Case 1327

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO EX REL OIL CONSERVATION COMMISSION, EDWIN L. MECHEM, MURRAY E. MORGAN, A. L. PORTER, JR., MEMBERS OF SAID COMMISSION, TEXAS PACIFIC COAL AND OIL COMPANY, EL PASO NATURAL GAS COMPANY AND PERMIAN BASIN PIPELINE COMPANY,	)	
Relators	)	NO. 6483
vs.	)	
HON. JOHN R. BRAND, JUDGE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW MEXICO,	)	
Respondent	)	

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BRIEF OF RELATORS

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I N D E X

AUTHORITIES

NEW MEXICO DECISIONS

STATUTES AND CONSTITUTION

TEXTS, TREATISES AND LAW REVIEW ARTICLES

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STATEMENT OF THE CASE

and

STATEMENT OF THE FACTS

This matter is before the Court pursuant to the application of Relators for a Writ of Prohibition as a result of which an Alternative Writ of Prohibition was issued by this Court on September 30, 1958. The question for decision is whether the Writ should be made permanent.

In view of the fact that no trial has been had in this case, Relators feel that combining the Statement of the Case and the Statement of the Facts will prove helpful to the Court in explaining what has taken place to date.

The case involves the question of proration of gas production from the Jalmat Gas Pool in Southern Lea County, New Mexico.

Gas prorationing was first instituted in the Jalmat Gas Pool and in a number of other pools in Southeastern New Mexico on January 1, 1954, after a series of hearings extending over

approximately four years. After these hearings, a gas proration formula based solely on acreage was adopted. On February 9, 1954, a committee was appointed to study the advisability and feasibility of including a deliverability factor in the proration formula at a subsequent date.

In the latter part of 1957, Texas Pacific Coal and Oil Company filed an application with the Oil Conservation Commission seeking an order terminating gas prorationing in the Jalmat Gas Pool, or, in the alternative, for an order establishing deliverability as a factor in the proration formula for the Pool.

The application was heard as Commission Case No. 1327 on October 18, November 14 and December 9, 1957. On January 29, 1958, the Commission entered Order No. R-1092-A. The Order denied the application for termination of gas prorationing, finding that proration was necessary to prevent waste. The Order did, however, change the gas proration formula for the Jalmat Gas Pool to one based upon 75% acreage times deliverability plus 25% acreage. The Commission found as a fact "that the applicant has proved that there is a general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the gas in place under the tracts dedicated to said wells, and that the inclusion of a deliverability factor in the proration formula for the Jalmat Gas Pool would, therefore, result in a more equitable allocation of the gas production in

said pool than under the present gas proration formula."

Following the entry of Order No. R-1092-A, fourteen operators filed applications for a rehearing before the Commission. A rehearing was held on March 25, 1958. Some one thousand pages of testimony, as well as approximately seventy-five exhibits, were received by the Commission in Case No. 1327. On April 25, 1958, the Commission entered Order No. R-1092-C reaffirming Order No. R-1092-A.

Petitions for review were then filed by the following operators pursuant to Section 65-3-22 (b), NMSA, 1953: Continental Oil Company, Shell Oil Company, Cities Service Oil Company, Pan American Petroleum Corporation, Humble Oil and Refining Company, Amerada Petroleum Corporation, Standard Oil Company of Texas, and the Atlantic Refining Company. The cases were docketed in the District Court of Lea County as Nos. 16213 through 16220 and were subsequently consolidated and docketed as Case No. 16213. The Oil Conservation Commission, Texas Pacific Coal and Oil Company, El Paso Natural Gas Company, Permian Basin Pipeline Company and Southern Union Gas Company were named as Respondents.

Relator Oil Conservation Commission requested a pre-trial conference and such conference was held on August 4, 1958, before the Hon. John R. Brand, District Judge and Respondent herein. At this pre-trial conference petitioners stated that they intend to introduce evidence in addition to the record made before the Commission when Cause No. 16213 comes on for trial. The Court advised petitioners to notify Relators and the Court as to the gist of the testimony they proposed to offer and the reason for doing so. The Court stated that it would rule

at a second pre-trial conference on whether it would listen to such additional testimony.

On September 15, 1958, Petitioners submitted an "offer of proof" to Relators setting forth the additional evidence which they intend to present upon trial of Cause No. 16213. A "supplemental offer of proof" was submitted to Relators on September 23, 1958.

A second pre-trial conference was held on September 23, 1958, before the Hon. John R. Brand. At this time Relators urged that in a review of an order of the Oil Conservation Commission in District Court, evidence in addition to the record made before the Commission cannot be received nor considered by the reviewing court in determining whether the Commission's findings of fact are arbitrary, capricious, unreasonable, improper or unlawful. Argument was then had on the admissibility of each proposed item of additional evidence with Relators stating that such argument in no way constituted a waiver of objection to the Court's taking any additional evidence in this case.

At the close of argument, the Court stated that it would take such additional evidence as was not available to petitioners at the time of the hearings before the Oil Conservation Commission and which was not presented to the Commission, in order to determine whether the Orders complained of were arbitrary, capricious, unreasonable, improper or unlawful.

On September 30, 1958, Relators filed an application for Writ of Prohibition with the Supreme Court of New Mexico seeking an order prohibiting the District Court from receiving any evidence in addition to the record made before the Oil

Conservation Commission for the purpose of determining whether the Commission's action is arbitrary, capricious, unreasonable, improper or unlawful. An Alternative Writ of Prohibition so ordering was issued by the Supreme Court of New Mexico on that date.

ARGUMENT AND AUTHORITIES

POINT I

THE OIL CONSERVATION COMMISSION IS A LEGISLATIVE BODY AND WAS ACTING IN A LEGISLATIVE-ADMINISTRATIVE CAPACITY WHEN IT ENTERED THE ORDERS COMPLAINED OF.

The Oil Conservation Commission of New Mexico was created in 1935 by an Act of the Legislature which was amended in 1949 and now appears as Chapter 65, Article 3, of the New Mexico Statutes Annotated, 1953 Compilation. The Act granted the Commission broad powers to deal with the production of oil and gas in the State of New Mexico. Section 65-3-10, NMSA, 1953, defines the general powers of the Oil Conservation Commission as follows:

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

The powers of the Oil Conservation Commission are of a prospective nature and deal primarily with the determination of state policy regarding the conservation of oil and gas and the promulgation of rules, regulations and orders to implement such policies. Powers such as these are basically legislative in nature and could be exercised by the legislature itself but for the fact that the legislature deemed it more prudent to commit such matters to an administrative agency with a staff of petroleum

engineers and geologists at its disposal.

The Orders complained of established a formula for prorationing the production of gas from the Jalmat Gas Pool, and in entering these orders the Oil Conservation Commission was acting in a legislative and administrative capacity. Superior Oil Company v. Beery, 216 Miss. 664, 64 So. 2d 357 (1953). See Seward v. D. & R. G. Ry. Co., 17 N.M. 557, 131 Pac. 980 (1913); Yarbrough v. Montoya, 54 N.M. 91, 214 P. 2d 769 (1950); Transcontinental Bus System v. State Corporation Commission, 56 N.M. 158, 241 P. 2d 829 (1952); Ferguson-Steere Motor Co. v. State Corporation Commission, 63 N.M. 137, 314 P. 2d 894 (1957).

As the Mississippi Supreme Court stated in California Co. v. State Oil and Gas Board, 200 Miss. 824, 27 So. 2d 542, 545 (1946):

> "The Legislature itself had the right in the first instance to prescribe the general rule and regulation as to the spacing of oil and gas wells and to provide for exceptions thereto under given circumstances, and it had the right to delegate this legislative power to a special administrative agency...and it is to be conceded that in adopting such general rule and regulation the Oil and Gas Board was acting in a legislative capacity..."

An extremely lucid test for determining whether an administrative agency performs legislative or judicial functions was set forth by the Supreme Court of Washington in the case of Floyd v. Department of Labor and Industries, 44 Wash. 2d 560, 269 P. 2d 563 (1954). The court quoted with approval the test originally propounded by Mr. Justice Holmes in Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S. Ct. 67, 69, 53 L. Ed. 150 (1908) as follows:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."

In addition, the Washington court stated that two questions must be asked: (1) Could the court have been charged in the first instance with the responsibility of making the decisions the administrative body must make? (2) Are the functions performed by the administrative agency ones which the courts have historically been accustomed to performing and did perform prior to the creation of the administrative body? If, as in the instant case, both questions must be answered in the negative, then the action of the agency is legislative in nature.

The proration orders complained of look to the future and make a new rule to be applied to gas proration in the Jalmat Gas Pool. The courts have never been accustomed to devising formulae for oil and gas proration, and, indeed, could not have been charged in the first instance with making such decisions. See Peterson v. Livestock Commission, 120 Mont. 140, 181 P. 2d 152 (1947). Hence the conclusion is inescapable, that the Oil Conservation Commission was acting in a legislative-administrative capacity when it entered the orders complained of.

POINT II

TO PERMIT THE DISTRICT COURT TO TAKE EVIDENCE WHICH WAS NOT PRESENTED TO THE COMMISSION FOR THE PURPOSE OF DETERMINING WHETHER THE COMMISSION ACTION WAS ARBITRARY, CAPRICIOUS, UNREASONABLE, IMPROPER OR UNLAWFUL WOULD VIOLATE THE SEPARATION OF POWERS PROVISION OF THE NEW MEXICO CONSTITUTION.

The District Court has ruled that it will take additional evidence in this case to determine whether the action of the

Oil Conservation Commission in the instant case was arbitrary, capricious, unreasonable, improper or unlawful.

The taking of such additional evidence will result in nothing more or less than a substitution by the District Court of its judgment for that of the Oil Conservation Commission on matters which have been committed to the discretion of the Commission by the legislature. See Seward v. D. & R. G. Ry. Co., 17 N.M. 557, 131 Pac. 980 (1913). Such action by the District Court would clearly violate the separation of powers doctrine of the Constitution of the State of New Mexico (Article III, Section 1) which provides:

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

An extremely thorough and well reasoned analysis of the limitation imposed by the separation of powers doctrine on judicial review of administrative actions can be found in the case of California Co. v. State Oil and Gas Board, supra. This was an appeal from an order of the State Oil and Gas Board of Mississippi on a factual situation similar to that in the case at bar. The statute which authorized appeals from the decisions of the Oil and Gas Board provided that such appeals were to be tried de novo by the circuit court. The question raised was whether the requirement that the matter be tried de novo was unconstitutional and void because it undertook to confer non-judicial functions on the circuit court. The Mississippi Supreme Court struck down the de novo provision as a violation

of the separation of powers doctrine, saying that since the Board was acting in a legislative capacity when it entered the challenged order,

> "the circuit court would be without Constitutional power on appeal to substitute its own opinion as to what are proper oil conservation measures for that of the State Oil and Gas Board, on a legislative or administrative question, since the separation of executive, legislative and judicial powers...forbid."
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> * * *
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> "Therefore, the only sound, practicable or workable rule that can be announced by the Court is to hold that when the appeal is from either a general rule and regulation or from an exception granted thereto, the Court to which the appeal is taken shall only inquire into whether or not the same is reasonable and proper according to the facts disclosed before the Board..." (Emphasis added)

Mr. Justice Frankfurter of the United States Supreme Court phrased this principle very aptly in Railroad Commission of Texas v. Rowan and Nichols Oil Co., 310 U.S. 573, 581, 60 S. Ct. 1021, 84 L. Ed. 1368 (1940), when he wrote:

> "Plainly these are not issues for our arbitrament. The state was confronted with its general problem of proration and with the special relation to it of the small tracts in the particular configuration of the East Texas field. It has chosen to meet these problems through the day to day exertions of a body especially entrusted with the task because presumably competent to deal with it."

In the same opinion Mr. Justice Frankfurter went on to say that the question of whether a system of proration based on hourly potential is fairer than one based on some other factor or combination of factors

> "is in itself a question for administrative and not judicial judgment."

The New Mexico Supreme Court has long been aware of the restriction imposed by the separation of powers doctrine. In the case of Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P. 2d 225, (1940), involving an appeal to District Court from a decision of the Chief of Division of Liquor Control, the Court made the following statement at page 199:

> "Assuming the constitutionality of Sec. 1303, it did not undertake to vest in the District Court the administrative function of whether or not the permit should be granted. It gave the Court authority only to determine whether upon the facts and law, the action of the Commissioner in cancelling the license was based upon an error of law or was unsupported by substantial evidence or clearly arbitrary or capricious...otherwise it would be a delegation of administrative authority to the district court in violation of the Constitution."
> (Emphasis added)

At the time Floeck v. Bureau of Revenue, supra, was decided there was no provision in the liquor law appeal statutes for a trial "de novo." However, in 1945 the legislature amended the act to provide that hearings in the district court on appeals from decisions by the chief of division shall be "de novo." Section 61-516, 1941 Comp., as amended by Chapter 87, Laws of 1945 (Section 46-5-16, NMSA, 1953 Comp.)

In 1950 the Supreme Court of New Mexico was called upon in the case of Yarbrough v. Montoya, 54 N.M. 91, 214 P. 2d 769 (1950), to determine the scope of review under the amended appeal statute referred to above. In that case the Court stated at page 95:

> "We are further committed to the doctrine that the Courts may not overrule the acts on an administrative officer on matters committed to their discretion unless their actions are unlawful, unreasonable, arbitrary, capricious, or not supported by evidence. Floeck v. Bureau of Revenue 44 N.M. 194, 100 P. 2d 225, 228."

The applicant argued that the above-quoted rule was no longer applicable since the appeal statute had been subsequently amended to provide for a hearing "de novo." The Court dismissed this argument by quoting that portion of the Floeck case, supra, which held that if the statute purported to authorize the District Court to substitute its judgment for that of the Chief of the Division in determining whether or not the permit should be granted,

> "it would be a delegation of administrative authority to the district court in violation of the constitution."

The Court in the Yarbrough case, supra, held that the scope of review by the District Court under the amended "de novo" statute is identical with that under the old statute even though the former was the result of an obvious legislative attempt to increase the scope of review by the District Court. The great significance of this decision is the fact that the Court felt compelled to so construe the amended statute in order to avoid declaring it unconstitutional as violating the separation of powers doctrine. This is clear from the court's language at page 96 of the opinion where it said,

> "We will adopt the construction of the amendment under which it can be held to be constitutional."

The essence of this holding is that the scope of review set forth in the Floeck case, supra, is the maximum review which the constitutional separation of powers doctrine will permit and that the legislature is powerless to go beyond this point.

Professor Davis in his treatise, Davis on Administrative Law § 256 (1951), recognizes that there is a constitutional limit on the scope of review by the courts of administrative action.

Professor Davis characterizes this concept as the "Constitutional Maximum of Review," and states as follows at page 922:

> "Congress may run afoul of constitutional limitations by providing too much review as well as by providing too little review. The maximum limit on review is imposed for the purpose of preventing courts from engaging in nonjudicial activities."

In light of the concept of "constitutional maximum" review, let us consider the numerous opinions of the Supreme Court of New Mexico on the scope of review of actions of the State Corporation Commission.

The first case in New Mexico appears to be Seward v. D. & R. G. Ry. Co., supra, which was a proceeding under the provisions of Article II, Section 7 of the Constitution of the State of New Mexico, which provides for removal of certain matters directly from the Corporation Commission to the Supreme Court and provides further that:

> "...the said court shall have the power and it shall be its duty to decide such cases on their merits, and carry into effect its judgments, orders, and decrees made in such cases, by fine, forfeiture, mandamus, injunction and contempt or other appropriate proceedings." (Emphasis added)

The Attorney General took the position that the Supreme Court had a right to form its independent judgment in the matter and was not confined to a consideration of the reasonableness and lawfulness of the order of the Commission. The Supreme Court had this to say at page 579 of the New Mexico Reports:

> "Now if the contention is sound then the provision just quoted invests this court with legislative power to fix rates. There is no doubt but that the people of the state, by constitutional provision could confer such power upon the judges of the Supreme Court. If they saw fit they might combine all the power of government in one department, but such action would not be in accord with the settled policy of the states of the Union, where it has been the studied purpose to, so far as possible, keep separate the three

> great departments, and we should not so construe the provision as conferring legislative power upon this body, unless compelled to do so by clear and unmistakable language."

The Court held that the only issue to be decided upon the appeal was the reasonableness and lawfulness of the order, and it concluded that if the Court finds the order reasonable and lawful, it enters a judgment to that effect, but if it finds it unlawful and unreasonable, it refuses to enforce it and the State Corporation Commission may proceed to form a new order under its rule.

This proposition was further discussed in the case of Seaberg v. Raton Public Service Co., 36 N.M. 59, 8 P. 2d 100 (1932), in which the petitioner had removed a matter which was before the Corporation Commission, directly to the Supreme Court, and the Corporation Commission filed a motion to dismiss. The facts of the case are not particularly pertinent to the present question, but some of the language of the Court indicates the position which it was quick to take in these matters. We quote from the case as follows (page 62, New Mexico Reports):

> "The proceeding of removal is not for the review of judicial action by the commission. It is to test the reasonableness and lawfulness of its orders. The function of the commission is legislative; that of the court, judicial. The commission is not given power to enforce any order; it being merely a rate-making or rule-making body, doing what, if there were no commission, the Legislature alone could do. The Court, on the other hand, can make no rate or rule, since it lacks the legislative power." (Emphasis added)

Perhaps the most complete discussion of the matter arose in the case of Harris v. State Corporation Commission, 46 N.M. 352, 129 P. 2d 323 (1942), which involved an appeal to the District Court of Santa Fe County. The carrier had been granted a certificate

and another carrier, adversely affected, appealed to the District Court. At the trial, the plaintiff, instead of introducing the record of the hearing before the Commission, introduced new evidence by way of testimony of seven witnesses. Upon conclusion of the evidence, the Court made many findings contrary to those of the Commission. The first question discussed was the scope of judicial review. The Court goes into a rather exhaustive review of the New Mexico authorities and discusses several Law Review articles concerning the subject. Some of its concluding remarks on pages 359-360 are as follows:

> "When our Legislature enacted Ch. 154, L. 1933, it declared its purpose and policy to confer upon the Commission the power and authority to make it its duty to supervise and regulate the transportation of persons and property by motor vehicle for hire upon the public highways of this state and to relieve the undue burdens on the highways, and to protect the safety, and welfare of the traveling and shipping public and to preserve, foster and regulate transportation and permit the co-ordination of transportation facilities.
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> Counsel for Appellee contends that in the removal of a cause pending before the Commission under Sec. 51, etc. of the Act, the trial before the District Court is a trial de novo. This view is repelled distinctly by what we said in the Seward Case.
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> Even where statutes of other states have said that upon judicial review of administrative or legislative acts the trial shall be de novo, some courts have held such provision unconstitutional, others hold that the de novo provision is limited to the ascertainment by the court of whether the jurisdictional facts exist and whether there had been due process, and whether the Commission had kept within its lawful authority.
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> * * * * * *

> We hold that the District Court erred in receiving and considering testimony other than that which had been produced at the hearing before the Commission."

In the case of New Mexico Transp. Co., Inc. v. State Corporation Commission, 51 N.M. 59, 178 P. 2d 580 (1947), the Court affirmed the position taken in Harris v. State Corporation Commission, supra, and refused to disturb an order of the State Corporation Commission. At page 60, the Court said:

> "Following the rules there announced, we are unable to say from an examination of the record that the order of the Commission granting these certificates was either unlawful or unreasonable. It is not sufficient that we might have reached a different conclusion." (Emphasis added)

The recent cases of Transcontinental Bus System v. State Corporation Commission, 56 N.M. 158, 241 P. 2d 829 (1952) and Ferguson-Steere Motor Co. v. State Corporation Commission, 62 N.M. 143, 306 P. 2d 637 (1957), confirm the previous decisions of the Supreme Court of New Mexico in connection with this question.

In Ferguson-Steere Motor Company v. State Corporation Commission, 63 N.M. 137, 142, 144, 314 P. 2d 894 (1957) the Court summarized its position regarding the scope of review of administrative actions when it said:

> "It was not within the province of the trial court, nor is it within the province of this Court, to consider any evidence other than that introduced at the hearing before the Commission.
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> * * *
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> "This Court has consistently held that the courts may not overrule the acts of an administrative officer on matters committed to their discretion unless their actions are unlawful, unreasonable, arbitrary, capricious, or not supported by evidence, and

> that in reviewing the actions of such bodies, the trial Court is bound by the substantial evidence rule, that is, whether the findings of the administrative body are supported by substantial evidence. Floeck v. Bureau of Revenue, supra; Harris v. State Corporation Commission supra; Yarbrough v. Montoya, supra, Transcontinental Bus System v. State Corporation Commission, supra; Ferguson-Steere Motor v. State Corporation, 62 N.M. 143, 306 P. 2d. 637." (Emphasis added)

Admittedly the statute providing for review of Corporation Commission action contains no do novo provision. But note that the above-quoted language is not limited to review of Corporation Commission action.

Further, it should be noted that the court chose to summarize the scope of review in appeals from the State Corporation Commission in the same identical terms as it used in defining the scope of review in appeals from the actions of the Chief of Division of Liquor Control in Yarbrough v. Montoya, supra, where the statute provided for an appeal de novo. This could hardly be coincidence and we deem it highly significant in light of the language in the Yarbrough case to the effect that any broader scope of review of administrative action

> "would be a delegation of administrative authority to the district court in violation of the constitution."

In view of this fact, the conclusion seems inescapable that the scope of review set forth in the Ferguson-Steere case, supra, is also the maximum review which the constitution will permit, and that the legislature would be powerless to expand the scope of review beyond that point. The conclusion is supported by the court's language in that case at page 142 of the New Mexico Reports:

"The Commission is an administrative body and the courts are limited in their review of the actions of such bodies."

Accord: Seward v. Denver & R. G. Ry. Co., supra; Woody v. Denver & R. G. Ry. Co., 17 N.M. 686, 132 Pac. 250 (1913); Harris v. State Corporation Commission, supra; Transcontinental Bus System v. State Corporation Commission, supra; Garrett Freight Lines v. State Corporation Commission, 63 N.M. 48, 312 P 2d 1061 (1957); State v. McCulloh, 63 N.M. 436, 321 P. 2d 207 (1958).

Thus the concept of "Constitutional Maximum Review" can be summed up as standing for the proposition that the courts, in reviewing findings of fact of administrative agencies on matters committed to the discretion of such agencies, are limited by the separation of powers doctrine to a determination of whether such findings are unlawful, improper, unreasonable, arbitrary, capricious or not supported by the evidence in the record made before the agency.

The factual determination by the Oil Conservation Commission which has been challenged in the instant case involves the advisability of including a deliverability factor in the proration formula for the Jalmat Gas Pool. Certainly the problem of devising an equitable and workable gas proration formula is a matter which has been committed to the judgment and discretion of the Oil Conservation Commission. Railroad Commission of Texas v. Rowan & Nichols Oil Co., supra.

This being the case, the constitutional separation of powers doctrine prohibits the district court from taking any additional evidence to determine whether the Commission's findings of fact in the instant case are arbitrary, capricious, unreasonable, improper or unlawful. The Commission's findings of fact must be sustained if they are supported by substantial evidence on the record made before the Commission.

A.

IF THE STATUTE PROVIDING FOR REVIEW OF ACTIONS OF THE OIL CONSERVATION COMMISSION MUST BE CONSTRUED TO PERMIT THE TAKING OF ADDITIONAL EVIDENCE FOR THE PURPOSES PROPOSED, THEN SUCH STATUTE IS UNCONSTITUTIONAL.

Section 65-3-22 (b), NMSA, 1953 Comp., contains a provision for the review of an order of the Oil Conservation Commission of New Mexico. This provision is as follows:

> "(b) Any party to such rehearing proceeding, dissatisfied with the disposition of the application for rehearing, may appeal therefrom to the district court of the county wherein is located any property of such party affected by the decision, by filing a petition for the review of the action of the commission within twenty (20) days after the entry of the order following rehearing or after the refusal or rehearing as the case may be. Such petition shall state briefly the nature of the proceedings before the Commission and shall set forth the order or decision of the commission complained of and the grounds of invalidity thereof upon which the applicant will rely; Provided, however, that the questions reviewed on appeal shall be only questions presented to the commission by the application for rehearing. Notice of such appeal shall be served upon the adverse party or parties and the commission in the manner provided for the service of summons in civil proceedings. The trial upon appeal shall be de novo, without a jury, and the transcript of proceedings before the commission, including the evidence taken in hearings by the commission, shall be received in evidence by the court in whole or in part upon offer by either party, subject to legal objections to evidence, in the same manner as if such evidence was originally offered in the district court. The commission action complained of shall be prima facie valid and the burden shall be upon the party or parties seeking review to establish the invalidity of such action of the commission. The court shall determine the issues of fact and of law and shall, upon a preponderance of the evidence introduced before the court, which may include evidence in addition to the transcript of proceedings before the commission, and the law applicable thereto, enter its order either affirming, modifying, or vacating the order of the Commission. In the event the court shall modify or vacate the order or decision of the commission, it shall enter such order in lieu thereof as it may determine to be proper. Appeals may be taken from the judgment or decision of the district court to the

> Supreme Court in the same manner as provided for appeals from any other final judgment entered by a district court in this state. The trial of such application for relief from action of the commission and the hearing of any appeal of the Supreme Court from the action of the district court shall be expedited to the fullest possible extent." (Emphasis added)

Although this section of the statute provides for a review proceeding, it also attempts to clothe the Courts, on appeal, with the broad and sweeping power to promulgate legislative and administrative rules and regulations in connection with the oil and gas conservation statutes of New Mexico.

If this statute must be construed as permitting the District Court to receive and consider evidence in addition to the record made before the Commission for the purpose of determining whether the Commission action is arbitrary, capricious, unreasonable, improper or unlawful, then it transcends the separation of powers provision contained in the New Mexico Constitution and hence is unconstitutional.

As pointed out by this Court in Harris v. State Corporation Commission, supra, at page 360 of the New Mexico Reports:

> "Even where statutes of other states have said that upon judicial review of administrative or legislative acts the trial shall be de novo, some courts have held such provision unconstitutional..."

A notable example of such result is the previously mentioned case of California Co. v. State Oil and Gas Board, supra, where the Court held the de novo provision unconstitutional. The Court stated as follows at page 546 of the Southern Reports:

> "In other words to permit a trial de novo in the Circuit Court on a legislative or administrative decision of the State Oil and Gas Board, within the common acceptance of the term 'tried de novo' would permit a party to withhold entirely any showing of these facts, as he contends them to be, from the original board composed of experts and of those charged with the responsibility of a great public policy of the State, and wait until on appeal when he will make his full disclosure

> for the first time before non-experts in that field to determine as to the proper spacing of oil and gas wells. In such case, the Court would be departing from its proper judicial function into the realm of things about which it has no such knowledge as would form the basis for intelligent action."

The same result has been reached in a number of cases from varying jurisdictions. Peterson v. Livestock Commission, supra; Borreson v. Department of Public Welfare, 368 Ill. 425, 14 N.E. 2d 485 (1938); Household Finance Corporation v. State ____ Wash._____, 244 P. 2d 260 (1952); State v. State Securities Commission, 145 Minn. 221, 176 N.W. 759 (1920); Mississippi Insurance Commission v. Insurance Company of North America, 203 Miss. 533, 36 So. 2d 165 (1948).

B.

THE STATUTE PROVIDING FOR REVIEW OF ACTIONS OF THE OIL CONSERVATION COMMISSION MAY BE CONSTRUED CONSTITUTIONALLY BY LIMITING THE SCOPE OF REVIEW OF SUCH ACTION SO AS TO PROHIBIT THE TAKING OF ADDITIONAL EVIDENCE FOR THE PURPOSES PROPOSED.

The "de novo" and "additional evidence"provisions of Section 65-3-22(b), supra, must be construed, insofar as possible, to uphold their constitutionality. See Yarbrough v. Montoya, supra, That such a construction is possible is clearly demonstrated by the case of Denver & R. G. W. R. Co. v. Public Service Commission, 98 Utah 431, 100 P. 2d 552 (1940). An applicant for a motor carrier permit and the protestant both applied for rehearings after the Public Service Commission of Utah had granted an application with certain limitations and the matter was then appealed to the district court. The Court called attention to the fact that prior to the enactment of a 1935 statute, the court's review of the

action of the Commission was limited to questions of law and the Commission's findings of fact were final. However, in 1935 the legislature changed the statute and provided that the district court "shall proceed after a trial de novo." The Utah Supreme Court in considering the extent of the authority of the district court under the amended statute, had this to say:

> "The expression 'trial de novo' has been used with two different meanings...(1) a complete retrial upon new evidence; (2) a trial upon the record made before the lower tribunal. Locally we find an example of the first in Section 104-77-4, R.S.U. 1933, covering appeals from the justice court to the district court---the case is tried in the district court as if it originated there. An example of the second meaning we find locally in our treatment of equity appeals wherein we say that the parties are entitled to a trial de novo upon the record." (Emphasis added)

In considering the effect of the amended Utah statute, as applied to these two different meanings, the court stated:

> "To review an action is to study or examine again. Thus, 'trial de novo' as used here must have a meaning consistent with the continued existence of that which is to be again examined or studied. If, in these cases, the first meaning were applied to the use of the term 'trial de novo' then one could not consistently speak of it as a review, as the Commission's action would no longer exist to be re-examined or restudied.
>
> * * *
>
> What the Legislature has done by Section 9 is to increase the scope of the court's review of the record of the Commission's action to include questions of fact as well as questions of law. A submission to the court of the application, together with testimony other than the record of the testimony before the Commission was not contemplated. The Legislature had in mind the second meaning when it used the word 'trial de novo'here. (Emphasis added)

It is not unusual for courts to so limit and restrict de novo statutes. Lloyd v. City of Gary, 214 Ind. 700, 17 N.E. 2d

836 (1938); State Board of Medical Registration and Examination v. Scherer, _____Ind._____, 46 N.E. 2d 602 (1943); State v. Farris, Tex. Civ. App., 239 S.W. 2d 419 (1951).

If the Commission record was skimpy or incomplete, perhaps the taking of additional evidence would be warranted. In the case of Denver & R. G. W. R. Co. v. Central Weber Sewer I District, 4 Utah 2d 105, 287 P. 2d 884 (1955), the Court had before it the review of an action of the Sewer Commission. It was urged that on writ of review only the record is reviewable, and that no evidence is adducible in addition to that shown in the record. At page 887 the Court stated:

> "We do not agree with the sewer district that the review can extend no further than to examine the record below, nor do we agree with the utilities that the act contemplates a trial de novo. The nature and extent of the review depends on what happened below as reflected by a true record of the proceedings, viewed in the light of accepted due process requirements. If the record made revealed the fact that the Commission had conducted a hearing, taken evidence, heard witnesses under oath and otherwise had proceeded in accordance with such due process requirements, and had the facts either supported or negatived the commission's findings and conclusions, the reviewing court could have examined only the record before it, to determine if the Commission regularly had pursued its authority, or had abused its discretion. But where, as here, there is nothing to review but an ipse dixit, due process would be denied if the reviewing court could not get at the facts." (Emphasis added)

We find little to criticize in this case. It simply presents a situation where the separation of powers doctrine must give way to the due process requirement. In the case at bar a full, complete and extensive record was made in presenting the matter to the commission, and additional evidence is not necessary in order to have a record to review. Thus the requirements of the due process clause were fully satisfied.

partisan expert witness is given in person and thus is likely to be more convincing.

POINT III

TO PERMIT THE DISTRICT COURT TO TAKE ADDITIONAL EVIDENCE IN THIS CASE FOR THE PURPOSES PROPOSED WOULD BE CONTRARY TO THE POLICY UNDERLYING THE SEPARATION OF POWERS DOCTRINE

"The second great structural principle of American Constitutional Law is supplied by the doctrine of the Separation of Powers." Corwin, Constitution of the United States of America p. XVI (1953). It is essential to the working of the American system of government, which effects a separation of the three great departments of government, that the persons entrusted with power in any one of the branches shall not be permitted to encroach upon the powers confided to any other branch. See State v. McCulloh, supra.

The basic policy underlying the inclusion of a separation of powers provision in the United States and New Mexico Constitution was not solely one of checks and balances. Such a provision was also included to accomplish the inestimable goal of conferring the many powers of government upon the branch most capable of performing them. This is the only way that a rational division of functions can be achieved. See Landis, The Administrative Process 46 (1938).

Regulation over oil and gas production is authorized as an exercise of the police power of the State, which power is vested in the legislature. The New Mexico Legislature created the Oil Conservation Commission in order to confide this field of regulation to an administrative body with a staff of experts at its disposal.

In the case of Spencer v. Bliss, 60 N.M. 16, 287 P. 2d 221 (1955), the Supreme Court had before it a question involving a review of the action of the State Engineer. The statute governing such reviews provides for a hearing de novo. The court stated as follows at page 28, New Mexico Reports:

> "We are satisfied we need not here decide just what effect the decision of the State Engineer should be given in the de novo trial provided for the hearing of an appeal."

The above-quoted language indicates to us that this Court feels that a provision for a de novo hearing can be reconciled with the constitutional requirement of separation of powers. However, we earnestly contend that in order to uphold the constitutionality of the de novo provision in Section 65-3-22(b) supra, this Court must construe the statute as prohibiting the District Court from taking additional evidence for the purpose of determining whether the Commission's action was arbitrary, capricious, unreasonable, improper or unlawful, Denver & R. G. W. R. Co. v. Public Service Commission, supra. See Yarbrough v. Montoya, supra; Harris v. State Corporation Commission, supra.

It is in no way significant that the additional evidence which the District Court proposes to take is evidence allegedly not available to petitioners at the time of the Commission hearing and not presented to the Commission. The receipt of such "new" evidence would be as much an invasion of the legislative function of the Oil Conservation Commission as would be the receipt of "old" evidence. California Co. v. State Oil and Gas Board, supra. As a practical matter, the taking of such allegedly "new" evidence is less warranted than allowing a person to start his case entirely anew in District Court. The evidence supporting the action of the Commission is simply the cold written word in the record. The "new" evidence presented to the Court by the

In its pre-trial ruling the Court stated that since the matter involved was presented to the Commission on the conflicting testimony of experts, the Court would, with the taking of additional testimony, be in a better position to determine whether the order was improper. A majority of the cases before the Oil Conservation Commission involve conflicting testimony of expert witnesses. We submit that this fact is not a legitimate reason for reviewing courts to take evidence in addition to the record made before the Commission. If administrative agencies are going to be mere preliminary examiners of expert testimony for the courts, then we certainly have a misconception of the true function and value of such agencies. Denver Products and Refining Company v. State, 199 Okl. 171, 184 P. 2d 961 (1947); The Ohio Oil Co. v. Porter, 225 Miss. 55, 82 So. 2d 636 (1955). This principle was well stated in the case of Railroad Commission of Texas v. Rowan and Nichols Oil Co., supra, at pp. 581-582, U. S. Reports:

> "Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering upon conjecture even for those learned in the art, it would be presumptous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment."

In the second Rowan Case, 311 U. S. 570, 61 S. Ct. 343, 85 L. Ed. 358 (1941), the Court added to what it had said in the first case. The Court concluded that the feel of the expert should not be supplanted by an independent view of judges "on conflicting testimony and prophesies and impressions of expert witnesses."

As was so ably stated by Segal in Administrative Procedure in Massachusetts, 33 B.U.L. Rev. 1, 25 (1953):

> "The proposition that new or additional evidence, which was not offered to the Commission, can first be offered in the appellate court is contrary to good administrative procedure and judicial review; it helps to reduce the administrative agency to a second class body which can be easily by-passed. It should not be the function of the court to hear the evidence in an administrative agency case."

This proposition is nowhere truer than in the review of an order entered by a Commission, such as the Oil Conservation Commission, which deals with highly technical matters and has a body of experts at its disposal. Professor Davis, quoting portions of the United States Supreme Court's decision in Railroad Commission of Texas v. Rowan and Nichols Oil Co., supra, states:

> "When problems 'tough matters of geography and geology and physics and engineering,' hardly suprising is the Supreme Court's action in announcing that 'Plainly these are not issues for our arbitrament', and in reversing the lower courts' decisions because those courts 'appear to have been dominated by their own conception of the fairness and reasonableness of the challenged order.'" Davis on Administrative Law p. 893.

As noted earlier the orders here complained of are proration orders. Professor Davis has pinpointed the evils of excessive judicial review in this area in an article entitled Judicial Emasculation of Administrative Action and Oil Proration, 19 Tex. L. Rev. 29 (1940). Davis is of the opinion that the Supreme Court's drastic curtailment of the scope of review in Railroad Commission of Texas v. Rowan and Nichols Oil Co., supra, can be found in the history of oil proration orders in the courts. At page 39 he states, "Nowhere may one find a more convincing demonstration of the evils of excessive judicial review of administrative action than in the record of regulation in the East Texas oil field. The recurring theme is the inadequacy of the judicial process in technical fields other than law."

Davis explains that his comments are not to be taken as a criticism of judges, but rather as an indictment of a system which does not adequately restrict judicial review of administrative action. He feels that all too frequently judges are expected to know more geology than geologists, more physics than physicists, and more engineering than engineers. Davis concludes that the result has been "the development of oil fields in a manner diametrically opposite to that favored by the physical conditions underground."

In the early days of administrative agencies there was undoubtedly a certain amount of legislative and judicial skepticism and distrust of such agencies - some of which probably was warranted. The result was the enactment of statutes and the handing down of judicial decisions which granted a broad (and in our opinion excessive) scope of judicial review. In practically every state at least one decision reflects such distrust, albeit not explicitly. New Mexico is no exception. See Farmers Development Company v. Rayado Land & Irrigation Co., 18 N.M. 1, 133 Pac. 104 (1913). The Rayado Case was decided when this aura of distrust pervaded actions of administrative agencies and when district courts were not perplexed by overcrowded dockets. Such skepticism was reminiscent of the distrust of equity displayed by the common law judges. Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 16 (1936).

This Court should not, as some courts have, follow a doctrinaire approach based on such sterile precedent. As Professor Landis has emphasized again and again, the creation of administrative agencies has been in response to the need for expertise both in policy-formation and fact-finding. To subject

the latter again to independent judicial determination on the basis of evidence not presented to the agency is to make pointless the fact-finding process itself. Landis, Crucial Issues in Administrative Law, 53 Harv. L. Rev. 1077, 1094 (1940).

It cannot be controverted that administrative agencies have grown in stature, as well as in number, during the past quarter century. This is as it should be. The only real choice is between effective regulation by expert commissions entrusted with a certain field of complicated regulatory problems or impotent administrative agencies circumscribed by excessive judicial review. See MacMahon, The Ordeal of Administrative Law, 25 Iowa L. Rev. 435 (1940).

One reason for the growth in statute of administrative agencies - and one frequently overlooked - is that hearings before most administrative agencies have become much more formal and less summary through the years. Thus the need for extensive judicial review of administrative action is mitigated. See Denver & R. G. W. R. Co. v. Central Weber Sewer I District, supra.

Certainly the hearings before the Oil Conservation Commission are not summary in nature. In the case here involved, the Commission heard some one thousand pages of sworn testimony and received in the neighborhood of seventy-five exhibits. There was extensive examination and cross-examination of expert witnesses. And we most strenously urge that whether the Commission's action was arbitrary, capricious, unreasonable, improper and unlawful, can and should be determined on the basis of the record made before the Commission. Against the possibility of arbitrariness, which all wish to prevent, the application of procedural requirements plus the continuation of the substantial evidence rule, even moderately applied, would be ample safeguards. Landis,

Crucial Issues in Administrative Law, 53 Harv. L. Rev. 1077, 1094 (1940).

Forward-looking courts have made a fundamental re-evaluation of the proper scope of review of administrative action, tending always in the direction of judicial self-restraint. The added emphasis on the peculiar competence of administrative agencies to fullfil tasks which the courts cannot expertly or expeditiously do has been a major factor in such re-evaluation. Broughtons' Estate v. Central Oregon Irrigation Dist., 165 Ore. 435, 108 P. 2d 276 (1940); Landis, The Administrative Process 143-144 (1938). Further, the courts have come to recognize that excessive review of administrative action "is not conducive to the development of habits of responsibility in administrative agencies." Federal Communications Commission v. Pottsville Broadcasting Company, 309 U. S. 134, 146, 60 S. Ct. 437, 84 L. Ed. 663 (1940).

Note the following statement by Justice Sadler in Spencer v. Bliss, 60 N.M. 16, 287 P. 2d 221 (1955), at page 28:

> "...it will be an unfortunate day and event when it is established in New Mexico, that the district courts must take over and substitute their judgment for that of the skilled and trained hydrologists of the State Engineer's office in the administration of so complicated a subject as the underground waters of this state."

Relators submit that petroleum engineering and geology is at least as complicated as hydrology. Further, we know of no statutory administrative agency in the State of NewMexico which has a trained staff of technical experts equal to that of the Oil Conservation Commission - some six petroleum engineers and five geologists.

It is incomprehensible to Relators how the action of an administrative agency could possibly be branded arbitrary, capricious, unreasonable or improper on the basis of evidence which was never presented to it. Such procedure under a de novo statute was also

incomprehensible to the Mississippi Supreme Court in California Co. v. State Oil and Gas Board, supra, where the Court stated as follows at page 546 of the Southern Reports:

> "But to allow an appellant to present to the Circuit Court a different state of case or one based on additional facts would merely tend to becloud the issue as to whether or not the administrative body had based its decision on substantial evidence, had acted arbitrarily or capriciously, beyond its power, or violated some constitutional right of the party affected thereby."

The concurring opinion by Justice Griffith in the same case recognized that it would be a remarkable incongruity to allow the reviewing court to receive evidence in addition to the record made before the Oil and Gas Board, Justice Griffith stated:

> "The essential nature of such a review is such that it must be of what the Board had before it at the time it made its order. It would be an incongruity as remarkable to permit another different record to be made upon appeal to the circuit court as it would be to allow another and a different record to be presented to this court on an appeal to it. The question is, and must be, what did the Oil and Gas Board have before it, and all this the majority opinion has well and sufficiently pointed out." (Emphasis added)

The Supreme Court of Washington in the case of Lillions v. Gibbs 47 Wash. 2d 629, 289, P. 2d 203, 305, (1955) stated that "arbitrary and capricious action of administrative bodies means willful and unreasoning action, without considering, and in disregard of facts and circumstances." (Emphasis added) We submit that an administrative agency cannot "disregard" facts not presented to it, and hence its action could not be found to be arbitrary or capricious on the basis of such "new" facts.

In Harris v. State Corporation Commission, supra, this Court quoted from, and with approval, an article entitled Court Review of Administrative Decisions, 30 Cal. L. Rev. 507. A portion of the article quoted in the opinion is as follows:

> "With respect to the issues of fact the reviewing court examines the evidence taken by the administrative agency, not to reweigh it, not to substitute the court's judgment for that of the agency, but to determine whether the agency acted rationally, that is, to see that it did not arrive at its conclusion arbitrarily." (Emphasis added)

If "new" or additional evidence actually becomes available subsequent to the action of an administrative agency, it should be presented to such agency rather than the court, either through the process of remand, or if this is not permissible, by dismissal of the petition for review so that a petitioner may file a new application for hearing before the agency. New York v. United States, 331 U.S. 284, 67 S. Ct. 1207, 91 L. Ed. 1492 (1947); Seward v. D. & R. G. Ry. Co., supra. See Woody v. R. R. Co., supra.

It is our abiding conviction that to permit district courts to take evidence which was not presented to the Commission in order to determine whether the Commission's action is arbitrary, capricious, unreasonable, improper or unlawful will render the Oil Conservation Commission a mere preliminary examiner for the courts.

Further, to allow such procedure is grossly unfair, both to the Commission and the parties who presented a full and complete case before the Commission. It will invite reopening of issues in the courts; it will permit the holding back of arguments and evidence before the Commission by a party who will then allege on review that he has pertinent "new" evidence,

which is only "new" because he waited until after Commission action to prepare it; it will permit an attempt to overwhelm the court with partisan expert testimony while opposing parties may well be financially unable to present additional expert testimony to the court; it will result in overburdening the already overcrowded dockets of the district courts. Counsel for Pan American Petroleum Corporation, a petitioner in this case, stated at the second pre-trial conference that three days would be needed for trial of this cause. This is a conservative estimate if petitioners are permitted to introduce additional evidence upon review of the Commission's action. See Gellhorn, Federal Administrative Proceedings 13-14 (1941).

We are in complete agreement with the following statement in General Accounting Fire & Life Assurance Corporation v. Industrial Commission, 223 Wis. 635, 271 N.W. 385, 389 (1937):

> "If (a court) must give a trial de novo, the twilight of administrative law is at hand, for the proceedings before the administrative body will be but a perfunctory skirmish, the principal contribution of which will be delay."

We should not ignore the reminder of Mr. Justice Holmes that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." M. K. & T. Railway of Texas v. May, 194 U.S. 267, 270, ____ S. Ct.____, 48 L. Ed. 971 (1904).

POINT IV

THE ALTERNATIVE WRIT OF PROHIBITION HERETOFORE ISSUED SHOULD BE MADE ABSOLUTE AND PERMANENT

Relators submit that since the taking of additional evidence by the District Court in the instant case would be

a violation of Article III, Section 1 of the New Mexico Constitution, as shown by the authorities cited above, it necessarily follows that the Court is without jurisdiction to take such additional evidence.

Even though the Court has jurisdiction over the parties and the subject matter, the taking of additional evidence for the purposes proposed would amount to an excess of jurisdiction and would render the Court without jurisdiction. This principle has been settled in New Mexico since the case of State v. Carmody, 53 N.M. 367, 208 P. 2d 1073 (1949). The Court stated as follows at page 370:

> "Counsel argue as though cases in which the writ is issued to restrain the trial court from exceeding its jurisdiction, as in State ex rel. Lynch v. District Court, supra; represent a modification of the unbending character of the rule that prohibition will not lie if the trial court has jurisdiction of both the parties and the subject matter. But such is not the case. In no sense do these cases represent a modification or liberalization of this cardinal rule, since to the extent the court proposes to exceed its jurisdiction, there is a want of jurisdiction, both over the parties and the subject matter. To such extent any judgment rendered by it would be a complete nullity and subject to collateral attack. (Emphasis added)

State v. Carmody, supra, which we consider controlling on the subject of prohibition, contains an exhaustive analysis of other New Mexico decisions on the question. Hence, we deem it unnecessary to burden the Court with further authority on this point.

Relators submit that it has been clearly shown by the foregoing authorities that the District Court is without jurisdiction to take additional evidence in the instant case on the issue of whether the Commission's action was arbitrary, capricious,

unreasonable, improper or unlawful.

Even if it be assumed that the threatened action by the District Court be error only, this Court should nevertheless make permanent the Writ of Prohibition, since Relators' remedy by appeal is wholly inadequate. This Court ruled unequivocally in State v. Carmody, supra, that prohibition is a proper remedy in such cases by virtue of the Supreme Court's power of superintending control over inferior courts. At page 378, the opinion states:

> "...even though the trial court be moving within its jurisdiction and the threatened action be error only, as distinguished from a want of jurisdiction as well, this court may intervene by an appropriate writ in an exercise of its power of superintending control, if the remedy by appeal seems wholly inadequate. State v. Raynolds, supra; or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship; costly delays and unusual burdens of expense."

A comparison of the Carmody case with the case at bar clearly establishes that the need for the exercise of superintending control is even greater in the present case than it was in State v. Carmody, supra.

Remedy by appeal after the entry of final judgment or decree would be accompanied by unbearable expense and delay. In order to preclude the possibility of having its action branded arbitrary, capricious, unreasonable, improper or unlawful on the basis of additional evidence which it had no opportunity to consider, Relator Oil Conservation Commission would feel compelled to present testimony in the District Court to support its action. The preparation and presentation of such testimony and exhibits would be extremely costly, time consuming

and detrimental to the efficiency of the already over-burdened technical staff of Relator Oil Conservation Commission, all to the ultimate detriment of the State of New Mexico.

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

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

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

would be an undue burden upon relators.

By reason of the expense involved and the delay which will inevitably occur before a final decision may be obtained upon an appeal, the remedy by appeal is wholly inadequate and the Alternative Writ of Prohibition should be made absolute and permanent in order to prevent irreparable mischief, great, extraordinary, and exceptional hardship; costly delays and highly unusual burdens of expense.

C O N C L U S I O N

Based upon the reasons and authorities cited herein Relators submit that the Alternative Writ of Prohibition heretofore issued should be made permanent by this Court.

Respectfully submitted,

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I CERTIFY THAT I MAILED A COPY OF THE FOREGOING BRIEF-IN-CHIEF TO RESPONDENT AND TO RESIDENT COUNSEL OF RECORD FOR REAL PARTIES IN INTEREST ON OCTOBER 14, 1958.