so. The commission's finding that the geological survey had adopted reasonable procedures to safeguard the information filed with it is amply supported by the evidence. In arguing insufficiency of evidence appellant largely ignores that offered by the commission which indicates a need for the information required by the rule. As was said in *Railroad Commission v. Humble Oil & Refining Co.*, 193 S. W. 2d 824, (Tex. Civ. App.):

"The responsibility for the proper administration of the conservation laws rests primarily with the Commission. What factors shall be considered, and their proper evaluation are matters exclusively within the Commission's discretion and not subject to judicial review, so long as they bear a reasonable relation to the subject matter of the order." (p. 833.)

In sum the commission's order of denial was supported

by substantial evidence and was not arbitrary or unreasonable.

Finally, appellant contends 82-2-125 and the order of denial entered pursuant to it amount to a taking of property without due process of law in violation of the fourteenth amendment to the federal constitution. Appellant acknowledges that the state may, in the exercise of its police power, legislate to prevent the waste or exploitation of natural resources. On the other hand, he asserts, the means used to secure the legislative ends must not be unreasonable, arbitrary or capricious, and must have a real and substantial relation to the objective sought to be attained. We treat first with the denial order. Appellant says it takes his private property for public use without just compensation. This contention is postulated on the same claim of economic burden which we have already considered and held to be not supported by the evidence offered. Appellant had a fair hearing. He has not shown his position to be any different from others affected by the rule. He has not demonstrated any financial loss nor has he shown how he would be adversely affected in the future by the denial of his application for exemption.

Appellant asserts the substantial cost incident to the acquisition of the information warrants the regulation being declared unconstitutional as a taking of property without just compensation. His testimony was that the average cost of obtaining a portion of the information was currently about \$3,400 per well. However, this figure is misleading because it appears that the information is routinely obtained during the drilling of a well as a matter of standard operating procedure. The costs of filing the information were shown to be only nominal. The pecuniary injury of filing would not alone warrant declaring the regulation unconstitutional (see 16 Am. Jur. 2d, Constitutional Law, § 294).

In 16 Am. Jur. 2d, Constitutional Law, § 363, it is stated:

"The constitutionally protected right of property is not

an absolute right. The right is subject to such reasonable restraints and regulations established by law as the legislature, under governing and controlling power vested in it by the constitution, may think necessary and expedient. Thus, it is subject to limitation by reason and by means of legitimate exercises of the state's police power." (pp. 691-692.)

Appellant cites eminent domain cases to support his proposition of unconstitutionality of the regulation. The distinction between the exercise of the right of eminent domain and the police power has been articulated in 29A C.J.S., Eminent Domain, § 6, thus:

"Eminent domain takes property because it is useful to the public, while the police power regulates the use of, or impairs rights in, property to prevent detriment to public interest; in the exercise of eminent domain private property is taken for public use and the owner is compensated, while the police power regulates an owner's use and enjoyment of property, or deprives him of it, by destruction, for the public welfare, without compensation other than the sharing of the resulting general benefits." (p. 178.)

In *Smith v. State Highway Commission*, 185 Kan. 445, 346 P. 2d 259, this court stated:

"The police power is the power of government to act in furtherance of the public good, either through legislation or by the exercise of any other legitimate means, in the promotion of the public health, safety, morals and general welfare, *without incurring liability* for the resulting injury to private individuals. [Citations] Eminent domain, on the other hand, is the power of the sovereign to take or damage private property for a public purpose *on payment of just compensation*. . . .

". . . Determination of whether damages are compensable under eminent domain or noncompensable under the

police power depends on the relative importance of the interests affected. The court must weigh the relative interests of the public and that of the individual, so as to arrive at a just balance in order that government will not be unduly restricted in the proper exercise of its functions for the public good, while at the same time giving due effect to the policy in the eminent domain clause of insuring the individual against an *unreasonable loss* occasioned by the exercise of governmental power." (pp. 453-454.)

Much of that which has already been said is applicable here. The regulation is designed to prevent waste in the production of oil and gas and to protect usable water as it may be affected by such production. Assuming that filing the information could impair the filer's use of it, a period of two years confidentiality is allowed for such use and upon a proper showing of economic hardship or that the period of confidentiality is too short, under the exception in the regulation no filing need be made at all. These are adequate safeguards for the protection of private rights as against those of the public. Neither 82-2-125 nor the denial order violates the due process clause of the federal constitution.

The judgment is affirmed.

Approved by the Court.

DISSENTING OPINION

FATZER, Chief Justice.

I respectfully dissent from that part of the holding of the court contained in Syllabus Paragraph No. 4, and the corresponding portions of the opinion that the State Corporation Commission has statutory authority to adopt the rule in question; that the rule is reasonably related to the prevention of waste in the production of oil and gas, and to the protection of usable water as it may be affected by such production; that the applicant failed to sustain his burden in proving an exemption; that the State Corporation Commis-

sion's order of denial was supported by substantial evidence and not arbitrary or unreasonable, and that the Commission's rule and denial order did not violate the due process clause of the federal Constitution.

The State Corporation Commission possesses no powers not granted it by statute. (Bennett v. Corporation Commission, 157 Kan. 589, 596, 142 P.2d 810.) Allegedly, under the authority granted by K.S.A. 1973 Supp. 55-604, and K.S.A. 55-704, the Commission promulgated K.A.R. 82-2-125. Rules and regulations of an administrative agency are void when they bear no reasonable relation to the purpose for which they are authorized to be made. I fail to see how the Commission's rule K.A.R. 82-2-125 accomplishes the purposes set forth in the relevant statutes.

SCHROEDER, J., joins in the foregoing dissenting opinion.

DISCUSSION NOTES

Government Regulation: Orders of Commissions—Filing of Drilling Information and Samples.

The basic thrust of the appellant's concern is that he is compelled to file valuable drilling information with the geological survey that may not be securely retained as confidential, in which case he may lose economically advantageous drilling agreements or attractive leasing possibilities. The requirements of the rule do appear to drastically reduce the value to the independent driller of a wildcat venture. As indicated in the opinion, the final provisions of the rule represent a compromise of various interests, private and public, which has resulted in a new definition of the kind of "property right" future drillers will acquire incident to their effort.

J. R. G.

NASH v. WHITTEN

Louisiana Court of Appeal
Second Circuit
April 30, 1975—No. 12590
312 So.2d 679
(Overruled, 52 O&GR 499)

Pipelines: Pipeline Servitude—Creation of Servitude by Acquisitive Prescription.

Plaintiff brought an action to compel removal from his land of a natural gas pipeline transversing plaintiff's land connecting a producing gas well located east of plaintiff's property to defendant's residence located west of plaintiff's property. Plaintiff alleged the line was laid across his property without authorization or muniment of title. Defendant maintained the gas line constituted a continuous and apparent servitude which could be established by acquisitive prescription through possession for a period of ten years. Plaintiff, on the other hand, contended that the gas line would be a discontinuous servitude which can be established only by title. The trial court concluded that the pipeline was a continuous and apparent servitude, title to which had been acquired by defendant by prescription of more than ten years. Plaintiff appealed. Held: Affirmed. Louisiana Civil Code article 727 provides that continuous servitudes are those whose use is or may be continual without the act of man. It is therefore evident that if an act of man is necessary to exercise the servitude, it is not continuous but discontinuous. However, it is necessary for the act of man to be performed on the servient estate. Since there was no evidence presented that defendant or his agents performed any act whatsoever on plaintiff's land in order to exercise the use of the servitude, such a gas pipeline should be considered a continuous servitude. There is no question the gas line is perceivable by exterior works and therefore is an apparent servitude as contemplated by Louisiana Civil Code article 728. That being the case, the presence of the pipeline in excess of ten years on plaintiff's property created by acquisitive prescription a continuous and apparent servitude. (Overruled, 52 O&GR 499.)

Appeal from the Eleventh Judicial District Court for the Parish of DeSoto, Louisiana. John S. Pickett, Jr., Judge.

Standard Alaska
Production Company
900 East Benson Boulevard
P.O. Box 196612
Anchorage, Alaska 99519-6612
(907) 564-5111

*Value to
private land owners
of conf. party
Ability to reel above value?*

STANDARD
ALASKA PRODUCTION

TESTIMONY OF STANDARD ALASKA PRODUCTION COMPANY
ON HB 41, CONFIDENTIALITY OF
EXPLORATORY WELL INFORMATION - FEBRUARY 18, 1987

My name is John A. Reeder and I am employed as Senior Counsel for Standard Alaska Production Company in Anchorage. I have been employed in this capacity by Standard or its affiliate, BP Alaska, Inc., since 1974 and served in the Department of Law as an Assistant Attorney General from 1971 to 1974. During this time, I have been almost exclusively involved in natural resource law in Alaska. My purpose in testifying today is to discuss the constitutional limitations in making public data from wells drilled on private or native land. Previously, Standard has indicated to this Committee that it does not favor HB 41 on policy grounds.

HB 41 seeks to repeal provisions of AS 31.05.035(c) which were adopted in 1978, and which now permit the Commissioner, Department of Natural Resources (DNR) to determine if information from oil and gas wells drilled in Alaska should be held by the Alaska Oil and Gas Conservation Commission (AOGCC) on a confidential basis, rather than released to the public after two years as would otherwise be provided under that section.

In the process of reviewing HB 41, I have come to the conclusion that the present structure of AS 31.05.035(c) may have significant constitutional flaws as it would be required to be applied to private (Native) lands regardless of the policy questions presented by HB 41. Removal of the

Commissioner's discretion would almost certainly cause the provision to be administered contrary to constitutional limitations.

While the AOGCC, in the exercise of its statutory oil and gas conservation responsibilities, clearly has authority to require the submission of data from wells drilled on private lands, the public release of economically valuable data from private lands (which some authorities have called the "speculative value" of land) is difficult to support as a valid exercise of the State's police power, and this is particularly true in the context of Alaska's difficult and time-consuming exploration environment. Premature release of such data destroys its commercial value to the landowner, and may subject the State to liability for an unpermitted "taking" of that value without compensation. Retroactive application of HB 41 also destroys the priority value of data from wells drilled on private lands. //

Private ownership of the mineral estate in Alaska was virtually unknown prior to the implementation of the Alaska Native Claims Settlement Act and the acquisition by Regional Corporations of mineral rights in the subsurface of Native lands. The lack of private lands is one of the unique aspects of land management in Alaska. //

As originally enacted in 1960, the confidentiality provision provided an automatic two-year period of confidentiality for data submitted from wells drilled in Alaska. This section was amended in 1970 to establish a separate section, AS 31.05.035, and provided that certain information be made immediately available to the public. In 1978, the section was again amended to its present form to provide a means of holding data confidential beyond the 24-month automatic period where the value of unleased lands might be affected by the information.

While this was a recognition of the commercial value of confidential data obtained by the State's oil and gas lessees, it is important to understand that, as applied to State lands, no real constitutional issue was or is presented by the prospective application of the submittal requirements. As applied to State lands, the issue of the duration of a confidentiality requirement, and the conditions under which it can be extended, is a policy matter to be decided by the legislature. As previously stated to this Committee, Standard feels a mechanism to extend the period of confidentiality on State lands is vital to the continued drilling of exploration wells in frontier areas, and should be retained as a matter of policy.

The issue is quite different with respect to private lands. As I will discuss later, the issue with respect to private lands concerns the exercise of the State's police power in the context of applicable constitutional limitations.// The issue has rarely been raised in Alaska due to the manner in which the 1978 amendments to Section 35 have been implemented. Apparently the Commissioner, DNR, has made a determination with respect to private lands as well as State lands. In fact, of the 13 wells now assigned extended confidentiality status, eight are on Native lands.//

Previously, this Committee has received a copy of a letter from former Commissioner Robert E. LeResche to Texaco, Inc. concerning a well drilled on Native lands in which he raised the issue of the applicability of the 1978 amendment to Section 35 to private lands. Commissioner LeResche decided to hold the data from the well confidential pending clarification of the law. No regulations were adopted concerning the applicability of Section 35(c) to private lands, and the DNR continued to deal with both private and State lands in the same manner.//

Thus, to date the issue of a possible taking of the speculative value of private lands under these circumstances has been avoided. //

The right of a landowner to keep information concerning his mineral estate confidential has been recognized in the United States for some time. Attached to my statement is a listing of material your staff may find useful which discusses this right. The property right has most often been examined in connection with a trespass committed by a third party in which geologic information affecting the value of the land was made public without the permission of the landowner. // The trespass is said to have destroyed the speculative value of the land, the right of the landowner to hold such information confidential in the expectation of obtaining valuable consideration from others wishing to explore on his land. //

Almost all oil-producing states recognize this right in requiring landowners to file information on oil and gas wells with conservation agencies, as almost all make some provisions for the landowner to automatically, or by application, protect the right of confidentiality. //

At least one reported case involved the assertion by a lessee that the requirement to file such data was a taking of property without compensation, where, in the judgment of the lessee, an inadequate period was allowed in which the data was to be kept confidential. In this case, a copy of which is attached to my statement, the Kansas Corporation Commission (the equivalent of the AOGCC) had refused to grant an exemption to a two-year confidentiality provision on the grounds that the existing regulations adequately protected the speculative value of the lands held by the oil and gas lessee. The court upheld the Commission's decision. The importance of the case is the clear

recognition by both the Commission and the court of the existence of the speculative value of the lessee's lands. The Commission merely decided that in this instance a two-year period was adequate.

In Alaska, I believe the automatic two-year period of confidentiality which would remain in AS 31.05.035(c) if HB 41 is passed is not adequate to protect the speculative value of well data from private lands. The long development times, difficult environmental conditions and extreme distance from markets which impede oil and gas development in Alaska are well known to the Committee and need not be repeated here, but these obstructions to development usually result in geologic information retaining its commercial value for much longer times than in the rest of the United States. In practice, geologic data from wells drilled on private lands may remain valuable for commercial purposes for many years, and some mechanism needs to be included in AS 31.05.035(c) to extend the period of confidentiality to protect the speculative value of such lands.// In this respect, Alaska has distinctly different requirements from other oil-producing states.//

On the other hand, there seems to be little need to include development wells, wells drilled in producing reservoirs, (either on private or State land) in any system intended to protect the speculative value of private or State lands. Elimination of this requirement would ease a significant administrative burden on the AOGCC.

In conclusion, Standard, as previously stated to the Committee, feels the present provisions of AS 31.05.035(c) should be retained, both as a sound policy to encourage the drilling of exploration wells on State land and to protect the speculative value of private lands as required by Alaska's Constitution.

Authorities Discussing Description of Speculative Value

For general background see:

1. 1 H. Williams & C. Meyers, Oil and Gas Law §§ 229-230 (1986).

2. 1 W. Summers, The Law of Oil and Gas §§ 21-40 (2d ed. 1954 & Supp. 1986).

Concerning constitutional limitations see:

1. Retroactive application of HB 41. Norton v. Alcoholic Beverage Control Board, 695 P.2d 1090 (Alaska 1985).

2. Unconstitutional taking of private property. Ruckelhaus v. Monsanto Co., 104 S. Ct. 2862 (1984); State v. Hammer, 550 P.2d 820 (Alaska 1976).

SUBSTANTIVE LAW CASES

HARTMAN v. STATE CORPORATION COMMISSION et al.

Kansas Supreme Court
December 7, 1974—No. 47420
529 P.2d 134

Government Regulation: Orders of Commissions—Filing of Drilling Information and Samples.

The Kansas State Corporation Commission duly promulgated Rule 82-2-125 which requires that certain information and samples obtained in drilling oil and gas wells be filed with the state geological survey. Provision was made for the granting of exceptions to the rule based upon a finding by the Commission that compliance would create an economic hardship, the information is not necessary for the specific area, or the length of confidential custody of the information is not sufficient to satisfy the needs of the developing operator. Appellant sought an exemption from the rule of some 4,600 acres in the Damme Pool area. The Commission denied Appellant's application generally on the grounds that he had not proven the need for an exception and that the provision for exceptions was not intended to allow mass exceptions. Upon judicial review, the district court adopted the facts and conclusions of law of the Commission, and it further held that the Commission had not exceeded its statutory power and the Commission's denial was not arbitrary, capricious, or unlawful. On appeal, held: Affirmed. The issuance of Rule 82-2-125 after conducting hearings does not preclude judicial review of the validity of the order, and it may be collaterally attacked upon an appeal from its application. In view of the broad authority and direction to the Corporation Commission to prevent waste and conserve natural resources, it appears that the power to enact the rule in question is necessarily implied and that the information required by the rule is reasonably related to the purposes of conservation statutes. Appellant failed to carry his burden of proof for an exception, and he sought no more than a blanket exemption from application of the rule. With regard to the assertion of the taking of

property without due compensation, the rule in question is a proper exercise of the state's police power and it is not an exercise of the power of eminent domain. Fatzer and Schroeder, dissenting.

SYLLABUS BY THE COURT

1. Rules and regulations made by an administrative agency are not *res judicata*.

2. In order to be valid, administrative regulations must be within the authority conferred by the legislature. An administrative regulation which goes beyond or conflicts with legislative authorization is void.

3. The responsibility for proper administration of the laws relating to the production and conservation of oil and gas rests primarily with the state corporation commission. The factors to be considered and their proper evaluation are matters exclusively within the commission's discretion and are not subject to judicial review so long as they bear a reasonable relation to the subject matter of the order.

4. In a proceeding wherein a driller sought exemption from filing certain material pursuant to a rule of the corporation commission (KAR 82-2-125) the record is examined and it is *held*: (1) The commission had statutory authority to adopt the rule; (2) the rule is reasonably related to the prevention of waste in the production of gas and oil and to the protection of usable water as it may be affected by such production; (3) the burden of proving entitlement to such exemption was on the applicant; (4) applicant failed to sustain this burden and the commission's order of denial was supported by substantial evidence and was not arbitrary or unreasonable; and (5) neither the rule nor the denial order violates the due process clause of the federal constitution.

Appeal from Finney district court; L. L. Morgan, judge assigned. *Affirmed*.

HARMAN, Commissioner.

The state corporation commission promulgated a regulation requiring certain information and samples obtained in drilling oil and gas wells to be filed with the state geological survey. Certain exceptions were provided. Applicant W. L. Hartman's request for exception from the provisions of the regulation was denied by the commission. Upon review the district court of Finney county upheld the commission's denial order and the matter is now here on applicant's appeal.

Following publication of notice and after holding hearings in which several oil producers, drillers and royalty owners or their representatives appeared, the corporation commission on August 19, 1971, promulgated a new regulation designated as rule 82-2-125, which became effective January 1, 1972. Applicant Hartman was present at the hearing and protested adoption of the regulation. KAR 82-2-125 provides:

"Preservation of well samples and logs. Every person, firm, association, or corporation drilling or responsible for drilling holes for the purpose of discovery or production of oil or gas (excluding seismic 'shotholes' and 'coreholes') shall preserve and have delivered at his expense (prepaid), the following samples and information to the Kansas geological survey, 4150 Monroe street, Wichita, Kansas 67209.

"(A) Formation samples (drill cuttings) normally saved in drilling operations shall be retained by the operator; and upon request of the Kansas geological survey, such samples shall be washed, cut into splits (sets) and one set placed in sample envelopes ready for repository when delivered to the above address. Notification to the operator that samples are required shall be made either by notice appended to or on a copy of the notice of intention to drill returned to the operator by the conservation division of the Kansas corporation commission. Delivery of the processed samples shall be made within 90 days of the com-

pletion of drilling operations. The survey may, on some bore holes, request shallow samples from portions of the hole that may not normally be saved in drilling operations. In this event, the saving, processing and delivery of such additional requested samples shall be a voluntary act on the part of the operator. The repository (sample library) shall accept all washed and cut samples whether or not requested.

“(B) A copy of electric logs, radioactivity logs, and similar wireline logs or surveys run by the operator on all boreholes (excluding seismic, ‘coreholes,’ and logs run for the purpose of obtaining geo-physical data) shall be delivered to the above address within 90 days following the running of such logs or surveys.

“(C) Copies of driller's logs prepared on a form prescribed by the Kansas corporation commission shall be completed and filed with the Kansas geological survey within 90 days after completion of the well.

“(D) Upon receipt of a written request at the address listed herein, said request to be submitted either prior to or simultaneously with, any or all samples or information filed as required in items (A), (B) and (C) hereof shall be held in confidential custody by the survey for an initial period of one year from the date of receipt thereof, unless release of said samples or information is approved in writing prior to the expiration of the one year period:

Provided, however, The period of confidential custody may be extended for one additional year by written notice to the survey, such notice to be received at least 30 days prior to the expiration of the initial one year period.

“(E) In a like manner, samples, logs or surveys of wells completed prior to the effective date of this order may be submitted to the survey and will be maintained in confidential custody if requested in writing to do so.

“(F) It shall be the duty of each company performing

logging services within the state of Kansas to furnish each month, to the state geological survey at the address listed herein, a list of all holes logged.

"Exceptions to the provisions of this rule may be granted whenever the commission shall find that the granting of such exception is justified because of one of the following:

"(1) Compliance with this order will create an economic hardship.

"(2) Submitting the requested samples, logs and information is not necessary for a local or prescribed area.

"(3) The length of the period of confidential custody is not sufficient to satisfy the needs of the developing operator.

"Exceptions may be requested by affidavit setting forth supporting facts. In the event the requested exception is not fully supported, the commission may set the matter for hearing after giving notice thereof."

Applicant Hartman is an independent oil and gas operator with extensive lease holdings in the Damme field in Finney county, Kansas. In 1951 he discovered the Damme pool and has since drilled approximately fifty oil and gas wells in or near that area. Geological information is collected in connection with each well drilled. Electric logs are kept and seismographs are also utilized on the wells. The information acquired is helpful in determining what land to lease and where to drill. Upon occasion applicant had in the past entered into dry hole support agreements whereby in exchange for formation samples, electric log, drilling times and other information supplied by him to other operators holding leases in the field, the latter contribute money toward the drilling of a well (or acreage), to the mutual benefit of the parties.

On January 19, 1972, Hartman filed an application seeking exception from the provisions of rule 82-2-125. He

alleged he was the owner of leases covering twenty-one tracts aggregating about 4,600 acres in the Damme pool and he sought exemption from the rule of all of his acreage "and/or the Damme Pool generally". The application alleged the information required to be filed had substantial economic value and public disclosure would create an economic burden in that no dry hole support contributions would be available; further that the two year maximum period of confidentiality was insufficient in that the pool was still being developed and in any event the arrangements of the state geological survey for safeguarding the filed information were inadequate. Applicant also alleged compliance with the rule would result in confiscation of his property.

Hearing on Hartman's application was had before the corporation commission March 23, 1972. Four major oil producers also appeared at the hearing in opposition to the application. Applicant's evidence consisted of exhibits and the testimony of Robert L. Schmidlapp, his geologist, engineer and production manager. Schmidlapp testified he had supervised the drilling of each of Hartman's wells in the Damme field; the information collected during drilling is important to the leasing of acreage and to the drilling and completion of other wells; the average cost per well over the years spent by applicant in the running of electric logs had been \$2,500 but is now around \$3,400; applicant has thus spent about \$125,000 for the fifty wells drilled by him in the field; he has spent about \$200,000 in seismographs; he received contributions toward drilling expense in exchange for electric log information in the discovery well drilled in 1951 and from two others drilled in 1953; applicant has declined on occasions to enter into this type of arrangement because he did not want to disclose the information obtained in drilling; he has undeveloped acreage and leases adjacent to the present boundaries of the pool; other operators have leases around the perimeter of the pool; there is competition when these leases expire; the geological information obtained in drilling applicant's fifty wells is of

benefit to the general area and has been used by applicant in acquiring new leases; all types of information secured from drilling are used to evaluate seismograph data; the information obtained by applicant in drilling was paid for by him, it belongs to him, he expects to use it and does not want to give it to competitors in the area; to do so would be an economic disadvantage; applicant is not drilling any well at the present time but has drilled and completed two wells since the rule was adopted; no samples or logs from these two have been filed; the cost of filing is nominal; three presently contemplated locations remain to be drilled; applicant has drilled more wells in the Damme pool than any other operator. The witness also testified that in his opinion the two year period of confidentiality was not long enough to protect applicant's interest; he had examined the storage facilities of the state geological survey and did not believe they were adequate. He feared applicant's competitors might obtain the information. This same witness has also testified for applicant in opposition to the rule at the hearing held on its adoption.

The state geologist, Dr. William M. Hambleton, who is also director of the state geological survey, testified. Preliminarily, he stated rule 82-2-125 had been adopted after extensive hearings in order that significant and important information would not be lost; after considering all the testimony presented the rule adopted was an expression of the corporation commission's sensitivity to the testimony of all interested parties and an excellent compromise which satisfied the state's need for information and yet did not unduly add to the cost of doing business. More stringent rules have been established in other states where there is less confidence in the petroleum industry. Absence of adequate rules and regulations elsewhere, coupled with wilful practices, have caused agencies of the federal government to become interested in environmental protection as related to the petroleum industry. Some congressional action has already been taken, which if completed, would probably result

in more stringent measures than required by the rule under consideration. In carrying out the provisions of the rule the state geological survey has been careful not to request unneeded samples and information and has developed procedures adequate to safeguard the confidentiality of the information. A burglar and fire resistant file has been requisitioned for such purpose. The witness further testified granting Hartman's application under the circumstances would set a precedent which would emasculate the rule since his leases are little different from leases held elsewhere in the state; anyone who drills a well to extract minerals not only gains mineral resources and information, he also produces a hole which under certain circumstances can be detrimental to the public health and safety; blowouts related to the oil and gas industry have occurred in recent years in Kansas; information from holes in the particular areas was inadequate to determine the source of the problems or the solutions; at least seven major surface collapses have occurred which resulted from corrosion of casing caused by underlying salt solutions; where information is inadequate new holes have to be drilled in the area to secure adequate knowledge; such information is necessary for the protection of fresh water resources and for correction of and protection from blowouts and surface collapses; electric logs are used with other geological data to acquire knowledge of rock pathology and changes in fluids, which is essential in the study of blowouts.

Robert Dilts, manager of the Wichita well sample library of the state geological survey, testified requests for samples are generally limited to "wildcats" (wells drilled one mile or more away from production), wells drilled deeper than those nearby, wells that are one-half mile away from those from which samples are presently held, and wells wherein the survey has a special interest; logs are requested from each well; information in an area such as the Damme field where so many holes have been drilled is necessary; the survey is interested in the setting of surface pipe in the area to pro-

tect fresh water strata; electric logs would reveal information as to areas above the producing formation.

Other oil operators made statements at the hearing. Champlin Petroleum Company, which owns producing wells and has interests in about 3,200 acres of land in the area, stated that in the past in order to encourage cooperative testing by drilling, it had contributed acreage to applicant, reserving a minimum overriding royalty thereon. Its position was that for rule 82-2-125 to be of fruitful effect, it must be universally applied and the exception should be denied.

Mobil Oil Corporation objected to the granting of the application, its position being that its grant would be a serious deterrent to further drilling and development in the area. Mobil believed it will not be able to secure approval for drilling proposals unless and until the rule is complied with.

The position of Texaco, Inc., was the applicant is no different from anyone else in the Damme field and doesn't deserve the exception and granting it for the whole Damme pool would set a very bad precedent.

Cities Service Oil Company also opposed the granting of the application; to grant it would do away with the effectiveness of the rule. Cities also stated applicant's evidence was insufficient to bring him within any of the three exceptions to the rule.

In an order filed May 31, 1972, the corporation commission denied the application. After reviewing the evidence and making certain findings the order of denial contained these recitals:

"6. The Commission finds on the basis of evidence presented that the granting of the application for an exception is not justified under any of the three grounds for exceptions set out in Rule 82-2-125 (F). The Commission finds that the evidence presented by the Applicant relating to economic hardship, is based on their apprehension of the possibility of unauthorized disclosure of the

information filed and is speculative and conjectural in nature. It is noted by the Commission that evidence presented by the Applicant as to the quantity and value of geological data accumulated from the Damme Pool relates almost entirely to data which is not required to be filed with the Kansas Geological Survey as it was obtained before the effective date of Rule 82-2-125.

"7. The Commission finds that the Kansas Geological Survey has taken adequate and reasonable security precautions and has adopted reasonable procedures to protect geological data filed or to be filed with the Survey.

"8. The Commission, having considered the history, present stage of development and other factors and characteristics relating to the Damme Pool, finds that the two year confidential period provided under Rule 82-2-125 (D) is adequate and reasonable to protect operators in the said Pool.

"9. The Commission finds that the granting of the application for an exception would damage the effectiveness and purpose of the rule; that the information required to be filed is necessary in order to provide for prudent conservation practices and procedure including the protection of fresh water resources and the health, safety and well-being of Kansas citizens.

"10. The Commission finds that the purpose of providing for exceptions to the provisions of this rule was to provide for specific or special cases involving extraordinary circumstances, and not to allow mass exceptions of substantial portions of or entire pools from the rule."

Thereafter the corporation commission denied an amended application for rehearing filed by applicant. Hartman then petitioned the district court of Finney county for review of the order. That court adopted the corporation commission's findings of fact and conclusions of law but withheld judgment by reason of two further issues raised by the parties

in that court: Applicant's contention that the commission exceeded its statutory power in promulgation of the rule in question and the commission's contention that applicant could not collaterally attack the rule in his petition for judicial review. After receiving additional briefs on these two issues the trial court denied relief, holding that the commission's order of denial was not arbitrary, capricious or unlawful; it further held the rule in question was subject to attack by applicant upon his petition for judicial review but that the corporation commission did not exceed its statutory authority in promulgating the rule. The court noted the legislature had empowered the commission to promulgate rules for the exploration, drilling, production and conservation of oil and natural gas and that K.S.A. Chapter 55 sets out guidelines for such rules in the protection of the public interest, including the following:

Prevention of economic, underground and surface waste; protection of correlative rights; disposal of salt water; issuing of drilling permits; re-pressuring—by the injection of air, gas, water and other fluids; plugging of wells; and protection of fresh water.

Applicant Hartman now appeals.

We should first consider the corporation commission's renewed assertion that appellant Hartman may not now collaterally attack the validity of the rule. This contention is premised upon the fact appellant was present and participated in the hearing held by the commission to determine whether the rule should be adopted, appellant objected to its adoption but did not appeal from the order of promulgation. A number of oil producers appeared in opposition at the hearing but apparently none sought district court review of the order. Appellee's argument is that appellant may not now challenge the rule's validity, that matter has become *res judicata*, and appellee includes for good measure appellant is now estopped by laches and by the doctrine of election of remedies to assert his present position. In these

latter two contentions appellee seeks refuge in broad general statements of law not applicable here and which need not be further discussed. Essentially appellee says appellant should not have a second opportunity to contest the rule. The proceeding was not an adversary one in the judicial sense and the doctrine of res judicata, in any of its aspects, does not bar appellant.

In 2 Davis, Administrative Law, § 18:08, it is stated:

"In name and tradition 'res judicata' means thing adjudicated. Only what is adjudicated can be res judicata. Administrative action other than adjudication cannot be res judicata. Even if an exercise of the rule-making powers depends on a finding of facts, neither the rule nor the finding is regarded as res judicata." (p. 597.)

We have held the doctrine of res judicata does not ordinarily apply to the decisions of administrative tribunals (*Warburton v. Warkentin*, 185 Kan. 468, 345 P. 2d 992) and in *Aylward Production Corp. v. Corporation Commission*, 162 Kan. 428, 176 P. 2d 861, a proceeding in which the target was a commission order establishing a minimum allowable for oil for wells in prorated pools, this court said:

"Force is given this argument by the fact that rules and regulations of the commission are never res judicata. Should bad consequences follow from such an order being made the commission might change it to meet conditions as they exist." (p. 440.)

The rule appears clearly to be that regulations made by an administrative agency are not res judicata.

Appellant contends the appellee commission had no statutory authority to promulgate rule 82-2-125 and its act in doing so was an arbitrary and capricious exercise of power. He argues the regulation does not carry out any statutory objective. He asserts, and correctly so, that to be valid, administrative regulations must be within the authority con-

ferred, and further that an administrative regulation which goes beyond or conflicts with legislative authorization is void, citing *Amoco Production Co. v. Arnold, Director of Taxation*, 213 Kan. 636, 518 P. 2d 453. He argues our statutes give appellee only the authority to prevent waste in the *current production* of oil and gas and the rule in question has no reasonable relation to that end—its only purpose is to try to secure information helpful in knowing where to explore for *future* oil and gas wells. He points out that legislatures in many other oil producing states have expressly conferred upon their regulatory agencies authority to require the furnishing by drillers of the material encompassed here by the rule in question and argues this tends to show that without specific enabling authority a commission empowered only to prevent "waste" is not authorized to speculate on future discovery by requiring the filing of electric logs.

In *1 Summers, Oil and Gas*, § 82, it is stated:

"There is a considerable variance in the extent of the control which the different oil and gas producing states exercise over the location, drilling, equipping and operating of oil and gas wells for the prevention of waste and the protection of correlative rights. . . . [pp. 269-270]

"Statutes or regulations commonly require that the operator keep at each well, while drilling, an accurate drilling record or log, showing all formations drilled through, method of casing, and other detailed information that may be required, and upon completion or abandonment of the well, require that copies of such record be filed with the conservation agency or other state or county officer." (pp. 274-275.)

Let us examine our own statutes pertaining to the corporation commission's powers and duties. K.S.A. 1973 Supp. 55-128 provides that anyone responsible for drilling seismic, core or exploratory holes for the purpose of ex-

ploration, discovery or production of oil and gas shall first give prior notice to the state corporation commission of intent to drill, such notice to include certain information pertaining to the proposed drilling; further that:

"The corporation commission shall determine the amount of pipe necessary to protect all usable water, and shall so notify the person, firm, association or corporation submitting the notice of intent to drill before said drilling is commenced.

.

"No person, firm, association, or corporation shall set pipe at any seismic, core or exploratory hole except with the approval of state corporation commission and in conformance with the rules and regulations of the corporation commission, except that additional pipe beyond the requirements of the corporation commission may be set by the driller. Before any such hole is abandoned, it shall be the duty of the party responsible for drilling such hole to plug the same in such manner as to properly protect all water-bearing formations and in conformance with the rules and regulations adopted by the corporation commission;

.

"It shall be the duty of the owner or operator of any well which is now drilling or drilled or that may hereafter be drilled for the purpose of discovery of oil and gas, before abandoning same, to shut off and exclude all water from entering oil-bearing or gas-bearing sand, strata or formation encountered in the well and to use every effort and endeavor to protect any usable underground or surface water from infiltration or addition of any detrimental substances, in accordance with methods, rules and regulations of the state corporation commission and under its direction. Before any work is commenced to abandon any well, the owner or operator thereof shall give written notice

to the state corporation commission or the agent of the commission as hereinafter designated, of his intention to abandon such well; the date upon which the work of abandonment shall begin, and that he will plug the well in accordance with the rules and regulations as prescribed by the commission. . . .

"Whenever operations shall cease for a period of ninety (90) days on any well which is now drilled, is being drilled or may hereafter be drilled in the future for the purpose of exploration, discovery or production of oil, gas or other minerals, the owner or operator of such well shall give notice thereof to the commission and, if the commission shall deem it necessary to prevent the pollution of any fresh water strata or supply, shall cause such well to be temporarily plugged in accordance with the rules and regulations of the commission and under its direction. . . .

"The state corporation commission is hereby authorized and directed to adopt rules and regulations necessary to carry out the provisions of this section. Prior to adopting any such rules and regulations, the commission shall take into consideration any recommendations of the state board of health, state geological survey and state water resources board with respect thereto. . . ."

K.S.A. 55-130 directs the commission to adopt such reasonable rules as may be necessary to provide the method by which oil and gas wells or holes may be plugged and abandoned. K.S.A. 55-601 prohibits and declares unlawful the production of crude oil or petroleum in such manner and under such conditions as to constitute waste. K.S.A. 55-602 provides:

"That the term 'waste' as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste, waste of reservoir energy, and the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands. The state corporation commission shall have

authority to make rules and regulations for the prevention of such waste and for the protection of all fresh-water strata, and oil- and gas-bearing strata encountered in any well drilled for, or producing, oil. . . ."

K.S.A. 1973 Supp. 55-604 provides:

"(A) The commission shall have and is hereby given jurisdiction and authority over all matters involving the application and enforcement of the act [act regulating production of petroleum oil, etc.], and shall have authority to make and enforce rules, regulations and orders for the prevention of waste as herein defined and for carrying out and enforcing each and all of the provisions of this act. . . ."

K.S.A. 55-704, relating to the production and conservation of natural gas, states:

"The commission shall promulgate such rules and regulations as may be necessary for the prevention of waste as defined by this act, the protection of all water, oil or gas-bearing strata encountered in any well drilled in such common source of supply . . . as the commission may find necessary and proper to carry out the spirit and the purpose of this act. . . ."

The foregoing statutes provide broad authority and direction to the corporation commission to prevent waste, including economic waste, in the production of oil and gas, to conserve these natural resources and to protect usable water as it may be affected by drilling for oil and gas. It has specific duties with respect to drilling, placement of pipe and abandonment and plugging of wells. To discharge all these responsibilities effectively the legislature must have been aware the commission would need certain information as to the holes drilled. Rule-making power was given the commission in carrying out its functions. Appellee asserts rule 82-2-125 was adopted to help prevent loss of ultimate re-

covery of this state's oil and gas reserves. Historically, powers granted to regulatory bodies under conservation statutes have been liberally construed by the courts. In *Aylward Production Corp.* the corporation commission took a restricted view of its own rule-making power with respect to fixing minimum allowables. In broadening the commission's narrow interpretation this court conceded that looking at the provisions of only one statute the commission's construction would be proper, then observed:

"But these provisions must be construed in connection with the whole purpose of the act and with the broad provisions with reference to the commission's power, all of which have been heretofore set out." (p. 441.)

In *Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 169 Kan. 722, 222 P. 2d 704, the court was concerned with the corporation commission's authority to fix a minimum wellhead price for natural gas. These observations were made:

"The dominant purpose of this statute [55-704] is to prohibit waste of natural gas in Kansas, not only in the manner and under the conditions of its production, but for such purposes as would constitute waste. In order that the term 'waste' should not be narrowly construed the statute makes it clear that it is to include economic, underground and surface waste, and the term 'economic waste' is defined. These provisions were for the purpose, if necessary, of expanding the meaning of the term 'waste' and not for the purpose of limiting such meaning. The statute also deals with the rights of owners of property under which there is a common source of supply of natural gas. We think the statute is broad enough to authorize the commission to make any rule or order to prohibit waste of natural gas, upon proper application made to it. . . . It is true the statute did not specifically authorize the commission to fix a wellhead minimum price to be paid for gas produced. It did not forbid the commission to do so

if and when the evidence disclosed the fixing of such price would tend to prevent waste and the inequitable and unfair taking of gas from a common source of supply. Hence, the legal question presented by appellants, that the statute did not authorize the commission to make the interim order complained of, is not well taken." (p. 732.)

The court further held:

"In this state the production and distribution of natural gas for light, fuel and power is a business of a public nature, the control of which belongs to the state.

"The dominant purpose of our statutes pertaining to the production and conservation of natural gas [55-701, et seq.] is to prohibit waste of natural gas in Kansas, not only in the manner and under the conditions of its production, but for such purposes as would constitute waste." (Syl. ¶¶ 2 & 3.)

Appellant also contends the information required by the regulation bears no reasonable relation to the prevention of waste. We are aware of no case in any jurisdiction having either a rule or statute similar to 82-2-125 where such a challenge has been made. The evidence here on this point is somewhat vague due to the fact appellant raised the point collaterally before the district court on the hearing of its petition for review. The hearing before the corporation commission was to determine whether appellant should be granted an exception to the regulation. However, the record before us reveals that when the regulation was adopted the commission made the following findings:

"3. The evidence presented supporting the adoption of the proposed rule consisted of four (4) witnesses including members of the Kansas Geological Survey, the President and past President of the Kansas Geological Society, the Geologists active in the oil and gas industry. The substance of their testimony and evidence presented was that the present voluntary system, which relies on voluntary

contributions of samples and logs to the survey, is no longer adequate as evidenced by the marked decline in their receipt of such data in recent years. Additional testimony indicated that much information vital to future exploration for oil and gas in Kansas had been irretrievably lost.

"4. Additional evidence indicated that for the period from July 5, 1970, to December 31, 1970, samples were received from only 44% of the wells drilled in that period and that the receipt of samples from wildcat wells also showed a substantial decline. The evidence indicated that the conservation of well samples and log information and *the continued loss of such information could result in economic and physical waste.*" (Our emphasis.)

Appellee asserts that without reliable geological data such as that revealed by electric logs its conservation division cannot develop the expertise to require proper use of reservoir energy and achieve maximum recovery in the reserves; further that availability of logs can prevent unnecessary drilling. Upon the hearing of appellant's application for exception there was evidence blowouts can affect fresh water, that electric logs provide information relative to blowouts and that the information called for is also necessary for the design of appropriate practices in the interest of public health and safety.

We need not labor the matter. The legislature has authorized the commission to adopt regulations for the prevention of waste and for the protection of all fresh water strata and oil and gas-bearing strata encountered in any well drilled for oil. We think the power to enact the rule in question is necessarily implied within those broad grants and the information required by the rule is reasonably related to the prevention of waste in the production of oil and gas and to the protection of usable water as it may be affected by such production.

Appellant further contends his application for an exception to compliance with 82-2-125 was improperly denied because the findings upon which the denial order was based are unreasonable, arbitrary, capricious and not supported by substantial evidence. He says he should have had an exception under subsection 1 of the rule (economic hardship) and 3 (insufficient period of confidential custody) because he produced evidence of past sales of the information now required to be furnished by the rule and also his expert believed the two year period of confidentiality was insufficient due to appellant's unique position in the Damme field by reason of the large number of wells he already had with his mass of information on them, plus his undeveloped acreage.

It should be noted appellant was not seeking exception for one particular well nor one limited area—rather he sought exemption for all his acreage in the Damme pool and/or the Damme pool generally. Appellant's evidence respecting economic hardship did show that when the field was new he had received contributions under dry hole agreements and that he had a valuable mass of information accumulated from his drilling the fifty wells in the pool, which he says he would have to disgorge without recompense. But all this occurred prior to the adoption of the rule. Section (E) of the rule states that sample logs or surveys of wells completed prior to the effective date of the rule *may* be submitted to the survey for confidential custody. Such submission is not required but is wholly voluntary. Thus the material upon which appellant largely bases his contention of economic hardship is not required to be filed.

The burden of proof in bringing himself within the exceptions provided in the rule was, of course, on appellant. The commission specifically found that on the basis of the evidence presented the grant of an exception was not justified. Appellant presented no evidence with respect to problems encountered or likely to occur in any specific well or area. The request was simply for blanket exemption of appellant's entire holdings and/or the entire field. There was

no testimony concerning conditions or positions of the two wells completed after the adoption of the rule with relation to acreage owned by others or of the contemplated three locations or as to how they would be affected by the rule. There was no indication dry hole support money was sought and was unavailable. There was no testimony the rule would in fact deter future contributions. Other than the bare assertion of opinion by his expert, appellant made no showing that the one year period of confidentiality or the two year period (actually two years plus ninety days) would not be sufficient "to satisfy the needs of the developing operator". In denying the application the commission was aware the Damme field was then entering its twenty-second year of development. Except for the size of his holdings and number of wells appellant was not shown to be in any position different from others in the field. No evidence was offered respecting any "step-out" or other location proposed for exemption or what would happen under the rule. All the appellant offered must be regarded as merely conjecture. Conceivably he might make a factual case justifying exemption from the rule but he did not do so. The commission's finding that the geological survey had adopted reasonable procedures to safeguard the information filed with it is amply supported by the evidence. In arguing insufficiency of evidence appellant largely ignores that offered by the commission which indicates a need for the information required by the rule. As was said in *Railroad Commission v. Humble Oil & Refining Co.*, 193 S. W. 2d 824, (Tex. Civ. App.):

"The responsibility for the proper administration of the conservation laws rests primarily with the Commission. What factors shall be considered, and their proper evaluation are matters exclusively within the Commission's discretion and not subject to judicial review, so long as they bear a reasonable relation to the subject matter of the order." (p. 833.)

In sum the commission's order of denial was supported

by substantial evidence and was not arbitrary or unreasonable.

Finally, appellant contends 82-2-125 and the order of denial entered pursuant to it amount to a taking of property without due process of law in violation of the fourteenth amendment to the federal constitution. Appellant acknowledges that the state may, in the exercise of its police power, legislate to prevent the waste or exploitation of natural resources. On the other hand, he asserts, the means used to secure the legislative ends must not be unreasonable, arbitrary or capricious, and must have a real and substantial relation to the objective sought to be attained. We treat first with the denial order. Appellant says it takes his private property for public use without just compensation. This contention is postulated on the same claim of economic burden which we have already considered and held to be not supported by the evidence offered. Appellant had a fair hearing. He has not shown his position to be any different from others affected by the rule. He has not demonstrated any financial loss nor has he shown how he would be adversely affected in the future by the denial of his application for exemption.

Appellant asserts the substantial cost incident to the acquisition of the information warrants the regulation being declared unconstitutional as a taking of property without just compensation. His testimony was that the average cost of obtaining a portion of the information was currently about \$3,400 per well. However, this figure is misleading because it appears that the information is routinely obtained during the drilling of a well as a matter of standard operating procedure. The costs of filing the information were shown to be only nominal. The pecuniary injury of filing would not alone warrant declaring the regulation unconstitutional (see 16 Am. Jur. 2d, Constitutional Law, § 294).

In 16 Am. Jur. 2d, Constitutional Law, § 363, it is stated:

"The constitutionally protected right of property is not

an absolute right. The right is subject to such reasonable restraints and regulations established by law as the legislature, under governing and controlling power vested in it by the constitution, may think necessary and expedient. Thus, it is subject to limitation by reason and by means of legitimate exercises of the state's police power." (pp. 691-692.)

Appellant cites eminent domain cases to support his proposition of unconstitutionality of the regulation. The distinction between the exercise of the right of eminent domain and the police power has been articulated in 29A C.J.S., Eminent Domain, § 6, thus:

"Eminent domain takes property because it is useful to the public, while the police power regulates the use of, or impairs rights in, property to prevent detriment to public interest; in the exercise of eminent domain private property is taken for public use and the owner is compensated, while the police power regulates an owner's use and enjoyment of property, or deprives him of it, by destruction, for the public welfare, without compensation other than the sharing of the resulting general benefits." (p. 178.)

In *Smith v. State Highway Commission*, 185 Kan. 445, 346 P. 2d 259, this court stated:

"The police power is the power of government to act in furtherance of the public good, either through legislation or by the exercise of any other legitimate means, in the promotion of the public health, safety, morals and general welfare, *without incurring liability* for the resulting injury to private individuals. [Citations] Eminent domain, on the other hand, is the power of the sovereign to take or damage private property for a public purpose *on payment of just compensation*. . . .

". . . Determination of whether damages are compensable under eminent domain or noncompensable under the

police power depends on the relative importance of the interests affected. The court must weigh the relative interests of the public and that of the individual, so as to arrive at a just balance in order that government will not be unduly restricted in the proper exercise of its functions for the public good, while at the same time giving due effect to the policy in the eminent domain clause of insuring the individual against an *unreasonable loss* occasioned by the exercise of governmental power." (pp. 453-454.)

Much of that which has already been said is applicable here. The regulation is designed to prevent waste in the production of oil and gas and to protect usable water as it may be affected by such production. Assuming that filing the information could impair the filer's use of it, a period of two years confidentiality is allowed for such use and upon a proper showing of economic hardship or that the period of confidentiality is too short, under the exception in the regulation no filing need be made at all. These are adequate safeguards for the protection of private rights as against those of the public. Neither 82-2-125 nor the denial order violates the due process clause of the federal constitution.

The judgment is affirmed.

Approved by the Court.

DISSENTING OPINION

FATZER, Chief Justice.

I respectfully dissent from that part of the holding of the court contained in Syllabus Paragraph No. 4, and the corresponding portions of the opinion that the State Corporation Commission has statutory authority to adopt the rule in question; that the rule is reasonably related to the prevention of waste in the production of oil and gas, and to the protection of usable water as it may be affected by such production; that the applicant failed to sustain his burden in proving an exemption; that the State Corporation Commis-

sion's order of denial was supported by substantial evidence and not arbitrary or unreasonable, and that the Commission's rule and denial order did not violate the due process clause of the federal Constitution.

The State Corporation Commission possesses no powers not granted it by statute. (Bennett v. Corporation Commission, 157 Kan. 589, 596, 142 P.2d 810.) Allegedly, under the authority granted by K.S.A. 1973 Supp. 55-604, and K.S.A. 55-704, the Commission promulgated K.A.R. 82-2-125. Rules and regulations of an administrative agency are void when they bear no reasonable relation to the purpose for which they are authorized to be made. I fail to see how the Commission's rule K.A.R. 82-2-125 accomplishes the purposes set forth in the relevant statutes.

SCHROEDER, J., joins in the foregoing dissenting opinion.

DISCUSSION NOTES

Government Regulation: Orders of Commissions—Filing of Drilling Information and Samples.

The basic thrust of the appellant's concern is that he is compelled to file valuable drilling information with the geological survey that may not be securely retained as confidential, in which case he may lose economically advantageous drilling agreements or attractive leasing possibilities. The requirements of the rule do appear to drastically reduce the value to the independent driller of a wildcat venture. As indicated in the opinion, the final provisions of the rule represent a compromise of various interests, private and public, which has resulted in a new definition of the kind of "property right" future drillers will acquire incident to their effort.

J. R. G.

NASH v. WHITTEN

Louisiana Court of Appeal

Second Circuit

April 30, 1975—No. 12590

312 So.2d 679

(Overruled, 52 O&GR 499)

Pipelines: Pipeline Servitude—Creation of Servitude by Acquisitive Prescription.

Plaintiff brought an action to compel removal from his land of a natural gas pipeline transversing plaintiff's land connecting a producing gas well located east of plaintiff's property to defendant's residence located west of plaintiff's property. Plaintiff alleged the line was laid across his property without authorization or muniment of title. Defendant maintained the gas line constituted a continuous and apparent servitude which could be established by acquisitive prescription through possession for a period of ten years. Plaintiff, on the other hand, contended that the gas line would be a discontinuous servitude which can be established only by title. The trial court concluded that the pipeline was a continuous and apparent servitude, title to which had been acquired by defendant by prescription of more than ten years. Plaintiff appealed. Held: Affirmed. Louisiana Civil Code article 727 provides that continuous servitudes are those whose use is or may be continual without the act of man. It is therefore evident that if an act of man is necessary to exercise the servitude, it is not continuous but discontinuous. However, it is necessary for the act of man to be performed on the servient estate. Since there was no evidence presented that defendant or his agents performed any act whatsoever on plaintiff's land in order to exercise the use of the servitude, such a gas pipeline should be considered a continuous servitude. There is no question the gas line is perceivable by exterior works and therefore is an apparent servitude as contemplated by Louisiana Civil Code article 728. That being the case, the presence of the pipeline in excess of ten years on plaintiff's property created by acquisitive prescription a continuous and apparent servitude. (Overruled, 52 O&GR 499.)

Appeal from the Eleventh Judicial District Court for the Parish of DeSoto, Louisiana. John S. Pickett, Jr., Judge.

5-0305B
Bannister
2/17/87

Original sponsors: Brown, Koponen
and Goll

1 IN THE HOUSE

BY THE RESOURCES COMMITTEE

2 CS FOR HOUSE BILL NO. 41 (Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the confidentiality of certain
7 oil and gas information; and providing for an effec-
8 tive date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. LEGISLATIVE FINDINGS. (a) The legislature finds that

11 (1) the best interests of the state will be served if oil and
12 gas well data and information are not held confidential for periods longer
13 than two years;

14 (2) increasing the amount of oil and gas well data and informa-
15 tion available to citizens of the state and to the state's oil and gas
16 industry will improve competition and encourage more companies to become
17 involved in oil and gas exploration and production in the state;

18 (3) the predictable release of oil and gas well data and infor-
19 mation will expedite oil and gas exploration and production and enhance the
20 state's economic interests;

21 (4) drilling operations will be safer and more efficient if oil
22 and gas well data and information are available from nearby wells; and

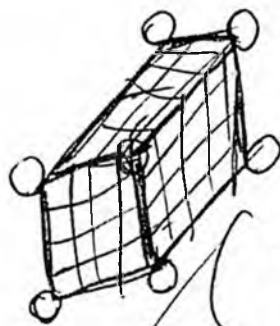
23 (5) a better overall understanding of Alaska's subsurface
24 resources and geology will be promoted if oil and gas well data and infor-
25 mation are made available to the public.

26 * Sec. 2. AS 31.05.035(c) is amended to read:

27 (c) The reports and information required in (a) of this section
28 shall be kept confidential for 24 months following the 30-day filing
29 period unless the owner of the well gives written permission to

1 release the reports and information at an earlier date. If the com-
 2 missioner of natural resources finds that the required reports and
 3 information filed under (b) of this section before July 1, 1987,
 4 contain significant information relating to the valuation of unleased
 5 land in the same vicinity, the commissioner shall keep the reports and
 6 information confidential for a reasonable time after the disposition
 7 of all affected unleased land, unless the owner of the well gives
 8 written permission to release the reports and information at an
 9 earlier date. Well location, depth, status and production data and
 10 production reports required by the commission to be filed subsequent
 11 to the 30-day filing period is [SHALL BE CONSIDERED] public informa-
 12 tion and may [SHALL] not be classified confidential. Production data,
 13 as used in this subsection, means volume, gravity, and gas-oil ratio
 14 of all production of oil or gas after the well begins regular produc-
 15 tion.

16 * Sec. 3. This Act takes effect July 1, 1987.



*leases obtained
 for purpose of
 giving advantage in
 unleased lands.*

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

HB 4i

WELL DATA CONFIDENTIALITY

ARGUMENTS AGAINST CSHB 41 (FINANCE), "AN ACT RELATING TO THE CONFIDENTIALITY OF CERTAIN OIL AND GAS INFORMATION."

1. CSHB 41 WILL PENALIZE THOSE COMPANIES WILLING TO UNDERTAKE EXPLORATORY DRILLING.
2. CSHB 41 WOULD REWARD THOSE COMPANIES NOT DRILLING.
3. BECAUSE ALASKA HAS HAD FEW EXPLORATORY WELLS DRILLED COMPARED TO OTHER STATES, THE STATE SHOULD ACTIVELY ENCOURAGE EXPLORATION RATHER THAN INSTITUTE DISINCENTIVES SUCH AS REMOVAL AFTER 1991 OF THE EXTENDED CONFIDENTIALITY OF WELL DATA AS PROVIDED IN CSHB 41.
4. CSHB 41 WILL DISCOURAGE DRILLING ON LEASES ADJACENT TO UNLEASED LANDS, ESPECIALLY STATE LANDS ON WHICH SCHEDULED LEASE SALES MAY BE DELAYED.
5. CSHB 41 WILL ALLOW WELL DATA FROM DRY HOLES TO BE MADE PUBLIC WHICH MAY SUBSTANTIALLY DIMINISH THE LEASE VALUE OF ADJACENT UNLEASED LAND.
6. CSHB 41 WILL DISCOURAGE DRILLING IN FRONTIER AREAS.
7. GIVEN THE LONG TIME PERIOD AND HIGH COST TO DRILL AN EXPLORATORY WELL, TWO YEARS IS NOT AN ADEQUATE PERIOD OF TIME TO PROTECT REQUIRED WELL DATA.
8. CSHB 41 WILL REDUCE THE NUMBER OF FIRMS PARTICIPATING IN LEASING AND LEASE DEVELOPMENT IN ALASKA.
9. CSHB 41 COULD REDUCE THE FUTURE LEVEL OF OIL PRODUCTION IN ALASKA TOGETHER WITH THE ECONOMIC BENEFITS INCLUDING STATE REVENUES, EMPLOYMENT, AND DEVELOPMENT OF CRITICALLY NEEDED INFRASTRUCTURE FACILITIES.
10. CSHB 41 WOULD ALLOW THE STATE TO ACQUIRE VALUABLE COMMERCIAL DATA FROM PRIVATE LANDS UNDER THE GUISE OF DISCHARGING STATUTORY DUTIES TO DEVELOP LANDS BELONGING TO IT. THIS IS A "TAKING" OF PRIVATE PROPERTY WITHOUT COMPENSATION.
11. CSHB 41 HAS SIGNIFICANT CONSTITUTIONAL FLAWS AS APPLIED TO PRIVATE LANDS. PREMATURE RELEASE OF WELL DATA FROM PRIVATE LANDS DESTROYS THE COMMERCIAL VALUE OF THE DATA TO THE LANDOWNER.
12. CSHB 41 OFFERS NO INCENTIVE TO DRILL A SECOND WELL IN SEQUENCE SINCE DATA FROM THE FIRST WELL WILL LIKELY BE PUBLIC PRIOR TO THE ACQUISITION OF PERMITS AND COMPLETION OF A SECOND WELL.

April 30, 1987

TESTIMONY OFFERED ON APRIL 28, 1987
BEFORE THE ALASKA HOUSE OF
REPRESENTATIVES FINANCE COMMITTEE
REGARDING BY 41 AND HB COMMITTEE
SUBSTITUTE 41

Thank you, Mr. Chairman. My name is John Carson. I am the Chief Geologist for Chevron U.S.A.'s Western Region. I have been a petroleum geologist for 31 years and have spent nearly two-thirds of that time involved with Alaska's exploration problems. I speak today on behalf of Chevron. Chevron appreciates the opportunity to testify on this matter of importance to both the State and the petroleum industry. My remarks will be brief and I will be glad to answer any questions you may have.

Chevron opposes HB Committee Substitute 41 because we feel that the State and the industry's best interests are served under the existing law. The State's best economic interests are served when increased leasing and exploratory drilling are promoted. Given the multiple lessors, harsh climate, long lead times, and uncertain economic conditions, a prudent operator will not drill an exploratory well next to open acreage unless he has some certainty that the open acreage will be sold prior to his well data being released.

Therefore, Chevron contends that exploratory drilling will decline if HB 41 is enacted. Previous testimony has generated much discussion on this topic and, I must admit, it is not an easily proven point from either side. However, I plan to present evidence that I hope will show why we contend that drilling will decrease.

First, historically there is a strong correlation between impending lease sales and exploratory drilling. In the eighteen months prior to