IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CONTINENTAL OIL COMPANY, AMERADA PETROLEUM CORPORATION, PAN AMERICAN PETROLEUM CORPORATION, SHELL OIL COMPANY, THE ATLANTIC REFINING COMPANY, STANDARD OIL COMPANY OF TEXAS, and HUMBLE OIL & REFINING COMPANY,	]	
Petitioners-Appellants and Cross-Appellees,	]	
vs.	]	No. 6830
OIL CONSERVATION COMMISSION,	]	
Respondent-Appellee and Cross-Appellant,	]	
TEXAS PACIFIC COAL & OIL COMPANY, a Foreign Corporation; EL PASO NATURAL GAS COMPANY, a Foreign Corporation; PERMIAN BASIN PIPELINE COMPANY, a Foreign Corporation; and SOUTHERN UNION GAS COMPANY, a Foreign Corportaion,	]	
Respondents-Appellees.	]	

APPELLANTS' BRIEF IN OPPOSITION TO MOTION FOR REHEARING

ATWOOD & MALONE
Roswell, New Mexico

HERVEY, DOW & HINKLE
Roswell, New Mexico

KELLAHIN AND FOX
Santa Fe, New Mexico

Attorneys for Appellants

TABLE OF CASES

OTHER AUTHORITIES

The Motion for Rehearing of Appellees asserts error and seeks rehearing solely as to the disposition of the case directed by the Court. Appellees assert that the Court should have remanded the case to the Commission to afford it an opportunity to further consider the evidence, to make new findings conforming to the requirements of the Court's opinion, and to enter a new order again changing the allocation formula. The Motion is without merit and should be denied.

This Court considered the question of its power to remand cases to administrative bodies after appeal in the case of State ex rel Transcontinental Bus Service, Inc. v. Carmody, 53 N.M. 367, 208 P. 2d 1073 (1949). In an exhaustive opinion by Justice Sadler, the Court held that in an appeal to test the validity of an administrative decision "the Court must act within the bounds of the statute conferring its jurisdiction to review "and that when that power is limited to a determination as to whether the order is unlawful or unreasonable the Courts action must be limited to either approval or vacation of the order. This Court has held that the power of the trial court in this case was so limited. It further held in Carmody that statutory or constitutional authorization must exist before remand to the Commission can be ordered.

The only case cited by Appellees in support of their position is the Maine case of Gauthier v. Penobscot Chemical Fiber Co., 120 Me. 73, 113 A. 28. That case was decided in 1921, twenty-eight years before Justice Sadler said, at page 376 of the opinion in Carmody:

> "Indeed, insofar as the writer's research goes, (and it has been extensive) not a single case has been found in which the cause was remanded to an administrative board or authority for further proceedings as, for instance, taking of additional testimony, that lacks the sanction of statutory or constitutional authorization for the remand."

It is to be assumed that the Gauthier case came to the attention of Justice Sadler and was discarded as inapplicable. The case involved reconsideration of a workmen's compensation award as the result of a change in condition, and further Commission action would have been contemplated in any event. The earlier Maine cases on which it relies are not in point. The case would seem to have even less application to the case at bar than to the decision in the Carmody case.

Since 1949 and the unanimous opinion of this Court in State v. Carmody it has been the law of New Mexico that, in the absence of legislative or constitutional provision therefor, a remand to an administrative body is not authorized. There is no statutory or constitutional authority in New Mexico for such a remand to the Oil Conservation Commission. The statute provides that on appeal the District Court shall:

> "enter its order either affirming, modifying, or vacating the order of the Commission." Sec. 65-3-22 (b) N.M.S.A., 1953.

It further provides:

> "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 *** ". Sec. 65-3-22 (b) N.M. S.A., 1953.

There is every reason to believe that the Court's conclusion in Carmody correctly interpreted the intent of the legislature as to the disposition to be made of Administrative orders under review. Since the opinion of this Court in Carmody in August, 1949, the legislature has amended the Oil Conservation Commission Act on at least five different occasions, but it has never seen fit to amend it to provide for remand to the Commission of orders under review. See Chap. 76,

Laws of 1953; Chap. 235, Laws of 1955; Chap. 61, Laws of 1961; Chap. 62, Laws of 1961 and Chap. 65, Laws of 1961.

Legislative inaction under such circumstances has been held to indicate acquiesence in the Court's construction. Missouri v. Ross, 299 U. S. 72, 81 L. Ed. 46, (1936); Granito v. Grace, 56 N.M. 652, 248 P. 2d 210, (1952); 50 Am. Jur. 318, Stats. Sec. 326.

Appellees suggest that perhaps Carmody might be distinguished by the fact that the remand there was for the taking of additional testimony, whereas the Commission proposes only to make new findings based on the existing record. The distinction is not valid. The conclusion reached in Carmody was based, not on the fact that additional testimony was proposed, but on the fact that no statutory or constitutional authority existed for any remand. That the rule announced was not limited to situations in which additional testimony was proposed is clearly indicated by Justice Sadler's language, quoted supra, that there was no authority for remand to an administrative board or authority "for further proceedings, as, for instance, taking of additional testimony" (emphasis supplied).

Finally, it must be borne in mind that the Motion for Rehearing seeks an opportunity for the Commission to attempt to make findings on the present record which would meet the requirements of the Court's opinion. To afford such an opportunity on the record in this case would avail nothing. There is no evidence in the record which would support such findings if they were made by the Commission. Point I-D relied on for reversal by Appellants, and argued at pages 34-46 of their Brief in Chief, was directed to that very proposition. Even if the Carmody case were not the law of New Mexico, the point

having been raised in this appeal and the record being barren of the required evidence, there would be no occasion for remand.

The language of the Court's opinion in this case, as to remand to the trial court, is equally applicable to the suggested remand to the Commission:

> "However, in this particular instance, we can conceive of no benefit which would result from such action, because there can be only one final conclusion based on the record before the Commission, and that is that the Order of the Commission is void."

It is respectfully submitted that the Motion for Rehearing should be denied.

Respectfully submitted,

ATWOOD & MALONE

By _____
P. O. Drawer 700
Roswell, New Mexico

HERVEY, DOW & HINKLE

By _____
P. O. Box 10
Roswell, New Mexico

KELLAHIN & FOX

By _____
P. O. Box 1713
Santa Fe, New Mexico

ATTORNEYS FOR APPELLANTS