Al Nicol (Pendragon)

Communication exists between the Fruitland Coal and the Pictured Cliffs. 68.

The Chaco Plant 5 was a producing well before the coal wells dewatered. No water produced, very strong wells initially. 69.

Pressure before workover was 158 p.s.i. 70.

After acid work, pressure was 180 p.s.i. 70.

Claims this is 60% of the original PC pressure. 71.

After fractured in early 1995, the pressure rose to 170 p.s.i. 71.

This is not coal pressure, which should be around 225 p.s.i. 71.

Pressures uniform over a large area. 72.

Coal pressure of virgin coal should be around 250 p.s.i. 72-73.

Shut-in data establishes no communication between PC and coal. 73.

Fracturing out of zone causes communication seen in Chaco 1, 4 and 5, not by well bores that are in communication. 73.

Claims you can't tell a PC well from a coal well based on gas analysis. 184.

Water first reported from Chaco wells in February, 1998. 185.

Claims that the gas analysis of the PC gas shows higher end components and the gas analysis of the coal shows no end components. 185-86.

Radioactive tracer studies can only detect fractures 12-20 inches from the well bore. 195-96.

Radioactive tracers studies can't detect 750" fractures claimed by Pendragon's expert Conway. 195.

The Dome Federal reportedly fractured the "third bench" well. 197.

Exhibit 33 shows "third bench" reserves.

Dome Federal 17-27-13 #3.

The definition of the Fruitland Gas Pool is set out in Order No. 8768.

Thompson (Pendragon)

President, Walsh Engineering. 228.

Fractured 1, 4, 5 and 2-R. Paul Thompson designed jobs on 1 and 2-R. 236. Paul Blauer designed jobs on 4 and 5. 236.

Production increased dramatically after fracturing. 237.

Volumes of water produced also increased after fracturing. 237.

"Minor amounts" of water produced. 238.

Chaco 2-J not fractured. 241.

Blauer (Pendragon)

OBSERVATION: heating value of PC gas is said to decline with production (Blauer) but also may explain communication with lower BTU-value coal gas.

Gas composition of Chaco wells between mid-1975 and July, 1998 closely mirrored the gas composition of the Gallegos Federal wells. 267.

"Bubble point." 270.

States there is a possibility of a "phase change" which accounts for the lowering of the BTU content of the PC wells. Not consistent with observations of gas content at the wellbore and T/P. 274.

States that the possibility of deabsorpotion of gas from the water had not been explored, and can't discount it. 276.

Adsorption commonly recognized in petroleum industry. 276.

Adsorption into nonorganic rock a possibility but not studies or calculated. 279.

Dr Lee disputes the above. 283.

Gas BTUs not a reliable means for determining the source of the gas supply. 293.

Conway (Pendragon)

McCarthy (Pendragon)

Production characteristics of PC wells inconsistent with coal production because of lack of produced water. 484.

Volumetric calculations indicate that PC wells could not be producing from coal. Coal wells have already drained more than available reserves. Presently each well has drained all recoverable reserves on 350 acres. 487. If the wells continue to produce at this rate, will end up draining 2000 acres. PC wells can't be producing from the coal because volumes would be unreasonable. 489.

Shut-in pressures of PC wells consistent with no communication. Reservoir pressures are consistently lower in PC than in coal. Cannot be that way if completed in coal. 489-490.

PC reservoir not pressure-depleted; wells not producing because of damage. 494.

Jump in gas-water ratios in coal wells coincided with shutting-in PC wells. Suggests new source of gas (PC). 495.

Agrees that Chaco 2-R is the only well which was fracture-stimulated below the lowest coal seam, and that it was the poorest performer after its fracturing. 530.

Whitehead (Pendragon)

Chaco wells are completed in the Pictured Cliffs formation. 580.

Volcanic ash common in Fruitland Coal. 615-16.

Ash found in coal rather than sandstone because of quiet water environment. 629.

Cox (Pendragon)

3 Chaco wells not showing any evidence of communication: 2-J, 1-J, 2 -R. This is because of shut-in pressures, well-test information, core information from the Lansdale federal, production records. 651.

Chaco 1 - slow pressure drop over one year. 651.

Chaco 4 and 5 responded very quickly each time the coal wells shut-in, over periods as short as 1-2 days. 651.

Pressure information shows that Chaco 4 and 5 do not "directly" communicate with the Fruitland Coal; instead they "indirectly" communicate through the Fruitland Coal. 652.

"[T]he coal wells communicate with the Pictured Cliffs, not the other way around." 652.

Chaco 1 shows long-term decline in production. 655.

Chaco 2-R takes a long time to build pressure after shut-in, indicative of "low effective permeability." 657.

(Query: low effective permeability support notion of reservoir depletion?)

It is clear that the formations are communicating because of evidence of pressure response. 658-59.

PC formation damaged. 659.

One core sample indicated good permeability in the PC. 662.

PC NOT depleted. 663.

Volumetrics - not all gas produced. 663-64.
Material balance - pressure still high but no production. 664.
Shape of decline curves doesn't suggest depletion. 664.

Communication response shows permeability good some distance from the wells. 665.

BTU data inconclusive. 666. Too many samples from the PC and the coal in the range of 1000 to 1050.

Coal wells on compression. 676.

(Gallegos - pressure comparison invalid because of compression? Coal gas migrating to PC during their production and then back to coal when PC wells shut-in - 678.)

Whiting well, Gallegos Federal, not frac'ed. 682. 740 feet from Pendragon 1-J.

No communication. 682

(suggests that fact there was no communication at this well - supports notion that frac's at other wells did communicate?)

Gallegos Federal Well No. 1 frac'ed as well; only 180 feet from Chaco 2-J which was not frac'ed by Pendragon. 684.

Chaco 2-R located 768 feet from Gallegos Federal 7 No. 1, which was frac'ed by Whiting. 685.

Pendragon frac'ed 2-R in January, 1995. 685.

Perforation in upper coal in Chaco 1, 4 and 5 which would have been frac'ed as well. 686.

Fact that the Gallegos Federal 7 No. 1 is not in communication with Chaco 2-R is because 2-R is not perforated in the upper PC - but that Gallegos 7 No. 1 could have frac'ed into the upper PC and could be communicating with other PC wells via the Upper Bench; therefore can't rule out 7 No. 1 as the offending well. 688.

Chaco No. 4: shut-in pressure of 199 lbs. After the acid treatment jumped to 170 lbs. Denies that acid treatment communicated with higher-pressure formation. 693.

Whiting wells frac'ed in August 1993. Pendragon acid stimulated on January 30 1995. Shut-in pressure of 119 lbs. 16 mos. Since the Whiting frac's. Gallegos suggests that 119 lbs. Too low. 693-94.

Cox says the distance explains the low pressures. 694.

Pressure response very rapid to changes in Whiting wells. Indicates high permeability. 714.

Acknowledges that when Gallegos Federal wells were fractured in August 1993 there was very little, if any, pressure response from the Chaco wells. 790 and earlier.

Chaco wells making only a few Mcf each day. 790.

Claims reason is that the Chaco wells were severely damaged and weren't in communication with the reservoir. 790.

When Chaco wells fractured in January 1995 huge pressure response re-established communication with reservoir. 790?

There had been no way for the Chaco wells to see beyond the damage until they were fractured. 790 and earlier.

Conway (Pendragon)

Lee reads excerpt from Warpinski publication where he describes the inability of models or simulators to accurately describe hydraulic fracturing without more in situ observations. 807-808. SPE 38573.

Lee reads excerpt from Schachter book which states that fluid loss coefficient is the most important factor in determining the effectiveness of a given fracture treatment. 810. Conway admits putting in the same constant for each simulation, despite this being the most important factor. 812.

O'Hare (Maralex)

Recognized in the late 1980s that PC wells producing volumes of gas that could not be accounted for by the gas-in-place calculations. Apparently producing coal gas. But coal on 320 acre spacing while PC on 160s. 835.

D The PC formation in the area of question depleted in 1995. 855. Chaco Plant No. 5 had 160 (93 million - corrected on page 876) million cubic feet of gas in place in 1977, and as of 1993 had produced 63 million cubic feet of gas and had been shut in 5 years. 871. Well has now produced 320 million cubic feet of gas, which is more than was in place. 871-72; 875 (Ex. AMO-17). Pressure declined at a fairly steep rate during the early life of the well. 872. Declined to 109 psi, and then increased to 150 psi after frac. 873. Now producing water. 877.

D Lansdale Federal No. 1 was shut off to the coal a week before Division hearing and left to produce solely from the PC. 881. Effect was dramatic: well stopped producing entirely. 881-82.

Maralex evaluated the wells in connection with an offer to sell the wells by Merrion in 1993-94. Maralex did not purchase because wells depleted. 855. (Ex. W-35) Chaco Plant 5 well showed production curve after stimulation by P's predecessor of a coal well, inclining to peak production over time followed by steep decline, similar to Gallegos Federal wells. Such an incline is not typical of conventional well. 869.

D Depleted because: (1) initial reported pressures of 230 to 250 psi had declined to 100 to 110 psi., as an example the Chaco No. 4 had a pressure in 1995 of 119 psi, 55 of pressure in that well lost; (2) "slimhole" completions which could not produce well from the coals and dewater effectively; (3) can only effectively recover 60-70 percent of pressure from a PC well; 856-857.

Maralex owns form the surface of the earth to the base of the Fruitland (Coal Gas) *Formation*. 858. Pendragon owns from base of the Fruitland *Formation* to the base of the PC *Formation*. 858.

Maralex made an attempt to stay away from PC. 859. Even to extent of not perforating the bottom coal. 859.

H Production and pressure history of Chaco wells demonstrated that Maralex did not frac into the PC. No impact on the Chaco wells after frac'ing of the Gallegos federal wells. No increase in production, no increase in pressure, no increase in water production. 861.

H None of stimulated Chaco wells showed any response to Maralex pressure stimulation. 861. Chaco 11, Chaco Limited 2-J, Chaco Limited 3 - no response. 862.

H By contrast, immediate pressure and production response in the Chaco wells after P stimulated the wells. 862. Also, gas analysis showed dramatic change in the gas analysis. 862. And substantial increase in water production. 862. PC wells do not produce the volumes of water seen after the stimulation. 863. 896. Also 895. Slim-hole completions also - less gas required to lift water through 1 1/4 in. tubing. 897.

Production from coal wells unexpectedly leveled off in 1995, coincident with Pendragon work on its wells. 887. Then, when Chaco wells shut down by order of Court in 1998, immediate and very noticeable production increase. 891.

AMO-11 shows correlation between Pendragon reworks and Maralex work. 893.

BTU If had broke through to PC from coal wells, coal wells would have been producing higher BTU gas. No increase in BTU rating. 901.

903-4 (wrap-up and review)

dewater Chaco wells responded to compression, which means they were producing from the coals because lower bottomhole pressure causes more gas to desorb from the coal, increasing production. E912.

Shut-in pressure of coal presently below shut-in pressure of PC. 971.

Now pressures in two formations roughly equal. 977. A year ago pressure in the coal was higher during a Chaco plant shutdown than the PC and gas crossflowed into the PC. 978. When coal wells producing gas flows from PC to coal, because of high production rates and low pressures. 978.

Distinguishes between production communication and pressure communication. 979.

Reimers (Whiting)

Chaco 2-R, 4 and 5 pits were always full of water after frac's. 1056. Even long after frac's. 1060.

Brown (Whiting)

C — Existence of communication between formations now conceded. 1078

D — PC depleted or near depleted in 1994. 1079.

C — No response when PC wells offsetting coal wells were fracture stimulated in 1993. When PC wells fractured, an immediate production response to unprecedented levels. 1080.

After shut-in of Chaco wells, immediate pressure response from Chaco wells when coal wells shut-in temporarily. Indicates communication in Chaco wells at or near the well bore. 1082.

Describes process of desorption. Very good. 1082.

Methane will desorb from coal only below a certain pressure . When a well produces gas from coal, the pressure is very low in the vicinity of the well bore, and gradually increases as the distance from the well bore increases. If well is shut in, gas continues to desorb until it builds up in the spaces enough to create pressure above which gas will not desorb. This occurs some distances from the well bore first, and gradually pressure increases to well bore itself. 1082-84. The fact that quick and large pressure responses were observed at Chaco wells proves that communication at or near the Chaco wellbores. 1084. Impossible for enough gas to actually migrate from coal to PC - would have to be 10 million cubic feet. 1085. Impossible. Id.

C- Production rate from Federal wells increased upon shutdown of Chaco wells. 1085.

GC - Gas produced from Chaco wells is Fruitland gas based on BTU analysis. 1087. 1091.

Chaco wells could produce gas without artificial water lift because of use of slimhole completions which, according to Turner, can be done up to 75 Mcf/day. 1094-95. Wells had been dewatered for two years through Federal wells. 1095.

When federal wells put on compression, bottomhole pressures in the coal wells dropped and a large flow of gas to the Gallegos Federal Well. 1096-97. Since Chaco well not on artificial lift, no longer had the ability with the gas rate dropping off to lift water. Well simply watered up and died. 1097. N Chaco wells now just monitoring wells for the Fruitland coal formation. 1098.

D PC depleted in 1994 according to production histories. 1100-01. Depletion means very little economic reserves left to recover. 1103.

GC — Chaco 5 communicated with coal through a casing leak. 1104. Pressures before repair indicative of coal pressures, not PC pressures. 1104. Also, BTU levels declining as well prior to repair of casing leak. 1107.

"Possibility" that Whiting fracs communicated with PC, but if they did it wasn't an effective communication with the PC." 1147.

Whiting Gallegos Federal wells are not communicated with the PC. The Chaco wells are communicated wit the Fruitland Coal. 1148.

Ayers (Whiting)

Petroleum geologist. 1176.

Studied (for four years) geologic controls of production of coalbed methane from the Fruitland formation in San Juan County. 1177.

Studied contact between Fruitland Coal and PC using Schneider Com B Number 1, established as reference well in Order R-8768. 1184.

Robinson (Whiting)

Well completion and stimulation. 1256.

F ✓ Fracture simulations showed frac's from PC would fracture into the coal and fractures started in the coal penetrated the PC. 1263-4.

D Numerous plugged and abandoned wells all over the PC. 1269.

H – Chaco wells after fracturing increased production 10,000-fold. Simply not possible. Hasn't seen that kind of increase attributable to hydraulic fracturing in 20 years. 1271-72.

D – Before fracturing, the Chaco wells were pressure-depleted. 1272. Pressure not down to zero in the reservoir, but it was not economically feasible to produce those reserves. 1272.

Performed injection falloff tests and determined that permeability of the coal is 200 millidarcies. Highly permeable coal. 1274.

H – Good summation 1274-5.

← Migration Pressure differential between PC and Fruitland means that gas flowing down into the PC from Fruitland; now Whiting producing gas which moved to PC years ago. 1281.

Permeability for the coal should be 150 millidarcies and 20 millidarcies for the PC. 1311.

From permeability figures can only reach the conclusion that the communication exists in the Chaco wells. 1311.

An explanation for the sharp decline of the production curve of the PC wells is a moderate-permeability reservoir (25-30 millidarcies) with a slight amount of damage. 1312.

Damage Reservoir damage can't be reservoir wide because there's no recognized damage mechanism that can damage a formation consisting of hard, brittle roses as occur here. 1313-14.

Damage Water block can't occur under these reservoir conditions. 1316. 1318.

Damage Acid job couldn't have relieved the kind of damage alleged by Pendragon. 1322.

Responds to Cox's argument that pressure could increase 10 lbs. in Chaco wells. 1327. 1328.

Couldn't see an increase of 10 psi in Chaco wells until you injected enough gas to fill up the entire PC, in the tens of millions of feet of gas; 66 million cubic feet. 1414.

3rd bench

Zone below the PC is 70% saturated with water. The rest is "probably" gas. 1423.

The gas is in "irreducible saturation", probably cannot be produced. 1423

Thompson (Pendragon)

The fact that water not reported was a clerical mistake. 1445-46.

Estimated 5-10 barrels of water a day. 1447. In February of 1998, 13.9 barrels from Chaco 2-R, 5 barrels from Chaco 4 and Chaco 5 and 1 none. 1447.

Chaco 1 probably produces 21 bbl. a day in June 1998. 1456

Chaco 5 produces 12 bbl. a day in 1996. 1474.

Hahn (Pendragon)

Testifies as to water in pits of Chaco wells.

Wagner (Pendragon)

Water in Chaco wells after put compression on. 1488.

Nichol (Pendragon)

Coal gas mixed with PC gas over time as a result of geologic events. 1514-15.

Claims damage occurred from Kaolinate clay migration in the pores of the rock, worse at the well bore and less of a problem farther back. 1530.

Cox (Pendragon)

Questions validity of injection falloff test. 1532-33.

Claims Robinson's conclusions based o the test are invalid as a result

Chaco 4 and 5 responds clearly to the Fruitland coal shut-ins. 1541.

McCartney (Pendragon)

States that pressure readings for the Chaco wells are erroneous and do not represent reservoir pressure. Reservoir pressure was higher than indicated. Use of those pressures would cause one to think that the PC was depleted when it wasn't. 1574.

The PC IS partially depleted. 1574. It certainly is not at original pressure. 1574. Only 62% of original pressure. 1574.

Dramatic reduction in transmissibility resulted in the PC wells having impaired flow condition so they were not able to flow gas as well as they should. Scale, mobile fines or water blockage could cause damage. 1578.

When estimated reserves, included the production which occurred AFTER the wells were fracture-stimulated in 1995. 1590

693 F.2d 1015 MOUNTAIN STATES NATURAL GAS CORP. V. PETROLEUM CORP. OF TEXAS (10th Cir. 1982)

MOUNTAIN STATES NATURAL GAS CORPORATION,
Plaintiff-Appellee,
vs.
PETROLEUM CORPORATION OF TEXAS, Defendant-Appellant.

No. 81-2358
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
693 F.2d 1015
December 03, 1982

Appeal From the United States District Court For the District of New Mexico

COUNSEL

W. Thomas Kellahin and James B. Grant of Kellahin & Kellahin, Santa Fe, New Mexico, for Plaintiff-Appellee.
William F. Carr of Campbell, Byrd & Black, Santa Fe, New Mexico, for Defendant-Appellant.
AUTHOR: BARRETT

OPINION

Before BARRETT, DOYLE and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel was determined unanimously that oral argument would not be of material assistance in the determination of this appeal. **See** Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

Petroleum Corporation of Texas (Petco) appeals from a decision issued by the district court authorizing Mountain States Natural Gas Corporation (Mountain States) to join in the drilling of a well in New Mexico without penalty and ordering Petco to compensate Mountain States for the amount of risk penalties withheld from production.

Petco is an independent oil company organized under the laws of Texas and authorized to do business in New Mexico. Petco owns the oil and gas interests underlying 120 acres in Rio Arriba County, New Mexico, on which it wanted to drill an oil well. Under the spacing rules promulgated by the New Mexico Oil Conservation Division,[1] a minimum of 160 acres is necessary to secure a drilling permit. Mountain States owns the oil and gas interests underlying the 40 acres contiguous to Petco's property.

In May 1978, Grady Ware, a Petco employee, telephoned Albert J. Blair, Jr., President of Mountain States, to propose that Mountain States farm out its rights in the contemplated well to

Petco. Blair suggested that Ware submit Petco's proposal in writing. On May 11, Ware sent Blair a farm-out agreement, which provided that Mountain States would assign its interest in the well to Petco in exchange for an overriding royalty interest.

Ware received no response from Blair by June 21. He consequently contacted Blair's office. Ware was informed by Blair's secretary that the farm-out agreement had not been received. Ware sent a copy of the farm-out agreement to Blair on June 22. On June 30, Blair telephoned Ware and informed him that he was not interested in Petco's proposal.

On July 19, Ware sent Blair a letter stating that Petco intended to force pool the oil and gas mineral interests on Mountain States' property unless an agreement could be reached with Blair. Blair did not respond to the letter.

On August 29, Petco submitted an application to the New Mexico Oil COnservation Division (Division) seeking to have Mountain States' 40-acre tract forced pooled into a drilling unit.[2] On September 27, the Division conducted a hearing, in which Mountain States did not participate, concerning the mandatory pooling of the oil and gas underlying Mountain States' 40-acre tract. Subsequent to the hearing, the Division issued an order creating a 160 acre oil spacing and proration unit and pooling all the mineral interests, including Mountain States' interests, therein. The order also named Petco as the operator of the well and unit and provided that: "[a]fter the effective date of [the] order and within a minimum of 30 days prior to commencing [the] well, the operator shall furnish . . . each known working interest owner . . . an itemized schedule of estimated well costs." The order further provided that: "[w]ithin 30 days from the date of schedule of estimated well costs is furnished to him, any non-consenting working interest owner shall have the right to pay his share of estimated well costs to the operator in lieu of paying his share of reasonable well costs out of production. . . ." The order also provided that non-consenting owners were required to pay 200 percent of the reasonable well costs as risk charges.

On October 24, Petco sent Mountain States a certified letter containing a copy of the Division's order and a copy of the estimated well costs. On October 31, without having heard from Mountain States, Petco commenced drilling the well. The well was drilled to its maximum depth by November 17 and was completed on January 10, 1970. On December 12 Petco's letter to Mountain states, containing the well costs and Division order was returned marked "unclaimed". The envelope indicated the post office had placed the letter in Mountain States' post-office box first on November 1 and again on November 11. Despite notification that Mountain States had not been informed of the pooling order, Petco made no other attempts to contact Mountain States.

The first gas sales from the well were made on April 17, 1979. Pursuant to the Division's order, Petco withheld from production Mountain States' share of the well costs plus an additional 200 percent thereof as a penalty for not consenting to pay its share of the well costs.

In a letter dated June 28, 1979 Petco was informed by Mountain States that it had never received notice of the well costs or had an opportunity to elect to pay its share, and thus was asserting its right to join in the drilling of the well without paying a penalty. Petco, nevertheless, continued to withhold Mountain states' costs from production.

On May 23, 1980, Mountain States filed a complaint in the district court seeking an order permitting it to join in the well free of risk penalty because Petco had failed to provide Mountain States with notice of well costs pursuant to the Division's order. Mountain States alleged that as a result of Petco's failure to provide it with notice, Mountain States' right to due process of law had been denied. The complaint was amended on December 12, 1980, to include a prayer for

damages for conversion and for an accounting.

On February 4, 1981, the district court dismissed the suit without prejudice so that the issues could be initially considered by the Division.[3] Mountain States filed a motion for reconsideration of the court's dismissal of the suit on February 6, contending that the Division need not consider the action initially inasmuch as the suit sought equitable relief which the Division could not grant and because the central issue was legal. Mountain States contended that the doctrine of primary jurisdiction therefore did not apply. The court granted Mountain States' motion on March 9, and set aside its order of dismissal.

The case was tried before the court on September 22, 1981. The court found that the Division's order requiring Petco to furnish estimated well costs to Mountain States contemplated **actual** notice to Mountain States, and that Petco's attempt to notify Mountain States by means of a certified letter did not satisfy the requirements of the order. Moreover, the court found that Petco's attempted notification on October 25 did not comply with the terms of the Division order inasmuch as notification was not made at least 30 days prior to commencing drilling of the well. Consequently, the court ordered Petco to pay Mountain States the sum it had withheld as a risk penalty from its share of the proceeds of the well, together with interest thereon at 12 percent per annum.

On appeal Petco contends that: (1) the court erred in ruling that the Division did not have primary jurisdiction over the suit; (2) the court erred in its consideration of Mountain States' due process claim; and (3) the court improperly ruled that Petco had not complied with the 30-day notification requirement inasmuch as that issue was not within the scope of the pleadings.

I.

Petco contends that the court erred in ruling that the Division did not have primary jurisdiction over the suit.

In **United States v. Western Pacific R. Co.,** 352 U.S. 59 (1956), the Supreme Court explained and related doctrines of exhaustion of administrative remedies and primary jurisdiction as follows:

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. [Citations omitted].

352 U.S. at pp. 63-64.

In **New Mexico Association For Retarded Citizens, et al. v. State of New Mexico, et al.,** 678 F.2d 847 (10th Cir. 1982), we recognized that exhaustion of [administrative] remedies and primary jurisdiction are closely connected doctrines. In that case, it was contended that the district court should have stayed its hand until administrative remedies had been exhausted or invoked the doctrine of primary jurisdiction to permit the administrative agency to first complete its investigation into the charges. We observed, **inter alia:**

Exhaustion requires agency determination of claims initially cognizable exclusively at the administrative level prior to court intervention. **See United States v. Radio Corp.,** 358 U.S. 334, 346 n.14, 79 S. Ct. 457, 464 n.14, 3 L. Ed. 2d 354 (1959). Primary jurisdiction mandates similar judicial restraint: disputes properly pressed in either the courts or administrative bodies are to be first decided by an agency specifically equipped with expertise to resolve the regulatory issues raised. **Id.**

678 F.2d at p. 850.

The exhaustion doctrine applies where the agency **alone** has exclusive jurisdiction over the case (generally premised on the exercise of the agency's expertise), whereas primary jurisdiction applies where **both** a court and an agency have the legal capacity to deal with the issue.

There are two main principles applicable to the rule that every court requires exhaustion of administrative remedies: "(1) a court will not decide a question [within the agency's specialization and when the administrative remedy will provide the wanted relief] not first presented to an agency; and (2) a court will not decide a constitutional question in a case that the agency might have decided on nonconstitutional grounds." Davis, **Administrative Law Treatise,** 1982 Supp., Ch. 20, § 20.11, p. 281.

However, In **McKart v. United States,** 395 U.S. 185 (1969) the Supreme Court observed that while the doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law, it is, like most judicial doctrines, subject to numerous exceptions. Indeed, this court has recognized that "[t]he exhaustion principle is not indiscriminately applied to block judicial action in every circumstance where a litigant has failed to explore his administrative avenues of relief." **New Mexico Association For Retarded Citizens, et al. v. State of New Mexico, et al.,** 678 F.2d at p. 850. Thus, in **Martinez v. Richardson,** 472 F.2d 1121 (10th Cir. 1973) we said:

It is, of course, axiomatic that a litigant must exhaust his administrative remedies, if such remedies exist, as a prerequisite to invoking the jurisdiction of the federal court. But this requirement of exhaustion is not invariable where, for example, the administrative remedy is wholly inadequate and the federal question is so plain that exhaustion is excused. [Citations and footnotes omitted].

As previously noted, the action which was taken against the plaintiffs here involves violation of rights guaranteed by the Fifth Amendment to the Constitution of the United States, and it cannot be doubted that the federal question is a substantial one.

472 F.2d at p. 1125. [Emphasis supplied].

In **Mathews v. Eldridge,** 424 U.S. 319 (1976) the question presented was whether a pre-termination hearing was required by due process and whether this issue must, in the first instance, be decided by the agency. The Supreme Court held that the Secretary was not required to consider such a challenge. The converse, of course, is that the challenge may be initially posited with the courts because it involves a constitutional question.

We hold that the court did not err in exercising primary jurisdiction in the case at bar. The crux of Mountain States' claim presented was that Petco violated its federal constitutional right of due process of law. Here, as in **Martinez v. Richardson, supra,** there was a substantial federal question presented.

II.

Petco's due process contentions are two-fold. First, Mountain States failed to plead or to prove that state action was involved, and thus the issue was improperly before the court. Second, even if due process was properly raised, Petco satisfied its obligations when it sent a letter containing the Division order and well costs to Mountain States.

To maintain an action for denial of due process, a party must demonstrate initially that "state action" is involved.[4] No cause of action exists for a dispute between purely private individuals.

In this case, Mountain States alleges that Petco denied it due process because Petco neglected to provide notification of well costs as mandated by the Division order. It is not clear from the record what Mountain States' state action contention is. Apparently, Mountain States is maintaining that because notification was required by order of the Division, which is a state agency, state action was involved. Admittedly, however, Mountain States' complaint is not with the Division's order, which it unquestioningly accepts, but rather with Petco's action seeking compliance with the order.

In **Norton v. Liddel,** 620 F.2d 1375 (10th Cir. 1980) this court, discussing **Torres v. First State Bank of Sierra County,** 588 F.2d 1322 (10th Cir. 1978), stated that where a state "does no more than furnish a neutral forum for the resolution of issues and has no interest in the outcome of the lawsuit, the State court's action in issuing an order cannot be imputed to the private party seeking issuance of the order." 620 F.2d at p. 1380. This rationale must extend also to neutral state agencies which, without having an interest in the outcome of the case, merely provide a forum for the resolution of disputes.

The dispute in the present case is between private parties. No state action is contested. Mountain States' contentions are directed solely to Petco, and Petco's actions cannot be said to rise to the level of state action merely because an uncontested state order is involved.

Without considering the "state action" question, the trial court found that the term "furnish" in the Division order required actual notification to Mountain States, and that Petco failed to comply with due process requirements by simply mailing a letter to Mountain States.

We decline to consider whether the order and due process require actual notification or whether Petco's attempt to notify by mail, even though not received by Mountain States, was sufficient notification. We need not reach the issue, inasmuch as the court ruled that Petco's attempt to notify Mountain States on October 25, even if received, failed to comply with the Division order requiring that Mountain States be accorded a minimum of 30 days notice before Petco commenced drilling operations. The record shows that the well was commenced on October 31, only six days following the mailing of notification to drill. Petco argues that the court improperly considered the "actual notification" issue because it was outside the scope of the pleadings. Even if this be true, an appellate court may affirm the order of the trial court on any grounds that find support in the record. **Fleming Bldg. Co. v. Northeastern Oklahoma Bldg.,** 532 F.2d 162 (10th Cir. 1976); **Keyes v. School District,** 521 F.2d 465 (10th Cir. 1975), **cert. denied,** 423 U.S. 1066 (1976); **Carpenters Dist. Council v. Brady Corp.,** 513 F.2d 1 (10th Cir. 1975); **Retail Store Employees v. Sav-On Groceries,** 508 F.2d 500 (10th Cir. 1975); **Sanchez v. TWA,** 499 F.2d 1107 (10th Cir. 1974); **Pound v. Insurance Co. of N. Am.,** 439 F.2d 1059 (10th Cir. 1971). Such is the case here.

The Division order provided that Petco was required to furnish notice to Mountain States "within a minimum of 30 days prior to commencing a well." The language of the order is clear. Despite Petco's argument that notification had to be **within** 30 days of drilling, the plain language of the order is that Petco was required to provide Mountain States with at least 30 days notice **before** commencing drilling operations.

We hold that Petco violated the terms of the Division order by failing to furnish Mountain States with notice at least 30 days before commencing the well. Accordingly, Mountain States was not allowed the opportunity accorded by Division's order to elect to pay the costs of drilling.

WE AFFIRM.

OPINION FOOTNOTES

1 See rule 104(II) (a), State of New Mexico Oil Conservation Division, Rules and Regulations.

2 Under NMSA § 70-2-6 the division has jurisdiction and authority over all matters relating to the conservation of oil and gas.

3 NMSA § 70-2-17 provides that: "In the event of any dispute relative to [the cost of drilling and completing the well], the division shall determine the proper costs after due notice to interested parties and a hearing thereon."

4 The Fourteenth Amendment to the United States Constitution provides in pertinent part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Mich. 349, 42 N.W.2d 113, 116 (1950); *see Mancini*, 101 A. at 583 ("[P]ublic peace is that sense of security and tranquility, so necessary to one's comfort, which every person feels under the protection of the law."); *State v. Brooks*, 146 La. 325, 83 So. 637, 639 (1919) ("Public peace is public tranquility and quiet order and freedom from agitation or disturbance which is guaranteed by the law.").

[4] Although the guidance provided by these authorities is sparse and imprecise, it suggests that the "public order" is disturbed when dogs are barking, biting, knocking over garbage cans, etc. *Cf. Commonwealth v. Koch*, 288 Pa.Super. 290, 431 A.2d 1052, 1056–58 (1981) (continuous barking of dogs housed in kennel in rural community is not "of such a nature as to 'break the public peace' "). On the other hand, an ACO ordinarily is not maintaining public order when picking up dead or injured animals, inspecting licenses and vaccination certificates, or enforcing laws against mistreatment of animals.

Thus, Exhibit 1 by itself cannot tell us whether a Las Cruces ACO comes within the definition of "law enforcement officer" in the Tort Claims Act. Two questions remain. First, how much time does the ACO devote to the various duties? An ACO is a "law enforcement officer" only if the majority of the ACO's time is devoted to the duties of maintaining public order. *See Anchondo*, 100 N.M. at 110, 666 P.2d at 1257. Second, insofar as a duty of an ACO involves maintaining public order, is the duty one traditionally performed by law enforcement officers? If the duty is not a traditional duty of law enforcement officers, it does not come within the meaning of "maintaining public order" in the statutory definition of "law enforcement officer." *See id.* For example, responding to complaints of barking or biting dogs is not "maintaining public order" under the statute unless law enforcement officers traditionally have engaged in that activity. Although we assume that they have, we have found no definitive literature and the record in this case is silent on the matter.

In sum, on the record before us, we cannot determine whether duties with respect to the maintenance of public order constitute the principal duties of a Las Cruces ACO. Because the sole evidence on the issue (the stipulated exhibit) is inadequate to establish that a Las Cruces ACO is not a law enforcement officer within the meaning of the Tort Claims Act, we must reverse the district court's dismissal and remand for further proceedings. Our reversal does not foreclose the district court from granting summary judgment on the law-enforcement-officer issue after the parties submit additional evidence to that court.

IT IS SO ORDERED.

CHAVEZ and FLORES, JJ., concur.

848 P.2d 1108

Henry MARTINEZ, Claimant–Appellant,

v.

SOUTHWEST LANDFILLS, INC., and Mountain States Mutual Casualty Company, Inc., Respondents–Appellees.

No. 13590.

Court of Appeals of New Mexico.

Feb. 15, 1993.

Award of 22% temporary partial disability was made by the Workers' Compensation Administration, Gregory D. Griego, Workers' Compensation Judge, and worker appealed. The Court of Appeals, Bivins, J., held that: (1) worker waived challenge to sufficiency of evidence to support award by failing to properly summarize evidence in his brief; (2) worker did not show entitlement to reimbursement for cost of examination by physician of his choice; and (3) worker failed to show entitlement to transfer of health care.

Affirmed.

1. Workers' Compensation ⇐1907

Worker waived right of review on issue of sufficiency of evidence to support award of 22% temporary partial disability benefits rather than 100%, for failure to comply with appellate rule concerning summary of evidence, where brief-in-chief selectively set forth evidence which would support different result than that reached by the Workers' Compensation Judge and did not provide the substance of evidence which would support judge's findings, nor state reasonable inferences that could be drawn from the evidence, nor acknowledge how employer's evidence could be viewed together with evidence offered by worker to support claim on appeal. SCRA 1986, Rule 12-213, subd. A(3).

2. Administrative Law and Procedure ⇐788

Challenge to sufficiency of evidence under whole record review involves two-step process; first, party challenging sufficiency must set forth substance of all evidence bearing on the proposition, which requires presentation of all supporting evidence in light most favorable to agency's decision; and, second, party must demonstrate why, on balance, evidence fails to support finding made. SCRA 1986, Rule 12-213.

3. Administrative Law and Procedure ⇐749

Court reviewing agency decision starts with perception that all evidence, favorable and unfavorable, will be viewed in light most favorable to decision, but this does not preclude party challenging substantiality of evidence from pointing out deficiencies in evidence that decision maker below might have considered favorable. SCRA 1986, Rule 12-213.

4. Administrative Law and Procedure ⇐791

Whole record standard of review of agency decision requiring reviewing court, in determining substantiality of evidence, to take into account whatever in the record fairly detracts from its weight, permits appellant to demonstrate why one expert's opinion should have been given more weight than another, but bottom line is that appellant must persuade reviewing court that it cannot conscientiously say that evidence supporting decision is substantial, when viewed in the light that the whole record furnishes. SCRA 1986, Rule 12-213.

5. Administrative Law and Procedure ⇐791

In whole record review of agency decision, reviewing court should be able to rely entirely on appellant's brief-in-chief in canvassing all the evidence bearing on finding or decision and in deciding whether there is substantial evidence to support result, and it is not responsibility of reviewing court to search the record to determine whether substantial evidence supports finding, and neither appellee nor reviewing court should have to supplement appellant's presentation of the evidence. SCRA 1986, Rule 12-213.

6. Administrative Law and Procedure ⇐791

Primary purposes of appellate rule concerning summary of the evidence on whole-record review of agency decision are to fully apprise reviewing court of fact finder's view of facts and its disposition of the issues, and help court decide issues on appeal, and another purpose is to oblige appellant to carefully review all the evidence to decide whether to pursue or discard sufficiency challenge. SCRA 1986, Rule 12-213.

7. Appeal and Error ⇐761

Attempts to incorporate by reference arguments and authority contained in memoranda submitted in opposition to calendaring notices do not preserve matters not specifically argued in appellate briefs.

8. Workers' Compensation ⇐999

Workers' Compensation Judge did not necessarily find worker's claim of 50% impairment to be correct, so as to entitle worker to recover for cost of examination by physician of his choice on theory that final determination differed from employer's physician's opinion of 7% impairment by more than 20%, though judge found that worker had temporary physical impairment as determined by his physician, where physician testified that 50% figure was specu-

lative and also used a 15% figure, and acceptance of determination to physical impairment did not necessarily accept determination of percentage. NMSA 1978, § 52-1-51, subd. E.

9. Trial ⇐404(1)

Findings are to be construed in support of judgment.

10. Workers' Compensation ⇐998

Worker failed to show entitlement to have his health care transferred to provider chosen by him on ground that his own physician testified that treating physicians provided by employer made wrong diagnosis and had not treated worker for herniated disc, where employer did provide medical care which was found by Worker's Compensation Judge to be adequate and satisfactory and failure to obtain positive result was not due to nature, quality or type of care provided. NMSA 1978, § 52-1-49.

11. Workers' Compensation ⇐1001

Worker was not harmed by being required to prove medical causation, allegedly contrary to previous acceptance by both parties of recommended resolution, where worker was able to establish causation and did not argue that he would have been entitled to more or different benefits if he had not been held bound by the recommended resolution.

Stephen E. McIlwain, Albuquerque, for claimant-appellant.

Robert Bruce Collins, Albuquerque, for respondents-appellees.

OPINION

BIVINS, Judge.

Worker appeals the Workers' Compensation Administration's Compensation Order awarding him 22% temporary partial disability as a result of an accidental injury on March 19, 1989. He raises four issues: (1) whether substantial evidence supports the award of 22% temporary partial disability; (2) whether the Workers' Compensation Judge (WCJ) erred in not awarding Worker reimbursement for charges incurred by him for examination by a health care provider of his choice; (3) whether the WCJ erred in not transferring Worker's health care to the health care provider chosen by Worker; and (4) whether the WCJ erred in concluding that all disputes over benefits due before August 19, 1990, had been fully resolved by the recommended resolution of Worker's first claim. We decline to address the first issue challenging the sufficiency of the evidence because Worker failed to comply with the appellate rule governing such a challenge, SCRA 1986, 12-213(A)(3) (Repl.1992), and we affirm on the remaining issues. We take this opportunity to spell out the requirements for a challenge to the sufficiency of the evidence under the whole record review standard, and to explain why compliance is necessary.

We summarize the portions of the WCJ's decision relevant to this appeal. Employed as a heavy equipment operator for Employer, Worker suffered an accidental injury within the scope of, and in the course of, his employment on March 19, 1989. Employer provided medical care as well as rehabilitation services with the goal of assisting Worker in re-entering the job market. Employer also paid Worker temporary total disability benefits from the date of the accident until February 1, 1990. After Worker filed his first claim for benefits, he and Employer attended a mediation conference and entered into a stipulation providing, among other things, that Worker suffered a disability to some percentage as a result of his accidental injury; that Worker would accept 10% partial disability benefits from February 1, 1990, to August 12, 1990, in full settlement of his claim prior to the mediation conference; that Worker would receive temporary total disability benefits from August 13, 1990, until October 13, 1990, or until further order of the Workers' Compensation Administration; and that the parties would attempt to resolve the issue of permanent disability by October 13, 1990, and, failing to do so, either party could pursue a resolution of that issue. Unable to resolve the issue, Worker filed his second claim and, after a second mediated recommended resolution was rejected by Employer, the matter went to hearing before the WCJ.

As a result of that hearing, the WCJ awarded Worker 22% temporary partial disability benefits from February 1, 1990, until further order. The WCJ rejected Worker's claim for reimbursement for charges incurred for an independent medical examination by Dr. Racca, and also rejected Worker's claim that his medical care should be transferred to Dr. Racca. This appeal followed. The WCJ concluded that the law in effect in 1987 applies and the parties do not disagree.

1. *Substantiality of the Evidence*

[1] Worker challenges the sufficiency of the evidence to support the award of 22% temporary partial disability benefits, claiming that he should have been awarded 100% temporary disability benefits. We decline to review this question because Worker has failed to comply with SCRA 12–213(A)(3) and related case law.

SCRA 12–213(A)(3) provides in pertinent part:

> A contention that a ... finding of fact is not supported by substantial evidence *shall be deemed waived* unless the summary of proceedings includes the substance of the evidence bearing upon the proposition, and the argument has identified with particularity the fact or facts which are not supported by substantial evidence.... (Emphasis added.)

Worker has not complied with this rule. The summary of proceedings portion of his brief-in-chief, as well as the argument portion, selectively set forth evidence which would support a different result. Worker acknowledges that Employer presented evidence concerning Worker's rehabilitation, medical evidence from the treating physicians, and evidence concerning Worker's disability. However, he neither provides us with the substance of this evidence or other evidence which would support the WCJ's findings on disability, nor states the reasonable inferences that could be drawn from the evidence, nor acknowledges how Employer's evidence could be viewed together with the evidence offered by Worker to support Worker's claim on appeal. Instead, Worker's brief-in-chief concentrates on the evidence he presented through Dr. Racca, as to impairment, and Dr. Krieger, as to disability.

Predictably, it was left to the opposing party to provide the missing evidence. This missing evidence includes testimony by job placement specialists, cross-examination testimony of Worker's disability specialist, medical evidence unfavorable to Worker's position, and most importantly, evidence of Worker's lack of cooperation in seeking reemployment. This last evidence undoubtedly influenced the award made by the WCJ.

Equally predictable, Worker, in his reply brief, for the first time, acknowledges apparent conflicts in the testimony of the two disability specialists, as well as other evidence brought to our attention by Employer. He then seeks to explain away this countervailing evidence. This reluctant unfolding of all the evidence commonly occurs where the appellant fails to comply with SCRA 12–213. Because of the frequency with which this occurs, we now set forth the appellant's responsibilities in challenging the sufficiency of the evidence under the whole record review standard, as required by the appellate rules and related case law.

[2] In *Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert. denied*, 109 N.M. 33, 781 P.2d 305 (1988), we went to some length to set forth the requirements for whole record review in administrative proceedings. Taking the teachings of that case together with SCRA 12–213, we believe that a challenge to the sufficiency of the evidence under whole record review involves a two-step process.

Step one. The party challenging the sufficiency of the evidence supporting a proposition must set forth the substance of *all* evidence bearing upon the proposition. SCRA 12–213 requires this. *See also Tallman*, 108 N.M. at 128, 767 P.2d at 367.

Step two. Once the challenging party has set forth the substance of all the pertinent evidence, the party must then demonstrate why, on balance, the evidence fails to support the finding made.

[3] In setting forth the substance of all the pertinent evidence, the appellant, in order to make a convincing argument, must present all supporting evidence in the light most favorable to the agency's decision. This includes stating all reasonable inferences that can be drawn from the facts, while acknowledging that "[t]he possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's findings are unsupported by substantial evidence." *Id.* at 129, 767 P.2d at 368. This kind of presentation takes into account and recognizes the considerable deference the reviewing court must give to the agency's findings. As we stated in *Tallman*, "[t]he reviewing court starts out with the perception that all evidence, favorable and unfavorable, will be viewed in the light most favorable to the agency's decision." *Id.* This does not mean, however, that the party challenging the substantiality of the evidence is prohibited from pointing out deficiencies in the evidence that the decision maker below might have considered favorable.

[4] Indeed, our second step contemplates that the appellant point out evidence that fairly detracts from the evidence relied upon by the decision maker in support of the challenged proposition. *See id.* The whole record review standard, unlike the traditional standard of appellate review, requires the reviewing court, in determining the substantiality of the evidence, to " 'take into account whatever in the record fairly detracts from its weight.' " *Id.* (quoting *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951)). This permits the appellant, for example, to demonstrate why one expert's opinion should have been given more weight than another. Failure of an expert to have available all underlying facts needed to form a reasonable opinion is but one example of evidence lessening the weight of expert testimony. The bottom line, however, is that the appellant must persuade the reviewing court that "it cannot conscientiously say that the evidence supporting the decision is substantial, when viewed in the light that the *whole* record furnishes." *Tallman*, 108 N.M. at 129, 767 P.2d at 368 (emphasis added).

[5] If there is compliance with the steps listed above, then the reviewing court should be able to rely entirely on the appellant's brief-in-chief in canvassing all the evidence bearing on a finding or a decision, favorable or unfavorable, and in deciding whether there is substantial evidence to support the result, using the approach we outlined in *Tallman*. SCRA 12–213 contemplates that the canvass and determination be made on the basis of appellant's presentation in the brief-in-chief. The appellee should likewise be able to rely on the brief-in-chief in arguing why, on balance, the finding or decision is supported by substantial evidence. Neither the appellee nor the reviewing court should have to supplement the appellant's presentation of the evidence.

The above procedure not only requires adroitness on the part of the challenging party, but also a high degree of forthrightness. The party must abandon the role of advocate for facts that were argued below and rejected, and assume the role of advocate for the law. After all, whether a finding is supported by substantial evidence is a question of law, not of fact. *Pickens–Bond Constr. Co. v. Case*, 266 Ark. 323, 584 S.W.2d 21, 25 (1979) (en banc), *cited in Neel v. State Distribs., Inc.*, 105 N.M. 359, 365, 732 P.2d 1382, 1388 (Ct.App.1986) (Donnelly, J., dissenting), *cert. quashed*, 105 N.M. 358, 732 P.2d 1381 (1987); *Ferreira v. Workmen's Compensation Appeals Bd.*, 38 Cal.App.3d 120, 112 Cal.Rptr. 232, 235 (1974). Once that role is assumed, it becomes easier for the appellant to more realistically evaluate the chances of success on appeal. This saves not only the time and resources of the party, but also the court's time and resources. This brings us to the purposes of SCRA 12–213.

[6] The primary purposes of SCRA 12–213's requirements are to fully apprise the reviewing court of the fact-finder's view of the facts and its disposition of the issues, and to help the court decide the issues on appeal. *See, e.g., Stanton v. Bokum*, 66

N.M. 256, 259, 346 P.2d 1039, 1041 (1959) (explaining purpose of former appellate rules requiring a statement of facts in appellate briefs). In this regard, it is not the responsibility of the reviewing court to search through the record to determine whether substantial evidence exists to support a finding. *See Zengerle v. City of Socorro*, 105 N.M. 797, 802, 737 P.2d 1174, 1179 (Ct.App.1986), *cert. quashed*, 105 N.M. 781, 737 P.2d 893 (1987), *overruled on other grounds by Whittenberg v. Graves Oil & Butane Co.*, 113 N.M. 450, 454, 827 P.2d 838, 842 (Ct.App.1991). That is the obligation of the appellant.

[7] In fairness to Worker, when all three briefs are considered, there is some compliance with SCRA 12–213, however, as previously noted, neither the appellee nor the appellate court should have to search the record to determine the relevant facts bearing upon Worker's claim that the decision of the WCJ was not supported by substantial evidence. In addition, Worker's brief appears to rely on factual recitations made earlier during the calendaring process. Such reliance is to no avail because attempts to incorporate by reference arguments and authority contained in memoranda submitted in opposition to calendaring notices do not preserve matters not specifically argued in the briefs. *State v. Aragon*, 109 N.M. 632, 634, 788 P.2d 932, 934 (Ct.App.), *cert. denied*, 109 N.M. 563, 787 P.2d 1246 (1990). Moreover, based on the manner in which the evidence unfolded, in order to conduct a proper review, this Court would be required to examine substantially all of the record to determine which side's view of the proof is accurate. Judicial resources simply do not permit us to do this, and we believe that SCRA 12–213 is designed to avoid that endeavor and to place the responsibility with the appellant.

SCRA 12–213 has another purpose just as salutary as those already discussed. It obliges an appellant to carefully review all the evidence as a reviewing court would and then decide whether to pursue or discard a sufficiency challenge. SCRA 12–213 demands this winnowing process. Only after a party challenging the sufficiency of the evidence goes through the steps outlined above in a careful and candid manner can that party truly decide whether the issue is worth pursuing. As already noted, this process saves time and money when issues found to be without merit are discarded.

We recently had occasion to refuse to consider a challenge to the sufficiency of the evidence where the appellant failed to include the substance of all the evidence bearing upon a proposition. *See Maloof v. San Juan County Valuation Protests Bd.*, 114 N.M. 755, 845 P.2d 849 (Ct.App. 1992). Although *Maloof* was decided under the traditional standard of review, the same principles enunciated there apply to whole record review. In *Maloof*, we said that an appellant is bound by the findings of fact made below unless the appellant properly attacks the findings, and that the appellant remains bound if he or she fails to properly set forth all the evidence bearing upon the findings. *Id.*, 114 N.M. at 759–760, 845 P.2d at 853–54; *see also In re Estate of McKim*, 111 N.M. 517, 521, 807 P.2d 215, 219 (1991); *Henderson v. Henderson*, 93 N.M. 405, 407, 600 P.2d 1195, 1197 (1979); *Galvan v. Miller*, 79 N.M. 540, 545–46, 549, 445 P.2d 961, 966–67, 970 (1968); *Giovannini v. Turrietta*, 76 N.M. 344, 346–47, 414 P.2d 855, 856–57 (1966); *State ex rel. State Highway Comm'n v. Pelletier*, 76 N.M. 555, 559, 417 P.2d 46, 48 (1966).

Therefore, deciding that Worker has waived his right of review on this issue, we affirm the WCJ's finding as to temporary partial disability.

2. *Reimbursement for Medical Costs*

[8] NMSA 1978, Section 52–1–51(E) (Repl.Pamp.1991), allows for reimbursement of Worker for the cost of an examination by a physician or other health care provider of his choice provided "the *final determination* of the worker's claim is that the worker's claim of impairment is correct and differed from the employer's physician's opinion of percentage of impairment by more than twenty percent." (Emphasis added.) Worker argues that because the WCJ found that "Worker has a

temporary physical impairment as determined by Dr. Racca," and because Dr. Racca opined an impairment rating of 50%, which was more than 20% greater than the impairment rating given by Employer's physicians, the WCJ was required to order reimbursement for the cost of Dr. Racca's examination, including the discogram. We disagree.

Employer's physicians rated Worker's impairment at 7%. Worker arrives at a percentage difference greater than 20% by relying on Dr. Racca's opinion that Worker's impairment rating was 50%, and on the WCJ's finding accepting Dr. Racca's determination that Worker had a temporary physical impairment. Worker reasons that because the WCJ accepted Dr. Racca's determination of physical impairment, he necessarily accepted Dr. Racca's determination of the *percentage* of impairment.

[9] Worker's reasoning, however, is contrary to the rule that findings are to be construed in support of the judgment, *see Sheraden v. Black*, 107 N.M. 76, 80, 752 P.2d 791, 795 (Ct.App.1988), and also contrary to the evidence. While Dr. Racca did use a 50% figure, he testified that the figure was speculative, and also used a 15% figure. Under this state of the evidence, and considering that the WCJ did not award Worker the cost of Dr. Racca's examination, we cannot say that the WCJ necessarily found the Worker's claim of 50% impairment to be correct.

The WCJ did not err in refusing at the time of the hearing to award Worker his independent medical examination costs.

3. *Transfer of Health Care*

[10] Worker claims that he requested the WCJ to order his health care transferred from AIMS (Albuquerque Industrial Medicine Specialists) to Dr. Racca, indicating that he was dissatisfied with the AIMS treatment. He notes that Dr. Racca testified that the treating physicians provided by Employer had made the wrong diagnosis and had not treated Worker for his herniated disc. He claims that this misdiagnosis is buttressed by AIMS' referral to Dr. Stern after Dr. Racca's examination.

Relying on *Sedillo v. Levi-Strauss Corp.*, 98 N.M. 52, 644 P.2d 1041 (Ct.App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982), Worker argues that failure to properly diagnose and treat is tantamount to a failure to provide adequate medical care as required under NMSA 1978, Section 52–1–49 (Repl.Pamp.1991). *Sedillo* is distinguishable. In that case, the employer entirely failed to offer or provide medical services, and this Court held that it was error to deny a claim for payment of services rendered by the worker's personal physician. *Sedillo*, 98 N.M. at 54–56, 644 P.2d at 1043–45.

In this case, Employer did not fail to provide medical care. In fact, the WCJ found that Employer did provide medical care; that the care provided by Employer was adequate and satisfactory; and that, although a positive result was not obtained from the care provided by Employer, such failure was not due to the nature, quality, or type of care provided by Employer. Worker does not directly challenge these findings. *See Gutierrez v. Amity Leather Prods. Co.*, 107 N.M. 26, 30–31, 751 P.2d 710, 714–15 (Ct.App.1988) (unchallenged findings binding on appeal).

In *Bowles v. Los Lunas Schools*, 109 N.M. 100, 781 P.2d 1178 (Ct.App.), *cert. denied*, 109 N.M. 131, 782 P.2d 384 (1989), a case which Employer cites but Worker overlooks, this Court held that for a worker to recover for medical services obtained from sources not provided by the employer, the worker must prove that the employer-provided services did not produce positive results, that this failure was due to the care provided, that the worker obtained other medical care which was successful, that this care was related to the worker's work-related injury, and that the care was reasonable and necessary. *Bowles*, 109 N.M. at 108, 781 P.2d at 1186. *See generally City of Albuquerque v. Sanchez*, 113 N.M. 721, 727, 832 P.2d 412, 418 (Ct.App. 1992) (We note that the *Bowles* interpretation of Section 52–1–49 has been superseded by an amendment to that statute. However, the version of Section 52–1–49 interpreted in *Bowles* also is applicable to the instant appeal.). Based on the WCJ's find-

ings, which are not directly attacked, Worker has not met the *Bowles* standard.

4. *WCJ's Conclusion that Disputes over Previous Benefits Were Resolved*

[11] While conceding he can cite no authority specifically on point, *see In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (issues raised which are unsupported by cited authority will not be reviewed on appeal), Worker argues that it was unfair for the WCJ to hold him bound by the first recommended resolution regarding Worker's previous acceptance of partial disability benefits while not holding Employer bound to the same resolution, when both parties accepted the recommended resolution. Specifically, Worker claims that he should not have been put to the test of proving medical causation. This argument is easily answered.

Worker has not shown how he was harmed by the WCJ's ruling. *See Nunez v. Smith's Management Corp.*, 108 N.M. 186, 188, 769 P.2d 99, 101 (Ct.App.1988) (illustrating two types of harmless error). Worker was able to establish causation, and he does not argue on appeal that he would have been entitled to more or different benefits had the WCJ not held him bound by the first recommended resolution. Nor does his brief show where this issue was preserved below. *See State v. Martin*, 90 N.M. 524, 527, 565 P.2d 1041, 1044 (Ct. App.), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977) (court will not address issues when the brief does not indicate, with appropriate record references, where the issue was preserved).

We affirm.

IT IS SO ORDERED.

DONNELLY and PICKARD, JJ., concur.

848 P.2d 1115

STATE of New Mexico, Plaintiff–Appellee,

v.

Roy Lee POWELL, Defendant–Appellant.

No. 13756.

Court of Appeals of New Mexico.

Feb. 15, 1993.

Defendant was convicted before the District Court, Lea County, R.W. Gallini, D.J., of unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages, and he appealed. The Court of Appeals, Hartz, J., held that defendant's conviction did not require proof of evil intent or purpose.

Affirmed.

1. Criminal Law ⇐21

In absence of express statutory language to the contrary, Court of Appeals presumes an intent requirement in the commission of a crime; however, presumption can be overcome.

2. Weapons ⇐7

To convict defendant of unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages, state was not required to prove that defendant had evil intent or purpose. NMSA 1978, § 30–7–3, subd. A.

Tom Udall, Atty. Gen., Elizabeth Blaisdell, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

C. Barry Crutchfield, Templeman and Crutchfield, Lovington, for defendant-appellant.

OPINION

HARTZ, Judge.

Defendant was convicted at a non-jury trial of a violation of NMSA 1978, Section 30–7–3(A) (Repl.Pamp.1984), which prohibits the "[u]nlawful carrying of a firearm in

1997-NMCA-032

937 P.2d 979

Doyle HARTMAN and Margaret Hartman, d/b/a Doyle Hartman, Oil Operator, Plaintiffs–Appellees,

v.

TEXACO INC., a Delaware Corporation, and Texaco Exploration and Production Inc., a Delaware Corporation, Defendants–Appellants.

No. 16328.

Court of Appeals of New Mexico.

Jan. 29, 1997.

Certiorari Denied March 7 and March 14, 1997.

Independent oil and gas operator brought action against oil company for damage to its well allegedly caused by oil company's waterflood operation. The District Court, Santa Fe County, Steve Herrera, D.J., entered judgment in favor of operator, and oil company appealed. The Court of Appeals, Bosson, J., held that: (1) provision of trespass statute imposing double damages in event person enters lands of another without prior permission and causes damage does not apply to subsurface trespass, and (2) graphs, maps, charts, spread sheets and data reports pertaining generally to waterflood and well production information that were prepared by oil company's employees were not prepared in anticipation of litigation for purposes of work product privilege.

Remanded with instructions.

1. Trespass ⇐60

Provision of trespass statute imposing double damages in event person enters lands of another without prior permission and causes damage does not apply to subsurface trespass. NMSA 1978, § 30–14–1.1, subd. D.

2. Mines and Minerals ⇐51(5)

Independent oil and gas operator was not entitled to double damages under trespass statute for damages allegedly caused by injected water as part of oil company's waterflood operations; statute was not directed at subsurface trespass. NMSA 1978, § 30–14–1.1, subd. D.

3. Trespass ⇐11

In New Mexico, action for common law trespass provides relief for trespass beneath surface of land.

4. Pretrial Procedure ⇐371

Oil company's graphs, maps, charts, spread sheets and data reports pertaining generally to waterflood and well production information were not prepared in anticipation of litigation for purposes of work product privilege; such documents were of type ordinarily created by operator of waterflood project in ordinary course of business. SCRA 1986, Rule 1–026.

5. Pretrial Procedure ⇐35, 358

Work product rule is not privilege, but immunity protecting from discovery documents and tangible things prepared by party or its representative in anticipation of litigation. SCRA 1986, Rule 1–026, subd. B(3).

6. Pretrial Procedure ⇐410

Burden of establishing that work product immunity applies to document may be met by submitting detailed affidavit sufficient to show that precise facts exist to support immunity claim. SCRA 1986, Rule 1–026, subd. B(4).

7. Pretrial Procedure ⇐410

Party with burden of persuasion must demonstrate that litigation was driving force behind preparation of each challenged document for work product privilege to apply. SCRA 1986, Rule 1–026.

8. Appeal and Error ⇐756, 757(1)

Appellate rules are designed, among other things, to obtain briefs that provide Court of Appeals with organized, accurate statement of material necessary to consider issues raised on appeal without reference to other extraneous matters; one-sided statement of facts is no help.

9. Appeal and Error ⇐757(3)

To evaluate evidentiary or discovery issues, Court of Appeals needs: description of evidence at issue; explanation of purpose for which evidence was offered; arguments

made in trial court in favor of and against admission of evidence; and trial court's ruling and, if stated by trial court, basis for ruling.

Alice Tomlinson Lorenz, Marte D. Lightstone, Miller, Stratvert, Torgerson & Schlenker, P.A., Albuquerque, Deborah G. Hankinson, Allison Roseman, Thompson & Knight, P.C., Dallas, TX, John D. Sullivan, Texaco Incorporated, Denver, CO, Eric D. Lanphere, Hinkle, Cox, Eaton, Coffield & Hensley, Albuquerque, for Appellants.

J.E. Gallegos, Michael J. Condon, Gallegos Law Firm, P.C., Steven L. Tucker, Tucker Law Firm, P.C., Santa Fe, for Appellees.

OPINION

BOSSON, Judge.

1. Defendants Texaco Incorporated and Texaco Exploration and Production Incorporated appeal from the judgment entered against them after a jury verdict in favor of Plaintiffs Doyle and Margaret Hartman d/b/a Doyle Hartman Oil Operator on claims of common law trespass, statutory trespass, and intentional private nuisance. For convenience, we will refer to the Parties in the singular as Texaco and Hartman.

2. On appeal, Texaco argues: (1) that the trial court erred in ordering Texaco to produce certain documents during discovery; (2) that the trial court erred in admitting evidence of unrelated waterflows and of Texaco's post-accident conduct; (3) that the trial court erred in applying statutory trespass, NMSA 1978, § 30–14–1.1(D) (Repl. Pamp.1994), to this case and entering judgment for a figure that represents double damages; and (4) cumulative error. If the judgment is reversed, Hartman contends he should be allowed to try the issue of punitive damages which he raised in his pleadings and upon which discovery was predicated. *See* NMRA 1997, 12–201(C). In addition, two motions were filed during the pendency of this appeal that have not yet been resolved. We discuss those motions, along with our disposition of the evidentiary issues, in a separate memorandum opinion.

3. We hold that Section 30–14–1.1(D) does not apply to subsurface trespass, and therefore we reverse the imposition of double damages. We affirm the trial court on all other issues. Accordingly, we remand this case to the trial court with instructions to vacate the judgment and enter judgment in favor of Hartman in the amount determined by the jury. Because we are not remanding this matter for a new trial, we need not decide whether Hartman should be allowed to try the issue of punitive damages. Additionally, because we affirm the trial court's discovery and trial rulings, we reject Texaco's claim of cumulative error. *See State v. Lopez*, 105 N.M. 538, 548, 734 P.2d 778, 788 (Ct.App.1986) ("The doctrine of cumulative error has no application if no cumulative errors are committed and defendant has received a fair trial.").

BACKGROUND

4. Doyle Hartman is an independent oil and gas operator who drills gas wells in Lea County, New Mexico. In January 1991, Hartman was drilling the Bates No. 2 well on property referred to as the Bates lease, when the drillers hit an uncontrolled, high pressure waterflow at a depth of 2281 feet, which is in the Salado formation.[1] After several round-the-clock days and several hundreds of thousands of dollars expended, as well as consultations with the New Mexico Oil Conservation Division and his own engineers, Hartman was forced to plug and abandon the well.

5. Hartman conducted an investigation into possible reasons for the blowout and came to the conclusion that the blowout was caused by injected water that had escaped from the Rhodes–Yates Unit (RYU), a waterflood operated by Texaco to recover oil from

1. Beneath the surface of the land are several formations or zones, each with distinct properties. Those most frequently mentioned in this opinion are the Salado, the Tansill, and the Yates. Of these formations, the Salado, a salt layer, is closest to the surface. Beneath the Salado lies the Tansill. Below the Tansill is the Yates formation, from which Texaco was taking oil.

the Yates formation.[2] In December 1992, Hartman met with Texaco employees and presented his theories concerning the cause of the blowout. In December 1993, Hartman filed suit against Texaco, alleging common law trespass, statutory trespass, and nuisance.

6. During discovery, Texaco resisted production of a number of its internal documents, contending that they were protected by the work product doctrine. Eventually, the trial court ordered most of these documents produced.

7. The trial took approximately two weeks. Hartman contended that Texaco injected water into its RYU injection wells at pressures sufficient to create vertical fractures in the Yates formation that extended through the Tansill and up to the Salado, that these high pressure injections went on for long periods of time, and that a substantial volume of the injected water was never recovered, indicating that it had escaped the formation and gone elsewhere—in Hartman's view, to the Bates lease area and into his well. Texaco, on the other hand, contended that it was physically impossible for the pressures it was using to create the vertical fractures necessary for water to escape from the Yates formation through the Tansill formation and into the Salado formation, and it was equally impossible for the water to travel 2½ miles through the Salado formation to the Bates lease. The jury returned a verdict in favor of Hartman on common law trespass, statutory trespass, and intentional private nuisance. During post-trial proceedings, the trial court determined that pursuant to Section 30–14–1.1(D), the portion of damages representing the appraised value of the damage to Hartman's property ($2,521,000) should be doubled. Judgment was entered accordingly, and this appeal followed.

STATUTORY DOUBLE DAMAGES DO NOT APPLY TO SUBSURFACE TRESPASS

[1, 2] 8. Hartman claims he is entitled to double the appraised value of the property destroyed under Section 30–14–1.1(D) because Texaco committed a statutory tr... Prior to trial, the district court indicat... it would instruct the jury on the st... trespass claim, but would await post... proceedings to decide whether subsec... applied. On appeal, Texaco argues th... tion 30–14–1.1(D) does not apply to ... face trespass. For the reasons dis... below, we agree.

9. Section 30–14–1.1 is entitled "Ty... trespass; injury to realty; civil dam... It reads:

> A. Any person who enters and re... on the lands of another after having ... requested to leave is guilty of a ... meanor.
>
> B. Any person who enters upon ... lands of another when such lands are ... ed against trespass at every roadway ... apparent way of access is guilty of a ... demeanor.
>
> C. Any person who drives a ve... upon the lands of another except thro... roadway or other apparent way of acc... when such lands are fenced in any mann... is guilty of a misdemeanor.
>
> D. In the event any person enters up... the lands of another without prior perm... sion and injures, damages or destroys ... part of the realty or its improvement... including buildings, structures, tre... shrubs or other natural features, he sh... be liable to the owner, lessee or person ... lawful possession for damages in ... amount equal to double the amount of ... appraised value of the damage of the pro... erty injured or destroyed.

10. The primary goal of statutory inte... pretation is to determine the intent of the legislature. *Edwards v. Board of Coun... Comm'rs*, 119 N.M. 114, 117, 888 P.2d 996, 999 (Ct.App.1994). In making this determination, we look first to the plain language of the statute, giving the words their ordinary meaning unless a different meaning is indicated. *Id.* We think the language of the statute more likely indicates that the legislature intended Section 30–14–1.1(D) to apply

2. A waterflood operation is a secondary recovery operation in which water is injected under pressure from injection wells into the target zone or formation to allow for subsurface sweeping of water and oil within the target formation toward recovery wells.

to trespasses on the surface of the land by persons who enter another's land, as opposed to the type of subsurface trespass by a substance that is involved in this case. In its common usage "upon" means "on; upward so as to be on." *Webster's Third New International Dictionary, Unabridged* 2517 (Merriam-Webster, Inc. 1961). Additionally, Section 30–14–1.1(D), by its terms, protects things which are usually found on the surface of the land—buildings, structures, vegetation, or other natural features. While "other natural features" is certainly broad enough to include subsurface trespass, that is not the case if the phrase is read harmoniously with the more limited, specific protections in the same sentence ("buildings, structures, trees, shrubs or other natural features"). Under the rule of statutory construction, *ejusdem generis*, when the legislature recites specific examples followed by a general phrase, it is a fair presumption that the legislature intended the general language to be focused on the class of specific examples enumerated. *In re Melissa H.*, 105 N.M. 678, 679, 735 P.2d 1184, 1185 (Ct.App.1987); *Grafe v. Delgado*, 30 N.M. 150, 152, 228 P. 601, 602 (1924).

11. When we construe a statute, this Court considers the statute in its entirety. *Bustamante v. De Baca*, 119 N.M. 739, 742, 895 P.2d 261, 264 (Ct.App.1995). Subsection A of Section 30–14–1.1 deals with persons who enter and remain on land after being asked to leave. Subsection B concerns entry by persons onto lands posted against trespass at every roadway or apparent way of access. Subsection C deals with persons driving on lands of another except on a roadway when the lands are fenced. All of these events one would normally expect to occur on the surface of the land. Subsection D essentially creates a civil remedy for the preceding subsection. Viewing the language of subsection D in context with the rest of the section, Section 30–14–1.1 generally pertains to trespass by persons on the surface of the land, and subsection D provides compensation to landowners when a person enters the land without permission and damages the land or things on, or accessible from, the surface of the land.[3]

12. We also consider the history and background of Section 30–14–1.1. *See Edwards*, 119 N.M. at 117, 888 P.2d at 999. Section 30–14–1.1 was originally enacted in 1979. *See* 1979 N.M.Laws, ch. 186, § 2. The title of the Act when considered by the legislature was "Relating to trespass; amending, repealing and enacting certain sections of the NMSA 1978 to make certain entries onto land unlawful; prescribing penalties." Section 1 of the Act amended Section 30–14–1 and is not germane to our discussion. Section 2 of the Act enacted Section 30–14–1.1 as a new section of the New Mexico Statutes Annotated. We note that as enacted in 1979, subsections A, B, and C of Section 30–14–1.1 were declared to be petty misdemeanors; in all other respects, Section 30–14–1.1 as enacted in 1979 is identical to the present language of Section 30–14–1.1. Section 3 of Laws 1979, chapter 186, amended a different statute dealing with posting of no trespassing signs and prescribing a penalty for wrongful posting of public lands, and Section 4 of Laws 1979, chapter 186, repealed Sections 30–14–5 and 30–14–7, NMSA 1978 (being 1969 N.M.Laws, ch. 195, §§ 1 and 3).

13. The laws that were repealed in 1979 include the predecessor of Section 30–14–1.1(D). They concerned posting of real property with no trespassing signs and penalties for trespassing on posted property and are similar to the provisions of Laws 1979, Chapter 186, § 3. *See* 1969 N.M.Laws, ch. 195. In addition, Section 3 of Laws 1969, chapter 195, before its repeal in 1979, reads as follows:

3. Because of our ruling, we need not decide the issue raised by the parties of whether the double damages provision of Section 30–14–1.1(D) is strictly compensatory or is also punitive. *Compare Hale v. Basin Motor Co.*, 110 N.M. 314, 320, 795 P.2d 1006, 1012 (1990) (observing, in dicta, that statutory multiplication of damages is a form of punitive damages, while holding that a person could not recover both treble damages under NMSA 1978, Section 57–12–10(B) and punitive damages based on the same conduct) *with Ventoza v. Anderson*, 14 Wash.App. 882, 545 P.2d 1219, 1227–28 (expressing the view that a treble damages provision is meant to compensate the landowner for intangible damages and damages that are difficult to quantify), *review denied*, 87 Wash.2d 1007 (1976).

Section 3. PENALTY—DOUBLE DAMAGES FOR INJURY TO REALTY.—

A. It shall be a petty misdemeanor for any person to enter upon or trespass on any real property posted in accordance with Section 2 of the Property Posting Act without the permission of the owner, lessee, person in lawful possession or his agent.

B. In the event any person enters upon the lands of another in violation of the Property Posting Act and injures or destroys any part of the realty or its improvements, including buildings, structures, trees, shrubs, or other natural features, he shall be liable to the owner, lessee or person in lawful possession for damages in an amount equal to double the amount of the appraised value of the property injured or destroyed.

C. It is a petty misdemeanor for any person other than the owner, lessee or person lawfully in possession, or his agent, to post property.

Thus, the 1979 Act was apparently an effort to integrate the laws relating to posting of property and the civil and criminal remedies for trespass to real property, including the provision for double damages. The concern of the legislature was directed to persons trespassing on the surface of the land and damaging features found on, or accessible from, the surface of the land.

14. In 1983, Section 30–14–1 and Section 30–14–1.1 were again amended. *See* 1983 N.M.Laws, ch. 27. The title of the 1983 Act was "Relating to Game and Fish; Authorizing Enforcement of Law by Conservation Officers; Defining Criminal Trespass; Providing a Penalty; Amending Certain Sections of the NMSA 1978." In addition to its provisions relating to the enforcement of game laws and increased authority of conservation officers, the 1983 amendment made violations of subsections A, B, and C of Section 30–14–1.1 misdemeanors rather than petty misdemeanors. Subsection D was reenacted without change, and it has remained the same since then. There has been no express expansion of the statute to address additional kinds of trespass. Therefore, our survey of the contextual landscape leads us to co... that the legislative focus was directed ... surface trespass and not the kind of ... face intrusion that occurred in this ca...

[3] 15. Hartman also argues that ... common law a trespass could occur be... the surface of the land, and therefo... Court should interpret Section 30–14–... in a manner consistent with the common... We recognize that in New Mexico an ... for common law trespass does provide ... for trespass beneath the surface of the ... *See Schwartzman Inc. v. Atchison, To... & S.F. Ry.*, 857 F.Supp. 838, 844 (D.N... 1994) (trespass for pollution of groundw... *see also Lincoln–Lucky & Lee Mining ... Hendry*, 9 N.M. 149, 155, 50 P. 330, ... (1897) (subsurface trespass by mining sh... *See generally* Restatement (Second) of T... § 159 (1965). We further recognize that ... court will not find the common law superse... ed unless it appears that it was the legi... tive intent, which is to be determined ... marily by the language of the statute itse... *Duncan v. Henington*, 114 N.M. 100, 1... 835 P.2d 816, 818 (1992) (citing *State ex r... Stratton v. Roswell Indep. Schs.*, 111 N.M. ... 495, 500, 806 P.2d 1085, 1090 (Ct.App.1991)); *see also State v. Gabehart*, 114 N.M. 18... 185, 836 P.2d 102, 104 (Ct.App.1992) (implie... repeals of common law are disfavored). However, throughout these proceedings the parties have treated Hartman's claims for common law trespass and statutory trespass as two distinct claims. Texaco does not challenge the legal efficacy of Hartman's claim for common law trespass, and we do not disturb it on appeal. Rather than limiting or abolishing a right that existed under the common law, Section 30–14–1.1(D) provides an additional remedy in certain statutorily defined circumstances. Those circumstances are not necessarily as expansive as the full reach of the common law. The legislature in its wisdom may focus on only certain kinds of trespass for purposes of enhancing damages.

16. In summary, the language of the statute, the titles of the acts when they were under legislative consideration, and the history of legislation on the subject, all indicate that the legislature was most likely con-

cerned with trespass by persons on the surface of the land resulting in damage to the land itself or to features on or accessible from the surface of the land, such as buildings or vegetation. Nothing in the statute indicates that the legislature envisioned applying Section 30–14–1.1(D) to a subsurface trespass by injected water, even if the trespass was ultimately attributable to the actions of a person on the surface. In the absence of any indication that the legislature intended Section 30–14–1.1(D) to apply to trespass by substances beneath the surface of the land, we hold that Section 30–14–1.1(D) does not apply to such a trespass.

17. Finally, we are aware that in New Mexico oil conservation is carefully regulated by statute and administrative procedure. *See, e.g.*, NMSA 1978, §§ 70–2–1 to –38 (Repl.Pamp.1995 & Supp.1996) (Oil and Gas Act creating Oil Conservation Commission); *Continental Oil Co. v. Oil Conservation Comm'n*, 70 N.M. 310, 373 P.2d 809 (1962). Among other objectives, those regulations are specifically directed at waterflood operations and their impact upon oil conservation as it affects the public interest. *See* § 70–2–12(B)(4), (7), (14), (15). This is an area of paramount public concern where the legislature and the appropriate administrative agency have spoken in some detail. We are hesitant to apply a generic statutory trespass statute in a manner that might create unforeseen and unintended consequences upon these public regulatory concerns, at least not without more evidence than we have before us of a legislative intent to do so. We recognize that our Supreme Court has indicated that a landowner whose property is damaged by injected water used in oil and gas operations has a claim for damages caused by the trespass. *See Snyder Ranches, Inc. v. Oil Conservation Comm'n*, 110 N.M. 637, 640, 798 P.2d 587, 590 (1990). We do not believe our decision today is inconsistent with that case.

WORK PRODUCT PROTECTION

[4] 18. There are no reported New Mexico decisions which conclusively resolve the work product discovery issues raised in this appeal. Cases addressing discovery and specifically NMRA 1997, 1–026, have determined that the rules intend liberal pretrial discovery. *Marchiondo v. Brown*, 98 N.M. 394, 397, 649 P.2d 462, 465 (1982); *Richards v. Upjohn*, 95 N.M. 675, 681, 625 P.2d 1192, 1198 (Ct.App.1980). There is a presumption in favor of discovery. *Marchiondo*, 98 N.M. at 397, 649 P.2d at 465.

[5] 19. The work product rule is not a privilege, but an immunity protecting from discovery documents and tangible things prepared by a party or its representative in anticipation of litigation. NMRA 1–026(B)(4); *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 698 (D.Nev.1994). The rule provides nearly absolute immunity for "opinion" work product, i.e., documents which reflect an attorney's mental impressions, conclusions, opinions or legal theories and a qualified immunity for all other "non-opinion" work product. *See Diamond State Ins. Co.*, 157 F.R.D. at 699. *See generally* Edna S. Epstein & Michael M. Martin, *The Attorney–Client Privilege and the Work Product Doctrine*, 102–08 (American Bar Association, 2d ed. 1989) (Epstein & Martin). Texaco concedes that the disputed documents are not opinion work product. Our focus then, is whether the documents are entitled to qualified immunity as non-opinion work product.

[6] 20. We note first that the standard of review for discovery orders is abuse of discretion. *Church's Fried Chicken No. 1040 v. Hanson*, 114 N.M. 730, 733, 845 P.2d 824, 827 (Ct.App.1992); *DeTevis v. Aragon*, 104 N.M. 793, 797–98, 727 P.2d 558, 562–63 (Ct. App.1986). The party asserting the work product immunity under NMRA 1–026(B)(4) bears the burden of establishing for each document that the rule applies. *See Hartman v. El Paso Natural Gas Co.*, 107 N.M. 679, 686–87, 763 P.2d 1144, 1151–52 (1988). This burden may be met by submitting detailed affidavits *sufficient to show that precise facts exist to support the immunity claim. Diamond State Ins. Co.*, 157 F.R.D. at 699 (emphasis added) (citing *Harvey's Wagon Wheel, Inc. v. N.L.R.B.*, 550 F.2d 1139, 1141 (9th Cir.1976)).

[7] 21. The critical issue in this case is whether Texaco sustained its burden of dem-

onstrating that the disputed documents were prepared "in anticipation of litigation or for trial" within the meaning of NMRA 1–026(B)(4). The courts have not found a "neat general formula" to determine whether documents were prepared in anticipation of litigation. *Diamond State Ins. Co.*, 157 F.R.D. at 699. *See generally* Epstein & Martin, *supra*, at 118. The party with the burden of persuasion must demonstrate that litigation was "the driving force" behind the preparation of each challenged document. *Diamond State Ins. Co.*, 157 F.R.D. at 699. The federal courts have treated the question of whether documents were prepared in anticipation of litigation as strongly dependent on the facts of a particular case. *See, e.g., Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118–20 (7th Cir.1983); *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 352 (D.Conn.1991).

22. Some courts also look to the extent legal counsel was involved in the preparation of the documents or in their supervision. *See Colorado ex rel. Woodard v. Schmidt–Tiago Constr. Co.*, 108 F.R.D. 731, 734 (D.Colo.1985); *APL Corp. v. Aetna Casualty & Sur. Co.*, 91 F.R.D. 10, 16–17 (D.Md.1980). Courts recognize that not all documents are prepared in anticipation of litigation, even though ultimately they may end up being used in litigation. Instead, they may be prepared during the course of ordinary investigations or in the ordinary course of business. *See, e.g., Binks Mfg. Co.*, 709 F.2d at 1118–19; *In re Grand Jury Subpoena*, 599 F.2d 504, 510–11 (2d Cir.1979); *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F.Supp. 491, 513–14 (D.N.H.1996).

23. Sometimes there may be more than one motive for the preparation of a document which moves a court to speak of requiring that litigation be a primary or principal motive, or even the exclusive motive, behind its preparation. *See Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 356 (4th Cir.1992), *vacated*, 1993 WL 524680 (1993); *Maloney v. Sisters of Charity Hosp.*, 165 F.R.D. 26, 30 (W.D.N.Y.1995); *Cameron v. General Motors Corp.*, 158 F.R.D. 581, 589 (D.S.C.1994); *Stout v. Illinois Farmers Ins. Co*, 150 F.R.D. 594, 597 (S.D.Ind.1993). Some courts require that the thrust of ... tion must have progressed to the point ... the movant can demonstrate that the ... ment was prepared pursuant to "an ... able resolve to litigate." *Binks Mfg. C...* F.2d at 1119 (quoting *Janicker v. ... Washington University*, 94 F.R.D. ... (D.D.C.1982)); *accord Stout*, 150 F.R.D. ... 600. We note one formulation of the ... forth in an often-cited treatise:

> the test should be whether, in light ... nature of the document and the ... situation in the particular case, the ... ment can fairly be said to have been ... pared or obtained because of the ... of litigation. But the converse of ... that even though litigation is already ... prospect, there is no work-product ... nity for documents prepared in the ... course of business rather than for ... poses of the litigation.

8 Charles A. Wright & Arthur R. Mi... *Federal Practice and Procedure* § 202... 343–46 (2d ed. 1994) (footnotes omitted).

24. In this case the documents in dispu... were primarily graphs, maps, charts, spre... sheets, data reports and similar kinds ... exhibits pertaining generally to waterflo... and well production information. Texaco ... gues that the disputed documents were ... pared in anticipation of litigation. In su... port, Texaco filed affidavits regarding ... waterflood operation from three employe... who helped prepare the documents. The ... affidavits do not show the precise facts ... essary to support the immunity claim. ... three affidavits are conclusory in form, se... serving, and lack detailed foundations ... their conclusions. For example, the affidav... of Mark Wilkins states that once Texaco was ... aware of the blowout at Bates No. 2 and ... Hartman's administrative protest of Texaco's ... application to expand the RYU (a date not ... precisely established in the affidavit), Texaco ... knew there was a "very good possibility" that ... there would be litigation over the blowout. ... In addition, the affidavit indicates globally ... that the disputed documents were "prepared ... or gathered in response to the claims made ... by Doyle Hartman, *or* in preparation for ... Texaco's hearing before the New Mexico Oil ... Conservation Division for approval of the ...

Rhodes waterflood applications, *or* the present lawsuit filed by Doyle Hartman[.]" (Emphasis added.) The affidavit further asserts generally, for each disputed document, that it was "compiled, created, and studied in anticipation of an administrative hearing before the New Mexico Oil Conservation Division (NMOCD) or the New Mexico Oil Conservation Commission (NMOCC) in response to the protest made by Doyle Hartman to Texaco's Rhodes Waterflood Applications Nos. 10572 and 10573 and in anticipation of the present lawsuit." The two other affidavits are similar, except that they refer only to the administrative protest filed by Hartman, and indicate that each employee "prepared or created [the documents] because of the actions taken by Doyle Hartman during the processing period of Texaco's application to expand the Rhodes waterflood and the subsequent litigation that followed."

25. Along with these three affidavits, the district court had before it an affidavit from Hartman's expert which stated that these graphs, maps, charts, spreadsheets, and statistical reports were of the type typically created by the operator of a waterflood project in the ordinary course of business. We note also that neither the pleadings nor these affidavits indicate that the disputed documents were prepared pursuant to the request, direction, or supervision of legal counsel. Furthermore, other documents which did indicate facially the involvement of legal counsel were ordered *not* produced. Texaco had the burden of establishing, for each document, the rule's application. In reviewing the record, including these vague and conclusory affidavits and the testimony presented below, we cannot say the trial court abused its discretion when it ordered production of the disputed documents.[4]

OTHER ISSUES

26. In a separate memorandum opinion, we discuss Texaco's evidentiary issues as well as the parties' motions pertaining to the record on appeal. Part of that discussion concerns the manner in which Texaco presented portions of its appeal to this Court. We make reference to that discussion hereafter for the purpose of clarifying our appellate rules regarding requirements for briefs submitted to this Court.

[8] 27. The appellate rules are designed, among other things, to obtain briefs that provide this Court with an organized, accurate statement of the material necessary to consider the issues raised on appeal without reference to extraneous matters. *Allen v. Williams*, 77 N.M. 189, 190, 420 P.2d 774, 775 (1966). A one-sided statement of the facts is no help to this Court. *See, e.g., Martinez v. Southwest Landfills, Inc.*, 115 N.M. 181, 184, 848 P.2d 1108, 1111 (Ct.App. 1993); *Perfetti v. McGhan Medical*, 99 N.M. 645, 654, 662 P.2d 646, 655 (Ct.App.1983).

28. While it is true that our admonitions against one-sided statements of the facts probably pertain most often to briefs challenging the sufficiency of the evidence, many other issues also involve appellate consideration of the facts or factual determinations by the trial court which must begin with a balanced presentation of the factual record. In this case for example, both the work product issue and Texaco's evidentiary issues involve factual determinations by the trial

4. We have not overlooked the fact that, during trial, the trial court sustained Texaco's objection to the admission into evidence of one document on the ground that the document was covered by the work product privilege and should not have been produced. At the time the trial court made its ruling, Texaco did not ask for any additional relief based on the erroneous production of this document. On appeal, Texaco contends that production of the document provided Hartman's expert witness with a "road map" of its case and was so highly prejudicial, even though it was not shown to the jury, that this Court should reverse and remand for a new trial. However, the document in question was produced quite some time after Hartman's expert witness had been deposed and less than a week before trial. The document was not admitted into evidence, and Texaco had ample opportunity to cross-examine the expert concerning any alleged changes in the views previously expressed in his deposition. Under these circumstances, we think Texaco's assertions of prejudice are at best speculative and do not warrant a new trial on the basis of one document. *See State v. Hoxsie*, 101 N.M. 7, 10, 677 P.2d 620, 623 (1984) ("An assertion of prejudice is not a showing of prejudice. In the absence of prejudice, there is no reversible error.") (citations omitted), *overruled on other grounds Gallegos v. Citizens Ins. Agency*, 108 N.M. 722, 731, 779 P.2d 99, 108 (1989).

court which cannot be reviewed effectively on appeal with a one-sided version of the facts. Indeed we note that the rule of appellate procedure that requires "a summary of the facts relevant to the issues presented for review," along with references to the record, is not restricted to challenges to the sufficiency of the evidence. NMRA 1997, 12–213(A)(2).

[9] 29. This Court was not provided with everything it needed to resolve the evidentiary or discovery issues presented on appeal. For example, Texaco objected to the admission of certain evidence on grounds of relevancy. What is relevant depends on the facts that are at issue in the proceeding and the purpose for which evidence is offered. To evaluate issues like these properly this Court needs: (1) a description of the evidence at issue; (2) an explanation of the purpose for which the evidence was offered; (3) the arguments made in the trial court in favor of and against the admission of the evidence; and (4) the trial court's ruling and, if stated by the trial court, the basis for the ruling. We expect appellate counsel to provide us with this information as a condition to raising evidentiary challenges on appeal. In addition, if the Court is persuaded that the trial court committed error in the admission or exclusion of evidence, this Court must still determine whether the error was harmless or prejudicial. This in turn requires an understanding of all the evidence submitted at trial, so that the prejudice or lack of [illegible] be assessed. *See City of Santa Fe v. [illegible]* 114 N.M. 659, 664, 845 P.2d 753, 758 [illegible]

CONCLUSION

30. We reject all of Texaco's [illegible] error relating to pretrial and trial [illegible] ings. We affirm the jury's verdict in [illegible] Hartman. We hold that Section [illegible] 1.1(D) does not apply to this case, and [illegible] fore the trial court erred in entering [illegible] ment for double the amount of the [illegible] value of the damage to the property, [illegible] cause the only error on appeal can be [illegible] rected by entry of a new judgment, without [illegible] new trial, we need not reach Hartman's [illegible] for punitive damages. Accordingly, we [illegible] mand this matter to the trial court [illegible] instructions to enter judgment in favor [illegible] Hartman and against Texaco in the amount awarded Hartman by the jury.

31. IT IS SO ORDERED.

ALARID and BUSTAMANTE, JJ., concur.

SI

Title
City of Alamo
Design Profe
Ins. Co.
Knight v. Sw
Martinez v. V
Peterson v. J
State v. Andc
State v. Apoc
State v. Arch
State v. Burr
State v. Call
State v. Cher
State v. Doss
State v. Gom
State v. Gon
State v. Gurr
State v. Her
State v. Juar
State v. McC
State v. Min
State v. Rod
State v. Rod
State v. Sen
State v. Sutt
State v. Tho
State v. Voy
State v. Wo
State ex rel.
Peterbil
Torres v. Ci
Williams v.

Title
Case Credit
Chapman v
High Ridge
State v. Arc
State v. Ca
State v. Ga
State v. Gu

GALLEGOS LAW FIRM

A Professional Corporation

460 St. Michael's Drive
Building 300
Santa Fe, New Mexico 87505
Telephone No. 505-983-6686
Telefax No. 505-986-1367
Telefax No. 505-986-0741
E-Mail glf460@spinn.net
www.gallegoslawfirm.com

MICHAEL J. CONDON

Steve -

Attached is a copy of a Court of Appeals case holding appellant in administrative appeal waived his right of review by failing to cite to evidence and reasonable inferences supporting the administrative decision. I believe a Motion to Dismiss is in order.

Mich. 349, 42 N.W.2d 113, 116 (1950); *see Mancini*, 101 A. at 583 ("[P]ublic peace is that sense of security and tranquility, so necessary to one's comfort, which every person feels under the protection of the law."); *State v. Brooks*, 146 La. 325, 83 So. 637, 639 (1919) ("Public peace is public tranquility and quiet order and freedom from agitation or disturbance which is guaranteed by the law.").

[4] Although the guidance provided by these authorities is sparse and imprecise, it suggests that the "public order" is disturbed when dogs are barking, biting, knocking over garbage cans, etc. *Cf. Commonwealth v. Koch*, 288 Pa.Super. 290, 431 A.2d 1052, 1056–58 (1981) (continuous barking of dogs housed in kennel in rural community is not "of such a nature as to 'break the public peace' "). On the other hand, an ACO ordinarily is not maintaining public order when picking up dead or injured animals, inspecting licenses and vaccination certificates, or enforcing laws against mistreatment of animals.

Thus, Exhibit 1 by itself cannot tell us whether a Las Cruces ACO comes within the definition of "law enforcement officer" in the Tort Claims Act. Two questions remain. First, how much time does the ACO devote to the various duties? An ACO is a "law enforcement officer" only if the majority of the ACO's time is devoted to the duties of maintaining public order. *See Anchondo*, 100 N.M. at 110, 666 P.2d at 1257. Second, insofar as a duty of an ACO involves maintaining public order, is the duty one traditionally performed by law enforcement officers? If the duty is not a traditional duty of law enforcement officers, it does not come within the meaning of "maintaining public order" in the statutory definition of "law enforcement officer." *See id.* For example, responding to complaints of barking or biting dogs is not "maintaining public order" under the statute unless law enforcement officers traditionally have engaged in that activity. Although we assume that they have, we have found no definitive literature and the record in this case is silent on the matter.

In sum, on the record before us, we cannot determine whether duties with respect to the maintenance of public order constitute the principal duties of a Las Cruces ACO. Because the sole evidence on the issue (the stipulated exhibit) is inadequate to establish that a Las Cruces ACO is not a law enforcement officer within the meaning of the Tort Claims Act, we must reverse the district court's dismissal and remand for further proceedings. Our reversal does not foreclose the district court from granting summary judgment on the law-enforcement-officer issue after the parties submit additional evidence to that court.

IT IS SO ORDERED.

CHAVEZ and FLORES, JJ., concur.

848 P.2d 1108

Henry MARTINEZ, Claimant–Appellant,

v.

SOUTHWEST LANDFILLS, INC., and Mountain States Mutual Casualty Company, Inc., Respondents–Appellees.

No. 13590.

Court of Appeals of New Mexico.

Feb. 15, 1993.

Award of 22% temporary partial disability was made by the Workers' Compensation Administration, Gregory D. Griego, Workers' Compensation Judge, and worker appealed. The Court of Appeals, Bivins, J., held that: (1) worker waived challenge to sufficiency of evidence to support award by failing to properly summarize evidence in his brief; (2) worker did not show entitlement to reimbursement for cost of examination by physician of his choice; and (3) worker failed to show entitlement to transfer of health care.

Affirmed.

1. Workers' Compensation ⇐1907

Worker waived right of review on issue of sufficiency of evidence to support award of 22% temporary partial disability benefits rather than 100%, for failure to comply with appellate rule concerning summary of evidence, where brief-in-chief selectively set forth evidence which would support different result than that reached by the Workers' Compensation Judge and did not provide the substance of evidence which would support judge's findings, nor state reasonable inferences that could be drawn from the evidence, nor acknowledge how employer's evidence could be viewed together with evidence offered by worker to support claim on appeal. SCRA 1986, Rule 12-213, subd. A(3).

2. Administrative Law and Procedure ⇐788

Challenge to sufficiency of evidence under whole record review involves two-step process; first, party challenging sufficiency must set forth substance of all evidence bearing on the proposition, which requires presentation of all supporting evidence in light most favorable to agency's decision; and, second, party must demonstrate why, on balance, evidence fails to support finding made. SCRA 1986, Rule 12-213.

3. Administrative Law and Procedure ⇐749

Court reviewing agency decision starts with perception that all evidence, favorable and unfavorable, will be viewed in light most favorable to decision, but this does not preclude party challenging substantiality of evidence from pointing out deficiencies in evidence that decision maker below might have considered favorable. SCRA 1986, Rule 12-213.

4. Administrative Law and Procedure ⇐791

Whole record standard of review of agency decision requiring reviewing court, in determining substantiality of evidence, to take into account whatever in the record fairly detracts from its weight, permits appellant to demonstrate why one expert's opinion should have been given more weight than another, but bottom line is that appellant must persuade reviewing court that it cannot conscientiously say that evidence supporting decision is substantial, when viewed in the light that the whole record furnishes. SCRA 1986, Rule 12-213.

5. Administrative Law and Procedure ⇐791

In whole record review of agency decision, reviewing court should be able to rely entirely on appellant's brief-in-chief in canvassing all the evidence bearing on finding or decision and in deciding whether there is substantial evidence to support result, and it is not responsibility of reviewing court to search the record to determine whether substantial evidence supports finding, and neither appellee nor reviewing court should have to supplement appellant's presentation of the evidence. SCRA 1986, Rule 12-213.

6. Administrative Law and Procedure ⇐791

Primary purposes of appellate rule concerning summary of the evidence on whole-record review of agency decision are to fully apprise reviewing court of fact finder's view of facts and its disposition of the issues, and help court decide issues on appeal, and another purpose is to oblige appellant to carefully review all the evidence to decide whether to pursue or discard sufficiency challenge. SCRA 1986, Rule 12-213.

7. Appeal and Error ⇐761

Attempts to incorporate by reference arguments and authority contained in memoranda submitted in opposition to calendaring notices do not preserve matters not specifically argued in appellate briefs.

8. Workers' Compensation ⇐999

Workers' Compensation Judge did not necessarily find worker's claim of 50% impairment to be correct, so as to entitle worker to recover for cost of examination by physician of his choice on theory that final determination differed from employer's physician's opinion of 7% impairment by more than 20%, though judge found that worker had temporary physical impairment as determined by his physician, where physician testified that 50% figure was specu-

lative and also used a 15% figure, and acceptance of determination to physical impairment did not necessarily accept determination of percentage. NMSA 1978, § 52-1-51, subd. E.

9. Trial ⇐404(1)

Findings are to be construed in support of judgment.

10. Workers' Compensation ⇐998

Worker failed to show entitlement to have his health care transferred to provider chosen by him on ground that his own physician testified that treating physicians provided by employer made wrong diagnosis and had not treated worker for herniated disc, where employer did provide medical care which was found by Worker's Compensation Judge to be adequate and satisfactory and failure to obtain positive result was not due to nature, quality or type of care provided. NMSA 1978, § 52-1-49.

11. Workers' Compensation ⇐1001

Worker was not harmed by being required to prove medical causation, allegedly contrary to previous acceptance by both parties of recommended resolution, where worker was able to establish causation and did not argue that he would have been entitled to more or different benefits if he had not been held bound by the recommended resolution.

Stephen E. McIlwain, Albuquerque, for claimant-appellant.

Robert Bruce Collins, Albuquerque, for respondents-appellees.

OPINION

BIVINS, Judge.

Worker appeals the Workers' Compensation Administration's Compensation Order awarding him 22% temporary partial disability as a result of an accidental injury on March 19, 1989. He raises four issues: (1) whether substantial evidence supports the award of 22% temporary partial disability; (2) whether the Workers' Compensation Judge (WCJ) erred in not awarding Worker reimbursement for charges incurred by him for examination by a health care provider of his choice; (3) whether the WCJ erred in not transferring Worker's health care to the health care provider chosen by Worker; and (4) whether the WCJ erred in concluding that all disputes over benefits due before August 19, 1990, had been fully resolved by the recommended resolution of Worker's first claim. We decline to address the first issue challenging the sufficiency of the evidence because Worker failed to comply with the appellate rule governing such a challenge, SCRA 1986, 12-213(A)(3) (Repl.1992), and we affirm on the remaining issues. We take this opportunity to spell out the requirements for a challenge to the sufficiency of the evidence under the whole record review standard, and to explain why compliance is necessary.

We summarize the portions of the WCJ's decision relevant to this appeal. Employed as a heavy equipment operator for Employer, Worker suffered an accidental injury within the scope of, and in the course of, his employment on March 19, 1989. Employer provided medical care as well as rehabilitation services with the goal of assisting Worker in re-entering the job market. Employer also paid Worker temporary total disability benefits from the date of the accident until February 1, 1990. After Worker filed his first claim for benefits, he and Employer attended a mediation conference and entered into a stipulation providing, among other things, that Worker suffered a disability to some percentage as a result of his accidental injury; that Worker would accept 10% partial disability benefits from February 1, 1990, to August 12, 1990, in full settlement of his claim prior to the mediation conference; that Worker would receive temporary total disability benefits from August 13, 1990, until October 13, 1990, or until further order of the Workers' Compensation Administration; and that the parties would attempt to resolve the issue of permanent disability by October 13, 1990, and, failing to do so, either party could pursue a resolution of that issue. Unable to resolve the issue, Worker filed his second claim and, after a second mediated recommended resolution was rejected by Employer, the matter went to hearing before the WCJ.

As a result of that hearing, the WCJ awarded Worker 22% temporary partial disability benefits from February 1, 1990, until further order. The WCJ rejected Worker's claim for reimbursement for charges incurred for an independent medical examination by Dr. Racca, and also rejected Worker's claim that his medical care should be transferred to Dr. Racca. This appeal followed. The WCJ concluded that the law in effect in 1987 applies and the parties do not disagree.

1. *Substantiality of the Evidence*

[1] Worker challenges the sufficiency of the evidence to support the award of 22% temporary partial disability benefits, claiming that he should have been awarded 100% temporary disability benefits. We decline to review this question because Worker has failed to comply with SCRA 12–213(A)(3) and related case law.

SCRA 12–213(A)(3) provides in pertinent part:

> A contention that a ... finding of fact is not supported by substantial evidence *shall be deemed waived* unless the summary of proceedings includes the substance of the evidence bearing upon the proposition, and the argument has identified with particularity the fact or facts which are not supported by substantial evidence.... (Emphasis added.)

Worker has not complied with this rule. The summary of proceedings portion of his brief-in-chief, as well as the argument portion, selectively set forth evidence which would support a different result. Worker acknowledges that Employer presented evidence concerning Worker's rehabilitation, medical evidence from the treating physicians, and evidence concerning Worker's disability. However, he neither provides us with the substance of this evidence or other evidence which would support the WCJ's findings on disability, nor states the reasonable inferences that could be drawn from the evidence, nor acknowledges how Employer's evidence could be viewed together with the evidence offered by Worker to support Worker's claim on appeal. Instead, Worker's brief-in-chief concentrates on the evidence he presented through Dr. Racca, as to impairment, and Dr. Krieger, as to disability.

Predictably, it was left to the opposing party to provide the missing evidence. This missing evidence includes testimony by job placement specialists, cross-examination testimony of Worker's disability specialist, medical evidence unfavorable to Worker's position, and most importantly, evidence of Worker's lack of cooperation in seeking reemployment. This last evidence undoubtedly influenced the award made by the WCJ.

Equally predictable, Worker, in his reply brief, for the first time, acknowledges apparent conflicts in the testimony of the two disability specialists, as well as other evidence brought to our attention by Employer. He then seeks to explain away this countervailing evidence. This reluctant unfolding of all the evidence commonly occurs where the appellant fails to comply with SCRA 12–213. Because of the frequency with which this occurs, we now set forth the appellant's responsibilities in challenging the sufficiency of the evidence under the whole record review standard, as required by the appellate rules and related case law.

[2] In *Tallman v. ABF (Arkansas Best Freight)*, 108 N.M. 124, 767 P.2d 363 (Ct. App.), *cert. denied*, 109 N.M. 33, 781 P.2d 305 (1988), we went to some length to set forth the requirements for whole record review in administrative proceedings. Taking the teachings of that case together with SCRA 12–213, we believe that a challenge to the sufficiency of the evidence under whole record review involves a two-step process.

Step one. The party challenging the sufficiency of the evidence supporting a proposition must set forth the substance of *all* evidence bearing upon the proposition. SCRA 12–213 requires this. *See also Tallman*, 108 N.M. at 128, 767 P.2d at 367.

Step two. Once the challenging party has set forth the substance of all the pertinent evidence, the party must then demonstrate why, on balance, the evidence fails to support the finding made.

[3] In setting forth the substance of all the pertinent evidence, the appellant, in order to make a convincing argument, must present all supporting evidence in the light most favorable to the agency's decision. This includes stating all reasonable inferences that can be drawn from the facts, while acknowledging that "[t]he possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's findings are unsupported by substantial evidence." *Id.* at 129, 767 P.2d at 368. This kind of presentation takes into account and recognizes the considerable deference the reviewing court must give to the agency's findings. As we stated in *Tallman,* "[t]he reviewing court starts out with the perception that all evidence, favorable and unfavorable, will be viewed in the light most favorable to the agency's decision." *Id.* This does not mean, however, that the party challenging the substantiality of the evidence is prohibited from pointing out deficiencies in the evidence that the decision maker below might have considered favorable.

[4] Indeed, our second step contemplates that the appellant point out evidence that fairly detracts from the evidence relied upon by the decision maker in support of the challenged proposition. *See id.* The whole record review standard, unlike the traditional standard of appellate review, requires the reviewing court, in determining the substantiality of the evidence, to " 'take into account whatever in the record fairly detracts from its weight.' " *Id.* (quoting *Universal Camera Corp. v. National Labor Relations Bd.,* 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951)). This permits the appellant, for example, to demonstrate why one expert's opinion should have been given more weight than another. Failure of an expert to have available all underlying facts needed to form a reasonable opinion is but one example of evidence lessening the weight of expert testimony. The bottom line, however, is that the appellant must persuade the reviewing court that "it cannot conscientiously say that the evidence supporting the decision is substantial, when viewed in the light that the *whole* record furnishes." *Tallman,* 108 N.M. at 129, 767 P.2d at 368 (emphasis added).

[5] If there is compliance with the steps listed above, then the reviewing court should be able to rely entirely on the appellant's brief-in-chief in canvassing all the evidence bearing on a finding or a decision, favorable or unfavorable, and in deciding whether there is substantial evidence to support the result, using the approach we outlined in *Tallman.* SCRA 12–213 contemplates that the canvass and determination be made on the basis of appellant's presentation in the brief-in-chief. The appellee should likewise be able to rely on the brief-in-chief in arguing why, on balance, the finding or decision is supported by substantial evidence. Neither the appellee nor the reviewing court should have to supplement the appellant's presentation of the evidence.

The above procedure not only requires adroitness on the part of the challenging party, but also a high degree of forthrightness. The party must abandon the role of advocate for facts that were argued below and rejected, and assume the role of advocate for the law. After all, whether a finding is supported by substantial evidence is a question of law, not of fact. *Pickens–Bond Constr. Co. v. Case,* 266 Ark. 323, 584 S.W.2d 21, 25 (1979) (en banc), *cited in Neel v. State Distribs., Inc.,* 105 N.M. 359, 365, 732 P.2d 1382, 1388 (Ct.App.1986) (Donnelly, J., dissenting), *cert. quashed,* 105 N.M. 358, 732 P.2d 1381 (1987); *Ferreira v. Workmen's Compensation Appeals Bd.,* 38 Cal.App.3d 120, 112 Cal.Rptr. 232, 235 (1974). Once that role is assumed, it becomes easier for the appellant to more realistically evaluate the chances of success on appeal. This saves not only the time and resources of the party, but also the court's time and resources. This brings us to the purposes of SCRA 12–213.

[6] The primary purposes of SCRA 12–213's requirements are to fully apprise the reviewing court of the fact-finder's view of the facts and its disposition of the issues, and to help the court decide the issues on appeal. *See, e.g., Stanton v. Bokum,* 66

N.M. 256, 259, 346 P.2d 1039, 1041 (1959) (explaining purpose of former appellate rules requiring a statement of facts in appellate briefs). In this regard, it is not the responsibility of the reviewing court to search through the record to determine whether substantial evidence exists to support a finding. *See Zengerle v. City of Socorro*, 105 N.M. 797, 802, 737 P.2d 1174, 1179 (Ct.App.1986), *cert. quashed*, 105 N.M. 781, 737 P.2d 893 (1987), *overruled on other grounds by Whittenberg v. Graves Oil & Butane Co.*, 113 N.M. 450, 454, 827 P.2d 838, 842 (Ct.App.1991). That is the obligation of the appellant.

[7] In fairness to Worker, when all three briefs are considered, there is some compliance with SCRA 12-213, however, as previously noted, neither the appellee nor the appellate court should have to search the record to determine the relevant facts bearing upon Worker's claim that the decision of the WCJ was not supported by substantial evidence. In addition, Worker's brief appears to rely on factual recitations made earlier during the calendaring process. Such reliance is to no avail because attempts to incorporate by reference arguments and authority contained in memoranda submitted in opposition to calendaring notices do not preserve matters not specifically argued in the briefs. *State v. Aragon*, 109 N.M. 632, 634, 788 P.2d 932, 934 (Ct.App.), *cert. denied*, 109 N.M. 563, 787 P.2d 1246 (1990). Moreover, based on the manner in which the evidence unfolded, in order to conduct a proper review, this Court would be required to examine substantially all of the record to determine which side's view of the proof is accurate. Judicial resources simply do not permit us to do this, and we believe that SCRA 12-213 is designed to avoid that endeavor and to place the responsibility with the appellant.

SCRA 12-213 has another purpose just as salutary as those already discussed. It obliges an appellant to carefully review all the evidence as a reviewing court would and then decide whether to pursue or discard a sufficiency challenge. SCRA 12-213 demands this winnowing process. Only after a party challenging the sufficiency of the evidence goes through the steps outlined above in a careful and candid manner can that party truly decide whether the issue is worth pursuing. As already noted, this process saves time and money when issues found to be without merit are discarded.

We recently had occasion to refuse to consider a challenge to the sufficiency of the evidence where the appellant failed to include the substance of all the evidence bearing upon a proposition. *See Maloof v. San Juan County Valuation Protests Bd.*, 114 N.M. 755, 845 P.2d 849 (Ct.App. 1992). Although *Maloof* was decided under the traditional standard of review, the same principles enunciated there apply to whole record review. In *Maloof*, we said that an appellant is bound by the findings of fact made below unless the appellant properly attacks the findings, and that the appellant remains bound if he or she fails to properly set forth all the evidence bearing upon the findings. *Id.*, 114 N.M. at 759-760, 845 P.2d at 853-54; *see also In re Estate of McKim*, 111 N.M. 517, 521, 807 P.2d 215, 219 (1991); *Henderson v. Henderson*, 93 N.M. 405, 407, 600 P.2d 1195, 1197 (1979); *Galvan v. Miller*, 79 N.M. 540, 545-46, 549, 445 P.2d 961, 966-67, 970 (1968); *Giovannini v. Turrietta*, 76 N.M. 344, 346-47, 414 P.2d 855, 856-57 (1966); *State ex rel. State Highway Comm'n v. Pelletier*, 76 N.M. 555, 559, 417 P.2d 46, 48 (1966).

Therefore, deciding that Worker has waived his right of review on this issue, we affirm the WCJ's finding as to temporary partial disability.

2. *Reimbursement for Medical Costs*

[8] NMSA 1978, Section 52-1-51(E) (Repl.Pamp.1991), allows for reimbursement of Worker for the cost of an examination by a physician or other health care provider of his choice provided "the *final determination* of the worker's claim is that the worker's claim of impairment is correct and differed from the employer's physician's opinion of percentage of impairment by more than twenty percent." (Emphasis added.) Worker argues that because the WCJ found that "Worker has a

temporary physical impairment as determined by Dr. Racca," and because Dr. Racca opined an impairment rating of 50%, which was more than 20% greater than the impairment rating given by Employer's physicians, the WCJ was required to order reimbursement for the cost of Dr. Racca's examination, including the discogram. We disagree.

Employer's physicians rated Worker's impairment at 7%. Worker arrives at a percentage difference greater than 20% by relying on Dr. Racca's opinion that Worker's impairment rating was 50%, and on the WCJ's finding accepting Dr. Racca's determination that Worker had a temporary physical impairment. Worker reasons that because the WCJ accepted Dr. Racca's determination of physical impairment, he necessarily accepted Dr. Racca's determination of the *percentage* of impairment.

[9] Worker's reasoning, however, is contrary to the rule that findings are to be construed in support of the judgment, *see Sheraden v. Black,* 107 N.M. 76, 80, 752 P.2d 791, 795 (Ct.App.1988), and also contrary to the evidence. While Dr. Racca did use a 50% figure, he testified that the figure was speculative, and also used a 15% figure. Under this state of the evidence, and considering that the WCJ did not award Worker the cost of Dr. Racca's examination, we cannot say that the WCJ necessarily found the Worker's claim of 50% impairment to be correct.

The WCJ did not err in refusing at the time of the hearing to award Worker his independent medical examination costs.

3. *Transfer of Health Care*

[10] Worker claims that he requested the WCJ to order his health care transferred from AIMS (Albuquerque Industrial Medicine Specialists) to Dr. Racca, indicating that he was dissatisfied with the AIMS treatment. He notes that Dr. Racca testified that the treating physicians provided by Employer had made the wrong diagnosis and had not treated Worker for his herniated disc. He claims that this misdiagnosis is buttressed by AIMS' referral to Dr. Stern after Dr. Racca's examination. Relying on *Sedillo v. Levi-Strauss Corp.*, 98 N.M. 52, 644 P.2d 1041 (Ct.App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982), Worker argues that failure to properly diagnose and treat is tantamount to a failure to provide adequate medical care as required under NMSA 1978, Section 52-1-49 (Repl.Pamp.1991). *Sedillo* is distinguishable. In that case, the employer entirely failed to offer or provide medical services, and this Court held that it was error to deny a claim for payment of services rendered by the worker's personal physician. *Sedillo,* 98 N.M. at 54-56, 644 P.2d at 1043-45.

In this case, Employer did not fail to provide medical care. In fact, the WCJ found that Employer did provide medical care; that the care provided by Employer was adequate and satisfactory; and that, although a positive result was not obtained from the care provided by Employer, such failure was not due to the nature, quality, or type of care provided by Employer. Worker does not directly challenge these findings. *See Gutierrez v. Amity Leather Prods. Co.,* 107 N.M. 26, 30-31, 751 P.2d 710, 714-15 (Ct.App.1988) (unchallenged findings binding on appeal).

In *Bowles v. Los Lunas Schools,* 109 N.M. 100, 781 P.2d 1178 (Ct.App.), *cert. denied,* 109 N.M. 131, 782 P.2d 384 (1989), a case which Employer cites but Worker overlooks, this Court held that for a worker to recover for medical services obtained from sources not provided by the employer, the worker must prove that the employer-provided services did not produce positive results, that this failure was due to the care provided, that the worker obtained other medical care which was successful, that this care was related to the worker's work-related injury, and that the care was reasonable and necessary. *Bowles,* 109 N.M. at 108, 781 P.2d at 1186. *See generally City of Albuquerque v. Sanchez,* 113 N.M. 721, 727, 832 P.2d 412, 418 (Ct.App. 1992) (We note that the *Bowles* interpretation of Section 52-1-49 has been superseded by an amendment to that statute. However, the version of Section 52-1-49 interpreted in *Bowles* also is applicable to the instant appeal.). Based on the WCJ's find-

ings, which are not directly attacked, Worker has not met the *Bowles* standard.

4. *WCJ's Conclusion that Disputes over Previous Benefits Were Resolved*

[11] While conceding he can cite no authority specifically on point, *see In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (issues raised which are unsupported by cited authority will not be reviewed on appeal), Worker argues that it was unfair for the WCJ to hold him bound by the first recommended resolution regarding Worker's previous acceptance of partial disability benefits while not holding Employer bound to the same resolution, when both parties accepted the recommended resolution. Specifically, Worker claims that he should not have been put to the test of proving medical causation. This argument is easily answered.

Worker has not shown how he was harmed by the WCJ's ruling. *See Nunez v. Smith's Management Corp.*, 108 N.M. 186, 188, 769 P.2d 99, 101 (Ct.App.1988) (illustrating two types of harmless error). Worker was able to establish causation, and he does not argue on appeal that he would have been entitled to more or different benefits had the WCJ not held him bound by the first recommended resolution. Nor does his brief show where this issue was preserved below. *See State v. Martin*, 90 N.M. 524, 527, 565 P.2d 1041, 1044 (Ct. App.), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977) (court will not address issues when the brief does not indicate, with appropriate record references, where the issue was preserved).

We affirm.

IT IS SO ORDERED.

DONNELLY and PICKARD, JJ., concur.

848 P.2d 1115

STATE of New Mexico, Plaintiff-Appellee,

v.

Roy Lee POWELL, Defendant-Appellant.

No. 13756.

Court of Appeals of New Mexico.

Feb. 15, 1993.

Defendant was convicted before the District Court, Lea County, R.W. Gallini, D.J., of unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages, and he appealed. The Court of Appeals, Hartz, J., held that defendant's conviction did not require proof of evil intent or purpose.

Affirmed.

1. Criminal Law ⇐21

In absence of express statutory language to the contrary, Court of Appeals presumes an intent requirement in the commission of a crime; however, presumption can be overcome.

2. Weapons ⇐7

To convict defendant of unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages, state was not required to prove that defendant had evil intent or purpose. NMSA 1978, § 30-7-3, subd. A.

Tom Udall, Atty. Gen., Elizabeth Blaisdell, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

C. Barry Crutchfield, Templeman and Crutchfield, Lovington, for defendant-appellant.

OPINION

HARTZ, Judge.

Defendant was convicted at a non-jury trial of a violation of NMSA 1978, Section 30-7-3(A) (Repl.Pamp.1984), which prohibits the "[u]nlawful carrying of a firearm in

ggests that these y not apply because a trust is involved, a reading of the statutes, and particularly of § 23–1–18, supra, clearly shows their applicability. See Reagan v. Brown, 59 N.M. 423, 285 P.2d 789 (1955).

Since we are of the opinion that any cause of action Philip may have had is barred by the six-year period of limitations, we need not discuss the matter of laches. We have considered Philip's contentions that his cause of action arose at a later date, but find them to be without merit.

The judgment should be affirmed.

It is so ordered.

McMANUS, C. J., and MARTINEZ, J., concur.

532 P.2d 582

RUTTER & WILBANKS CORPORATION, a Texas Corporation, Petitioner-Appellant,

v.

OIL CONSERVATION COMMISSION of the State of New Mexico, Respondent-Appellee,

and

Black River Corporation, Intervenor-Appellee.

No. 9907.

Supreme Court of New Mexico.

Feb. 21, 1975.

Actions were brought to reverse orders of Oil Conservation Commission which created two nonstandard gas proration units and force-pooled the tracts comprising the units. The District Court, Eddy County, D. D. Archer, D. J., upheld the Commission's decisions, and appeal was taken. The Supreme Court, Stephenson, J., held that the Oil Conservation Commission has power to fix spacing units without first creating proration units, that standards in statute empowering the Commission to prevent waste and protect correlative rights were sufficient to allow the Commission's power to prorate and create standard or nonstandard spacing units to remain intact, and that substantial evidence supported orders of Conservation Commission.

Affirmed.

1. Mines and Minerals ⇐92.21

On appeal from order of district court upholding decisions of Oil Conservation Commission, the Supreme Court would make the same review of the Commission's action as did the district court and was restricted to considering whether, as a matter of law, the action of the Commission was consistent with and within the scope of its statutory authority, and whether the administrative orders were supported by substantial evidence.

2. Mines and Minerals ⇐92.23

Under conservation statutes, the Oil Conservation Commission has power to fix spacing units without first creating proration units. 1953 Comp. §§ 65–3–11, 65–3–14, 65–3–14(b, c), 65–3–14.5.

3. Constitutional Law ⇐62(5)
Mines and Minerals ⇐92.4, 92.23

Standards, in statute empowering Oil Conservation Commission to prevent waste and protect correlative rights, were sufficient to allow the Commission's power to prorate and create standard or nonstandard spacing units to remain intact, and there was no unlawful delegation of power; fact that more explicit standards appeared in particular sections of conservation statutes did not dictate a different result. 1953 Comp. §§ 65–3–10, 65–3–14.5, 65–3–14.5, subd. C.

4. Mines and Minerals ⇐92.78

Oil Conservation Commission's power to pool is not limited to tracts within 320-acre standing space units; the Commission has authority to pool separately

owned tracts within an oversize nonstandard spacing unit. 1953 Comp. §§ 65-3-14(c), 65-3-14.5, subd. C.

5. Mines and Minerals ⇐92.79

Conservation Commission's orders, which created two nonstandard gas proration units and force-pooled the tracts comprising the units, included sufficient findings as to correlative rights and economic waste.

6. Mines and Minerals ⇐92.79

Substantial evidence supported orders of Conservation Commission which created two nonstandard gas proration units and force-pooled the tracts comprising the units and which had effect of including certain undrilled areas within the two drilling units, each of which had a completed gas well, thus diluting overriding royalty interests.

Kellahin & Fox, Santa Fe, for appellant.

David L. Norvell, Atty. Gen., William F. Carr, Special Asst. Atty. Gen., Santa Fe, for Oil Conservation Comm.

Hinkle, Bondurant, Cox & Eaton, Harold L. Hensley, Jr., Roswell, for Black River Corp.

OPINION

STEPHENSON, Justice.

This appeal arises out of two suits brought in the District Court of Eddy County to reverse orders entered by the Oil Conservation Commission (the Commission) in August and November, 1972, which created two "nonstandard gas proration units" and force pooled the tracts comprising the units, which are in the Washington Ranch—Morrow Gas Pool. After separate hearings before the Examiner, the cases were consolidated for hearing before the full Commission as well as for trial before the district court. After reviewing the record and hearing argument, the district court upheld the Commission's decisions. Rutter and Wilbanks Corporation (R & W) is the only party to the proceedings below who contests the district court's ruling.

R & W is the owner of overriding royalty interests in the northerly portion of each of the two units consisting of the east half (409.22 acres) and the west half (407.20 acres) of Section 3, Township 26, South, Range 24, East, N.M.P.M., Eddy County. The effect of the Commission's orders was to include certain undrilled areas in the southern portion of the section within the two drilling units, each of which had a completed gas well, thus diluting the overriding royalty interests of R & W.

R & W did not, and does not here, object to the compulsory pooling but only to the size of the non-standard units. It contends the Commission orders are "unlawful, unreasonable, arbitrary and capricious" because (1) the Commission did not comply with the state statutes regulating oil and gas wells in creating "the non-standard proration units" and (2) the orders do not protect the correlative rights of R & W as required by law.

[1] The district court reviewed the record of the administrative hearing and concluded, as a matter of law, that the Commission's orders were substantially supported by the evidence and by applicable law. We make the same review of the Commission's action as did the district court. Grace v. Oil Conservation Com'n, N.M., 531 P.2d 939 (decided January 31, 1975); El Paso Natural Gas Co. v. Oil Conservation Com'n, 76 N.M. 268, 414 P.2d 496 (1966). We are restricted to considering whether, as a matter of law, the action of the Commission was consistent with and within the scope of its statutory authority, and whether the administrative orders are supported by substantial evidence. McDaniel v. New Mexico Board of Medical Examiners, 86 N.M. 447, 525 P.2d 374 (1974); Otero v. New Mexico State Police Board, 83 N.M. 594, 495 P.2d 374 (1972); Seidenberg v. New Mexico Board of Medical Exam., 80 N.M. 135, 452 P.2d 469 (1969); Llano, Inc. v. Southern Union Gas

Company, 75 N.M. 7, 399 P.2d 646 (1964); Cameron v. Corporation Commission, Okl., 414 P.2d 266 (1966).

R & W's first contention is without merit. The argument is that the applicable statutes make no distinction between "spacing units" and "proration units" and that because the orders were inadvertently characterized as creating "non-standard proration units", the Commission could not create these spacing units without first determining that they qualified as proration units under § 65-3-14(b), N.M.S.A. 1953. There is no question that what the Commission intended to do, and in fact did, was to create two non-standard spacing units. Before the Commission, R & W expressly rejected any need or desire for the gas pool to be prorated. R & W's authority for this proposition is a footnote to an oil and gas text which recites:

> "In states like New Mexico, Louisiana, Oklahoma, Arkansas and others where the conservation agency is authorized to create drilling or spacing units and to limit and prorate the production of oil or gas, or both, the terms drilling unit and proration unit become practically synonymous." 1A Summers, Oil and Gas § 95 at 52 n. 16 (2nd ed. 1954).

Were this case controlled by § 69-213½, N.M.S.A. 1941 (Supp.1949), the statute which Professor Summers cites for the foregoing statement, R & W might have a colorable argument since no explicit distinction between the two terms was made therein. Since 1949, however, the Act has been amended several times, the most recent occurring in 1961. The progeny of § 69-213½, supra, is § 65-3-14, N.M.S.A. 1953, as amended. That section and others in the act explicitly maintain the distinction by the use of the phrase "spacing or proration unit", indicating that the terms are not synonymous and implying that a spacing unit may be created independently of a proration unit. See § 65-3-14(c), N. M.S.A. 1953 (Supp.1973), § 65-3-14.5, N. M.S.A. 1953 (Supp.1969). Additionally, the section upon which R & W relies, § 65-3-14(b) supra, commences with "The commission may establish a proration unit for each pool, * * *.", indicating the permissive character of the power.

The authority of the Commission to create spacing units is found in § 65-3-11, N. M.S.A. 1953, as amended. The second paragraph of this section provides:

> "Apart from any authority, express or implied, elsewhere given to or existing in the commission by virtue of this act or the statutes of this state, the commission is hereby authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated herein, viz.:
>
> * * * * * *
>
> "(10) To fix the spacing of wells;
>
> "* * *."

Pursuant to this authority, the Commission has provided for well spacing by adoption of Rule 104. The applicable section says that:

> "Unless otherwise provided in the special pool rules, each development well for a defined gas pool of Pennsylvanian age or older which was created and defined by the Commission after June 1, 1964, shall be located on a designated drilling tract consisting of 320 surface contiguous acres, more or less, comprising any two contiguous quarter sections of a single governmental section, being a legal subdivision of the U. S. Public Land Surveys. * * *" N. M. Oil Conservation Com'n Rules and Reg., No. 104(C)(II)(a)(1972).

[2] This rule sets the general standard for creating spacing units. There is no dispute that the units created here satisfy the requirements of the rule cited above. We find no merit to R & W's contention and hold the Commission has power to fix spacing units without first creating proration units.

R & W does not "question the Commission's authority to create non-standard

[spacing] units" under § 65–3–14.5(C), N. M.S.A. 1953 (Supp.1969) which provides:

"C. Nonstandard spacing or proration units may be established by the commission and all mineral and leasehold interests in any such nonstandard unit shall share in production from that unit from the date of the order establishing the said nonstandard unit."

But R & W then makes an unlawful delegation argument based on inadequate standards regarding the Commission's authority under § 65–3–14.5, supra, or under a Commission rule or regulation. It contends the Commission exceeded its authority because it had no standards to follow in creating the non-standard spacing units in excess of the 320 acre standard spacing unit provided for in Rule 104(C), supra. We disagree.

Section 65–3–10, N.M.S.A. 1953 provides:

"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).

Additionally, N. M. Oil Conservation Com'n, Rules and Reg. No. 104(L) (1971) specifically provides:

"L. In order to *prevent waste* the Commission may, after notice and hearing, fix different spacing requirements and require greater acreage for drilling tracts in any defined oil pool or in any defined gas pool notwithstanding the provisions of B and C above." (Emphasis added).

[3] We think it would be impracticable and unreasonable to require legislation setting out more precise standards than those provided above. See Oxford Oil Co. v. Atlantic Oil & Producing Co., 16 F.2d 639 (N.D.Tex.1926), aff'd, 22 F.2d 597 (5th Cir. 1927); Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W.2d 935, reh. denied, 126 Tex. 296, 87 S.W.2d 1069 (1935). We hold these standards sufficient to allow the Commission's power to prorate and create standard or non-standard spacing units to remain intact. The fact that more explicit standards appear in particular sections of the conservation statutes does not dictate a different result.

[4] R & W also argues the Commission's authority to pool is limited to lands "embraced within a spacing or proration unit" citing § 65–3–14(c), N.M.S.A.1953 (Supp.1973). Relying on several treatises explaining that compulsory pooling statutes grew out of the "small tract problem", R & W draws the conclusion that § 65–3–14(c) "assumes that the tract sought to be pooled is 'embraced within' a standard spacing [320 acres] or proration unit". See 6 Williams & Meyers, Oil & Gas Law § 905.2 (1972). The unstated implication of this contention is that the Commission's power to pool is limited to tracts within 320 acre standard spacing units. Rule 104(L), supra, disposes of this argument. Recognizing the Commission's power to pool separately owned tracts "within a spacing or proration unit" (§ 65–3–14(c), supra), as well as its concomitant authority to establish oversize non-standard spacing units (§ 65–3–14.5(C), supra, Rule 104(L), supra) it would be absurd to hold the Commission does not have authority to pool separately owned tracts within an oversize non-standard spacing unit.

R & W finally complains that the Commission's orders did not make sufficient findings on either the prevention of waste or the protection of correlative rights and that, in any event, the orders are not supported by "substantial evidence" and are therefore void.

The allegation as to the insufficiency of the findings is not seriously argued. The only defect in the orders appearing to R &

W is that "the type of waste contemplated is not mentioned." The pertinent findings in Commission Order R–4353–A state:

"(2) That after an examiner hearing, Commission Order No. R–4353, dated August 7, 1972, was entered in Case No. 4763 pooling all mineral interests, whatever they may be, in the Washington Ranch-Morrow Gas Pool underlying the E/2 of Section 3, Township 26 South, Range 24 East, NMPM, Eddy County, New Mexico, to form a 409.22-acre non-standard gas proration unit to be dedicated to Black River Corporation's Cities "3" Federal Well No. 2, located 2212 feet from the North line and 1998 feet from the East line of said Section 3, and designating Black River Corporation as operator of the unit.

(4) That the evidence presented at the hearing *de novo* indicates that the entire E/2 of the above-described Section 3 can reasonably be presumed to be productive of gas from the Washington Ranch-Morrow Gas Pool.

(5) That the evidence presented at the hearing *de novo* establishes to the satisfaction of the Commission that the entire E/2 of the above-described Section 3 can be efficiently and economically drained by the above-described Cities "3" Federal Well No. 2.

(6) That to reduce the size of the proration unit dedicated to said Cities "3" Federal Well No. 2, as proposed by Rutter and Wilbanks Corporation, would deprive the owners of mineral interests in that portion of the unit which would be deleted of the opportunity to recover their just and equitable share of the hydrocarbons in the Washington Ranch-Morrow Gas Pool, unless a third well were to be drilled in said Section 3, with a complete realignment of the acreage dedicated to the subject well and to the well located in the W/2 of Section 3.

(7) That to drill a third well in Section 3, Township 26 South, Range 24 East, Washington Ranch-Morrow Gas Pool, would result in supererogatory risk and economic waste caused by the drilling of an unnecessary well.

(8) That Commission Order No. R–4353 provides protection for the correlative rights of all mineral interest owners in the E/2 of Section 3, when considered as a whole, and will result in the prevention of waste.

Commission Order R–4354–A, which force pooled the west half of Section 3, essentially recites the same pertinent findings.

[5] This court's opinion in Continental Oil Co. v. Oil Conservation Com'n, 70 N. M. 310, 373 P.2d 809 (1962), established the requirement that the Commission make "basic conclusions of fact" or findings. We hold the findings as to correlative rights and economic waste to be sufficient.

The remaining question is whether these orders are supported by substantial evidence.

In Grace v. Oil Conservation Com'n, supra, we recently said:

" 'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Rinker v. State Corporation Commission, 84 N.M. 622, 506 P.2d 783 (1973). In resolving those arguments of the appellant, we will not weigh the evidence. By definition, the inquiry is whether, on the record, the administrative body could reasonably make the findings. See 4 Davis, Administrative Law Treatise, § 29.01 (1958).

"Moreover, in considering these issues, we will give special weight and credence to the experience, technical competence and specialized knowledge of the Commission. Cf., McDaniel v. New Mexico Board of Medical Examiners, 86 N.M. 447, 525 P.2d 374 (1974); § 4–32–22A., N.M.S.A.1953."

Both R & W and the intervenor, Black River Corporation, produced experts and exhibits regarding the advisability of creating these non-standard units and force pooling the tracts. R & W introduced an

exhibit which clearly shows that all of Section 3 is estimated to be commercially productive of gas. This is also true of the west half of Section 2, which is contiguous to Section 3 on the east, and on the east half of Section 4, which is contiguous to Section 3 on the west. The exhibit also shows producing gas wells on the aforementioned contiguous half sections and the testimony indicates these are also oversize non-standard spacing units, containing approximately 402 acres in the east half of Section 4 and approximately 380 acres in the west half of Section 2.

Mr. Aycock, Black River's expert, testified that the completed wells in Section 3 should be placed in production as soon as possible to prevent drainage to Sections 4 and 2 and thereby to protect the correlative rights of all interest owners in Section 3.

The evidence presented by Black River Corporation, and not seriously disputed by R & W, indicates that the existing wells in Section 3 will effectively and efficiently drain the allotted acreage.

Arguing the Commission would not protect its correlative rights if the proposed spacing units were established larger than 320 acres, R & W proposed alternatives which would cut out tract owners in the southern portion of Section 3. This would either leave them with no well to produce hydrocarbons underlying their land or require them to drill to protect their own correlative rights. To support the orders, the Commission concluded from the evidence that the drilling of an extra well would be unnecessary since the two completed wells would effectively and efficiently drain all of Section 3 and that it would be economically wasteful. It appears the extra well would, at most, effect a $37,500 redistribution of royalty income to R & W while the evidence undisputedly showed that the costs of this drilling would reach $180,000 if it was a dry hole and range from $225,000 to $250,000 if it was a producer. It further appears there would be a risk of drilling a dry hole in the southern part of Section 3 resulting in a complete commercial failure. As far as is now known, the added expense of drilling an extra well would enable the recovery of no substantial amount more gas underlying Section 3 than the two completed wells could drain. The question was one of reasonableness and the Commission found that it would be unreasonable and contrary to the spirit of the conservation statutes to drill an unnecessary and economically wasteful well. See Grace v. Oil Conservation Com'n.

Though there was some indication that tract owners in the southern portion of Section 3 had no recoverable gas underlying their property, it also appears that the Washington Ranch-Morrow Pool is still being developed and proof as to its recoverable reserves and its limits and character is far from complete. In a comparable factual situation, the Oklahoma Supreme Court commented, when referring to an earlier opinion:

> "We also recognized the risk, without such a requirement (and under wide spacing) of some owners of mineral interests being enabled to share, at least, for a time, in production to which subsequently developed knowledge (whether gained from wells later drilled on smaller units, or otherwise) indicates they were never entitled, because of the (subsequently established) unproductivity of the locus of their interests. But, in said opinion (p. 853) we had also noted that the prevention of wasteful, excessive drilling (as well as the protection of correlative rights) was a primary Legislative consideration in the enactment of the original Well Spacing Act. And, we concluded that it has been the policy of the Legislature to tolerate the lesser hazard (i. e., the possibility that some production, or production proceeds, may be taken from some owners rightfully entitled to it, and transmitted to others not so entitled) '* * * in preference to

the greater hazard to the greater number of owners, and the State in the dissipation of its natural resources by excessive drilling.' * * * * *". Landowners, Oil, Gas & Roy. Own. v. Corporation Com'n, Okl., 415 P.2d 942, 950 (1966), referring to Panhandle Eastern Pipe Line Co. v. Corporation Com'n, Okl., 285 P.2d 847 (1955).

See also Grace v. Oil Conservation Com'n; Ward v. Corporation Commission, Okl., 470 P.2d 993 (1970).

[6] Nothing we have said to now is contrary to Continental Oil, supra. When the Commission exercises its duty to allow each interest owner in a pool "his just and equitable share" of the oil or gas underlying his property, the mandate to determine the extent of those correlative rights, as prescribed by § 65-3-29(H), N.M.S.A. 1953, is subject to the qualification "as far as it is practicable to do so." See Grace v. Oil Conservation Com'n. While the evidence lacked many of the factual details thought to be desirable in a case of this sort, it was because the appropriate data was as yet unobtainable. We cannot say that the exhibits, statements and expressions of opinion by the applicant's witness do not consitute "substantial evidence" or that the orders were improperly entered or that they did not protect the correlative rights of the parties "so far as [could] be practicably determined" or that they were arbitrary or capricious.

The Commission established a participation formula giving each owner in the unit a share in production in the same ratio as his acreage bears to the acreage of the whole units. We think such a formula is a reasonable and logical one, if perhaps not the most complete or accurate method that may be used when more subsurface information becomes available.

Having found no cause for reversal of the orders appealed from, they are hereby affirmed.

It is so ordered.

OMAN and MONTOYA, JJ., concur.

532 P.2d 588

David FASKEN, Petitioner-Appellant,

v.

OIL CONSERVATION COMMISSION of the State of New Mexico, Respondent-Appellee.

No. 9958.

Supreme Court of New Mexico.

Feb. 28, 1975.

The District Court, Eddy County, D. D. Archer, J., entered judgments which affirmed orders of the Oil Conservation Commission, and appeal was taken. The Supreme Court, Stephenson, J., held that in absence of sufficient findings disclosing reasoning of the Oil Conservation Commission in reaching its ultimate findings, reversal was required.

Reversed and remanded with directions.

1. Mines and Minerals ⇐92.21

On appeal from judgments affirming orders of the Oil Conservation Commission, the Supreme Court is not a fact finder or weigher; rather will consider whether, as a matter of law, the action of the commission was consistent with and within the scope of its statutory authority and whether the administrative order is supported by substantial evidence.

2. Mines and Minerals ⇐92.17

The Oil Conservation Commission must make findings of ultimate facts which are material to the issues.

3. Mines and Minerals ⇐92.21

In absence of sufficient findings disclosing reasoning of the Oil Conservation Commission in reaching its ultimate findings, reversal was required.

Montgomery, Federici, Andrews, Hannahs & Buell, Santa Fe, for petitioner-appellant.

William F. Carr, Special Asst. Atty. Gen., Santa Fe, for respondent-appellee.

808 P.2d 592

In the Matter of the Adjudication of Alternatives to the Inventorying Ratemaking Methodology, and/or Plans for the Phasing in of Public Service Company of New Mexico's Excess Generating Capacity.

Public Service Company of New Mexico, Applicant,

NEW MEXICO INDUSTRIAL ENERGY CONSUMERS, Appellant,

v.

NEW MEXICO PUBLIC SERVICE COMMISSION, Public Service Company of New Mexico, Appellees.

In the Matter of the Adjudication of Alternatives to the Inventorying Ratemaking Methodology, and/or Plans for the Phasing in of Public Service Company of New Mexico's Excess Generating Capacity.

ATTORNEY GENERAL OF the STATE OF NEW MEXICO, Appellant,

v.

NEW MEXICO PUBLIC SERVICE COMMISSION, Public Service Company of New Mexico and Southwestern Public Service Company, Appellees.

Nos. 18381, 18415.

Supreme Court of New Mexico.

Feb. 20, 1991.

Rehearing Denied April 10, 1991.

In hearing considering alternatives to inventory rate making methodology and of problems relating to phasing in of utility's excess generating capacity, the Public Service Commission entered order which, inter alia, terminated Commission's inventory stipulation effective upon resolution of rate case, determined that utility could not recover its entire investment in all three units of nuclear generating station, excluded unit from rate base, requested utility to submit proposals for decertification and abandonment, and permanently excluded contract between utility and consortium of three municipalities. Attorney General and utility consumers' association appealed. The Supreme Court, Baca, J., held that: (1) final order did not exceed Commission's jurisdiction, violate supremacy clause, or violate commerce clause; (2) Commission's consideration of fuel mix when it granted utility's certificate of convenience and necessity to participate in investment in nuclear generating station was not arbitrary or capricious; and (3) issues dealing with proper rates and elements to be used in considering proper rates were not ripe for judicial review.

Affirmed.

1. Administrative Law and Procedure ⇐704

In order for Supreme Court to fulfill its role in reviewing orders of administrative agencies, issues must be ripe for judicial review, with final resolution of relevant issues by agency and with concrete, developed factual record.

2. Electricity ⇐11.3(4)

Public Service Commission acted within its jurisdiction in its determination of utility's cost of electricity when it refused to allow utility to include contract under which utility bought 105 megawatts from consortium of three municipalities after municipalities had exercised their option to purchase 28.8% of a unit's capacity from utility. NMSA 1978, § 62–6–4, subds. A, B.

3. Electricity ⇐11.3(4)
States ⇐18.73

Public Service Commission's exclusion of contract between utility and consortium of municipalities from utility's cost of electricity did not implicate area of exclusive federal concern; Commission's activity regulated retail sale of power, and constituted regulation of utility and not of municipalities. Federal Power Act, § 201(a, f), as amended, 16 U.S.C.A. § 824(a, f).

4. Commerce ⇐62.1

Public Service Commission's exclusion of contract between municipality and utility from utility's cost of electricity did not violate commerce clause; exclusion of con-

tract was not regulation directly implicating out-of-state interest, burden, if any, could only be incidental to legitimate regulation of utility, and Commission articulated many legitimate reasons for excluding contract. U.S.C.A. Const. Art. 1, § 8, cl. 3.

5. **Electricity** ⇐8.1(1)

Public Service Commission's consideration of fuel mix when it granted utility's certificate of convenience and necessity to participate in investment in nuclear generating station was not arbitrary or capricious. NMSA 1978, § 62–6–4, subd. B.

6. **Administrative Law and Procedure** ⇐704

The determination of whether administrative body's consideration of issues has reached "finality," for purposes of judicial review, must be based on pragmatic consideration of matters at issue and analysis of whether administrative body has in fact finally resolved issues.

7. **Administrative Law and Procedure** ⇐704

Electricity ⇐11.3(7)

Supreme Court's analysis as to whether certain issues in proceeding involving utility before Public Service Commission were final required determination as to whether issues would be revisited by Commission in its subsequent hearings and thus should be reserved for its initial discretionary determination, whether further fact-finding by Commission would elicit more evidence illuminating issues, whether further agency decisions would moot some contentions, and whether parties would suffer imminently effects of final order; ultimate question remained whether agency action was sufficiently final or definitive.

8. **Administrative Law and Procedure** ⇐704

Public Utilities ⇐194

Public Service Commission has great discretion in initially determining issues before it, and thus, if Commission reasonably states that it has not finally resolved issue or will return to it, Commission should be allowed opportunity to exercise its discretion.

9. **Administrative Law and Procedure** ⇐704

Electricity ⇐11.3(7)

Public Service Commission's reliance on corporate financial models submitted by utility to conclude that corporate earnings would be too low if contract between utility and municipalities were totally excluded from utility's cost of electricity was not ripe for review; question of corporate earnings would be considered again, and in greater depth, in rate case. NMSA 1978, § 62–6–4, subd. B.

10. **Administrative Law and Procedure** ⇐704

Electricity ⇐11.3(7)

Issue of whether Public Service Commission acted arbitrarily and capriciously when it allegedly applied standard of fairness to shareholders of utility without defining fairness, in rate making methodology proceeding, was not ripe for judicial review; ultimate question of fairness to shareholders could not be resolved until rates were set. NMSA 1978, § 62–6–4, subd. B.

11. **Administrative Law and Procedure** ⇐475

Electricity ⇐11.3(6)

Based on magnitude of evidence and size of record generated by proceedings, Public Service Commission's decision to trifurcate proceedings involving utility into rate making methodology and excess generating capacity case, prudence of investment case, was reasonable. NMSA 1978, §§ 62–8–1, 62–8–7, subd. C, 62–10–6.

12. **Administrative Law and Procedure** ⇐704

Electricity ⇐11.3(7)

Issue of whether Public Service Commission arbitrarily and capriciously failed to distinguish between prudent and imprudent investment when it determined fairness and acceptability of excess capacity plan was not ripe for judicial review; Commission expressly stated in final order that prudence hearing would continue, and that

Attorney General would be able to present evidence on question of prudence at prudence hearing.

13. Administrative Law and Procedure ⇐476

Constitutional Law ⇐298(7)

Electricity ⇐11.3(6)

Public Service Commission's refusal to allow Attorney General to present evidence of prudence of investment decisions that created excess capacity in proceeding in which Commission was determining fairness and acceptability of excess capacity plan of utility did not deprive Attorney General of due process; Attorney General would be able to present evidence on questions of prudence at prudence hearing. U.S.C.A. Const.Amends. 5, 14.

14. Administrative Law and Procedure ⇐704

Electricity ⇐11.3(7)

Issue of whether Public Service Commission improperly changed its methodology by bringing plant into rates in manner other than based on most recent in-service date was not ripe for judicial review; phase in of specific capacity into rates had not yet been determined.

15. Administrative Law and Procedure ⇐704

Electricity ⇐11.3(7)

Issues of whether Public Service Commission determined without ample evidence in record that total exclusion of contract between utility and municipalities would not provide sufficient generating capacity, changed its definition of reasonable planning, ignored evidence of availability of alternative sources, and improperly relied on utility forecast were not ripe for judicial review; no final action in reliance on forecast had been made, and argument that more contract purchases should be used could be presented at subsequent hearings.

16. Administrative Law and Procedure ⇐701

Electricity ⇐11.3(7)

Public Service Commission's reasoning, in support of refusing total exclusion of contract, that if it had determined that total exclusion of units were appropriate, it would have had to decertify units in fairness to utility did not present reviewable decision; Commission had not determined that decertification should be done and it had not decided that total exclusion was inappropriate because of decertification.

17. Administrative Law and Procedure ⇐476

Public Utilities ⇐165

While Public Service Commission can not arbitrarily reject testimony of any particular witness, Commission is not required to accept testimony, but rather must weigh conflicting evidence of witnesses, using its discretion to ultimately reach decision within its mandate.

18. Administrative Law and Procedure ⇐704

Electricity ⇐11.3(7)

Issue of whether Public Service Commission acted arbitrarily and capriciously when it adopted mix of generating plant to be included in utility's rates was not ripe for judicial review; Commission's decision was not made at rate hearing, and no rates had been set.

Tom Udall, Atty. Gen., Randall W. Childress, Deputy Atty. Gen., Gary Epler, Asst. Atty. Gen., Santa Fe, for Atty. Gen.

James C. Martin, Lee W. Huffman, Santa Fe, for New Mexico Public Service Com'n.

Keleher & McLeod, Richard B. Cole, Robert H. Clark, Kathryn J. Kuhlen, Albuquerque, for Public Service Co.

Hinkle, Cox, Eaton, Coffield & Hensley, Paul Kelly, Jr., Paul W. Eaton, Santa Fe, for Southwestern Public Service Co.

Margot Steadman, Albuquerque, for City of Albuquerque, N.M.

Campbell, Pica & Olson, Lewis O. Campbell, Wayne Shirley, Albuquerque, for New Mexico Indust. Energy Consumers.

OPINION

BACA, Justice.

The attorney general and New Mexico Industrial Energy Consumers (NMIEC) ap-

peal from a final order issued by the New Mexico Public Service Commission (Commission) in its case No. 2146, Part II. The order has been reported as *In re Public Service Company*, 101 Pub.Util.Rep. (PUR) 4th 126 (1989) (hereinafter *Final Order*). In the original application for a hearing, the Public Service Company of New Mexico (PNM) sought authority to restructure certain aspects of its organization. It subsequently moved to withdraw its application. The Commission partially granted the motion to withdraw, but leave to dismiss the case in its entirety was denied. The case was retitled NMPSC Case No. 2146, Part II, and the scope of the hearing was redefined to be a consideration of alternatives to the inventory ratemaking methodology and of problems relating to the phasing in of PNM's excess generating capacity. Before this case commenced, the Commission docketed NMPSC Case No. 2087 (prudence case) to consider the prudence of PNM investment in the Palo Verde Nuclear Generating Station (PVNGS), the hearing on which was pending at the time of appeal. Subsequent to the filing of this case, NMPSC Case No. 2262 (rate case) was filed. The final order in this case in essence framed the issues to be considered in the rate case, which will determine the rates PNM may recover for its investment in PVNGS and other facets of the utility system.[1] The rate case includes the determination of how generating capacity will be phased into use and rates, or, as expressed by the Commission, "the *extent* to which it recovers a return *of* (capital) and *on* (profit) its investment."

The *Final Order*, 101 Pub.Util.Rep. (PUR) 4th at 131–40, summarizes the factual background and discusses the procedural history of this case. For the purposes of this appeal, it is sufficient to understand that PNM over the last several decades had invested in excess generating capacity, including portions of PVNGS. The Commission initially had addressed this problem through inventory ratemaking, *see New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 104 N.M. 565, 725 P. 2d 244 (1986), which allowed PNM to accrue carrying costs for its investment in capacity not yet needed by energy consumers. That stop-gap solution proved to be ineffective, leading the Commission to consider the problem anew.

This proceeding considered treatment of other capacity in addition to three units of PVNGS. This capacity includes: San Juan Unit 4 (SJ–4), the Southwestern Public Service Company (SPS) contract to supply power to PNM, the Los Alamos County (LAC) contract, and the Modesto, Santa Clara and Redding (M–S–R)[2] contract whereby M–S–R exercised its option to purchase 28.8 percent of SJ–4 in 1983, with PNM repurchasing 105 megawatts (MW) through 1995.

The final order terminated the Commission's inventory stipulation effective upon resolution of the rate case. The Commission determined that PNM could not recover its entire investment in all three units of PVNGS, excluding Unit 3 from rate base, and requested PNM to submit proposals for decertification and abandonment. The M–S–R contract was permanently excluded; 130 MW of SJ–4 were excluded from base rates until it is no longer a part of excess capacity; PVNGS Units 1 and 2 were included with the precise rate treatment reserved for the rate case subject to the prudence hearings; 147 MW of SJ–4, the SPS contract and the LAC contract all were

1. At the time this appeal was brought, both the prudence and rate hearings were pending before the Commission. Both hearings now have been held. Certain aspects of the prudence hearing are before this court in a separate appeal, and the order issuing from the final aspect of this trilogy, the rate hearing, has not been appealed. The Commission and PNM subsequently have presented argument asking us to take judicial notice of the two later hearings. We reject this request, because, although it would resolve the ripeness problem that we discuss in this opinion, it would raise other questions regarding finality and the rules of appellate procedure. Essentially, if we chose to consider the results of the rate hearing—a case that was not appealed—to guide us through this case, we would be allowing a back-door appeal of that case.

2. M–S–R is a consortium of three California municipalities.

included in rates. *Final Order*, 101 Pub. Util.Rep. (PUR) 4th at 181–82.

The attorney general and New Mexico Industrial Energy Consumers (NMIEC) appeal from the final order. PNM has not appealed and along with the Commission has filed a brief in support of the order.

Appellants have raised many issues, claiming that aspects of the final order were not supported by substantial evidence, were arbitrary and capricious, exceeded the jurisdiction of the Commission, or violated the constitution. The attorney general claims that the Commission's determination that total exclusion of PVNGS would be unfair to the shareholders in PNM is unsupported by substantial evidence and is arbitrary and capricious and that the Commission's justifications for rejecting total exclusion of PVNGS were not supported by substantial evidence. NMIEC reiterates several of the attorney general's points and, in addition, argues that, in violation of state and federal statutory and constitutional mandates, the Commission exceeded its jurisdiction by removing power purchased from M–S–R from rate base. NMIEC additionally asserts that the Commission acted arbitrarily and capriciously, and without support of substantial evidence in adopting the mix of generating plants to be placed in rate base.

[1] "This Court's role in reviewing orders of an administrative agency is to ensure that the order is neither arbitrary nor capricious, that the order is supported by substantial evidence, and that the order is within the agency's scope of authority." *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 106 N.M. 622, 626, 747 P.2d 917, 921 (1987). In order to fulfill our role, the issues also must be ripe for judicial review, with a final resolution of the relevant issues by the agency and with a concrete, developed factual record. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Midwestern Gas Transmission Co. v. FERC*, 589 F.2d 603, 617–18 (D.C.Cir.1978).

I. DOES THE FINAL ORDER EXCEED THE COMMISSION'S JURISDICTION, VIOLATE THE SUPREMACY CLAUSE, OR VIOLATE THE COMMERCE CLAUSE?

NMIEC presents three issues regarding the scope of the Commission's ability to act. It argues that the Commission exceeded its jurisdiction granted by the New Mexico Public Utility Act, NMSA 1978, Section 62–6–4(B) (Repl.Pamp.1984), by excluding the M–S–R contract from rates. Should we find that the legislature intended to grant the Commission authority to exclude from rates a wholesale purchase, we are then asked to determine whether this conflicts with the Federal Power Act (FPA), 16 U.S.C. Sections 791a–825r (1988), and therefore violates the Supremacy Clause, U.S. Const. art. VI. If the FPA, however, does not apply to the M–S–R transaction, NMIEC presents us with a Commerce Clause issue, asking us to determine whether the final order unconstitutionally burdens interstate commerce in violation of U.S. Const. art. I, section 8, cl. 3.

Before we address these issues on their merits, it is helpful to consider exactly what the Commission did. As discussed earlier, it excluded the M–S–R contract from PNM's rates. M–S–R had exercised its option to purchase 28.8 percent of SJ–4 from PNM in 1983; as part of the agreement, PNM bought back 105 MW from M–S–R through 1995. At the hearing, PNM posited that the contract should be excluded from jurisdictional rates, and the Commission agreed, stating:

> We agree with the testimony of [a City of Albuquerque witness] that "[T]he M–S–R purchase is biggest now, 105 megawatts, precisely when PNM doesn't need the megawatts; and it disappears in 1995, precisely the time when PNM might be starting to need megawatts." This results in a mismatch between PNM's loads and resources. This is sufficient reason by itself to exclude the M–S–R Contract.
>
> Additionally, before 1995, the costs of PNM's owned portion of SJ–4 are less than the costs of the M–S–R Contract.

Good regulatory policy and the public interest require that if any portion of SJ–4 is to be paid for by PNM's ratepayers, it should be through direct inclusion in rate base of Company-owned resources rather than via the M–S–R purchase.

For all the above reasons, the M–S–R contract should be excluded from PNM's jurisdictional rates.

Final Order, 101 Pub.Util.Rep. (PUR) 4th at 177 (citations omitted).

A. *Does the Order Exceed the Commission's Jurisdiction?*

[2] The scope of the Commission's authority to regulate sales of capacity to PNM for resale is governed by Section 62–6–4(B), which states in pertinent part that such sales:

> shall be subject to regulation by the commission but only to the extent necessary to enable the commission to determine that the cost to the utility of such * * * electricity at the place where the major distribution to the public begins shall be reasonable and that the methods of delivery thereof shall be adequate * * *.

NMIEC asserts that, by denying public access to the capacity, the Commission has attempted to regulate the purchase of electricity at the point of delivery to PNM rather than the cost at the point of distribution to the public. It contends that, because the capacity is not owned by PNM, the Commission's jurisdiction does not extend to its regulation and the Commission made no findings that would warrant an exercise of jurisdiction over the M–S–R contract.

Examination of what the Commission actually has done with regard to the M–S–R contract illustrates the flaw in this argument and requires us to uphold the exercise of jurisdiction. The Commission, by excluding the contract, did not attempt to regulate PNM's purchase of electricity—PNM's contract with M–S–R remains undisturbed by the Commission's actions. PNM simply cannot include the capacity in rates. The Commission, in other words, regulated the *utility* by excluding the contract; it made no attempt to regulate or interfere with the contract to purchase. The general grant of jurisdiction to regulate a utility's rate and service contained in Section 62–6–4(A) provides the statutory authority for this action. The Commission's decision not to allow PNM to include the M–S–R contract in rates did not implicate Section 62–6–4(B)—there simply was no regulation of a sale of wholesale capacity—and we hold that the Commission acted within its jurisdiction.

B. *Does the Order Conflict with the FPA and the Supremacy Clause?*

[3] In *Public Utilities Commission v. Attleboro Steam & Electric Co.,* 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 54 (1927), the Supreme Court established a bright line separating federal and state regulation—state regulation was limited to the retail sale of power, while the regulation of wholesale transactions was reserved exclusively to the federal domain. This bright line was codified in the FPA, 16 U.S.C. Section 824(a). Exempted from regulation, however, were municipalities, such as M–S–R. *See id.* § 824(f). NMIEC contends that regulation of the M–S–R contract falls within an area of exclusive federal jurisdiction and that the express exemption from regulation indicates the congressional intent that such contracts should remain unregulated and beyond the reach of state control.

We find it unnecessary to determine the legal issue of whether this is an area of exclusive federal jurisdiction, *cf. Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983) (allowing state regulation of rural electric cooperatives), because the Commission's activity regulates the retail sale of power. The Commission's actions constituted regulation of PNM and not of M–S–R. Exclusion of the contract in no way affected the municipalities' contract; it only affected PNM's ability to recover the cost of the contract from New Mexico consumers. Accordingly, we do not find that regulation of this type implicates an area of exclusive federal concern. *See Rochester Gas & Elec. Corp. v. Public*

Serv. Comm'n, 754 F.2d 99, 102–05 (2d Cir.1985) (state regulation that does not compel nonjurisdictional activity is not preempted and does not violate supremacy clause).

C. *Does the Order Violate the Commerce Clause?*

[4] NMIEC maintains that, having found that this was not an area of regulation reserved solely to the federal government, we must consider the implications of the Commission's regulation on the commerce clause, arguing that the exclusion of the M–S–R contract is "economic protectionism in its purest form" and therefore exactly the type of activity protected against by the commerce clause. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 623, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1977).

Two problems defeat NMIEC's argument. First, it is not clear that the Commission is regulating interstate commerce. It regulates the activities of PNM, an area incontrovertibly within its jurisdiction and sanctioned by the commerce clause. *See Panhandle E. Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 521, 68 S.Ct. 190, 197, 92 L.Ed. 128 (1947). The exclusion of the M–S–R contract does not directly affect M–S–R; it does not implicate its sales, or affect its decisions in a direct way. *See Rochester Gas & Elec. Corp.*, 754 F.2d at 102–03. The effect on interstate commerce thus cannot be outright protectionism or per se violative of the commerce clause—exclusion of the contract is not regulation directly implicating out-of-state interests. *Cf. Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935) (striking down as violative of the commerce clause New York's denial of a vendor license to a dealer procuring out-of-state milk at a price below the New York minimum fixed price).

The second problem is that the burden on interstate commerce, if there is a burden, could only be incidental to legitimate regulation of PNM. To determine whether the Commission's actions have impermissibly burdened interstate commerce, we apply the modern commerce clause balancing test articulated in *Arkansas Electric Cooperative Corp.*, 461 U.S. at 393–94, 103 S.Ct. at 1917–18:

> Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

(quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970)).

NMIEC argues that the regulation is not evenhanded—that the final order explains that M–S–R should be excluded over the San Juan capacity owned by PNM, giving precedent to sources simply by virtue of their local ownership. We disagree. The Commission articulated many legitimate reasons for excluding the contract, the most significant being that the contract provided power at a relatively higher rate at the time when it was least needed. The Commission excluded several sources of capacity, only one of which—the M–S–R contract—was owned by out-of-state interests. Moreover, the regulation directly implicated PNM, not M–S–R, and was part of the Commission's resolution of the legitimate and important concern of the excess capacity problem. The purpose of the regulation was not to exclude out-of-state capacity or to protect in-state generating capacity from out-of-state competition; the focus of the regulation was PNM, and it did not affect directly M–S–R or its marketing position. The contract is still intact, and any harm to M–S–R or any other interest seeking to sell power into New Mexico would be prospective. When the regulation is viewed in the context of its purpose, it is apparent that any prospective burden is highly speculative and ephemeral. This is not regulation

nefariously poised to protect local interests from interstate competition. It is regulation that, as soon as the excess capacity problem is resolved, will be without effect, even incidentally, on interstate commerce.

In addition to the regulation's rational goal—to deal with excess capacity—and its minimal impact on interstate commerce, we must consider the very important New Mexico interest in regulating utilities. *Cf. Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986) (overt discrimination against out-of-state interests upheld when balanced against highly significant state interest).

Thus, we conclude that exclusion of the M-S-R contract does not violate the commerce clause.

II. DID THE COMMISSION PROPERLY CONSIDER FUEL MIX?

[5] The Commission stated in its order that, in addition to reserve margin to insure sufficient availability of energy sources and the time required to construct alternative future sources, "[a]nother persuasive reason why all three units of PVNGS should not be excluded for jurisdictional use is fuel mix." *Final Order*, 101 Pub.Util.Rep. (PUR) 4th at 174. When it granted PNM's certificate of convenience and necessity to participate in PVNGS, the Commission stated that participation would allow a desirable mix of generating fuels. *See id.* at 174–75. In the order, it reaffirms that "[f]uel mix is important in minimizing the risk that some unanticipated event may adversely affect the price or supply of a single type of fuel." *Id.* at 175.

The attorney general's argument that the Commission erred by considering fuel mix fails to convince us that the Commission has acted improperly. Fuel mix considerations were not dispositive to the Commission's decision—they were cited as one further factor supporting the decision. Moreover, the Commission did rely on evidence in the record when it considered the effect of various mixes of generating fuels. Although the attorney general may not agree with the focus of the evidence, he did have the opportunity to present his own evidence on the benefits, or lack thereof, of different fuel mixes. The attorney general relies on the naked assertion that: "[a] diverse fuel mix is a desirable goal only if it provides protection against rising costs." It is not apparent why this is true, or why the Commission could not, in its expertise and discretion, assign other values to the benefits of diversity, and we hold that the Commission's consideration of the effects of various fuel mixes was not error.

III. ARE THE ISSUES RIPE FOR JUDICIAL RESOLUTION?

The Commission has directed us to consider the scope of the hearing at issue, examining its decision in the final order to determine exactly which issues this inventory case finally resolved and which this case considered as only threshold determinations with final resolution deferred to the prudence and rate cases. This is an essential concern of the ripeness doctrine, and we consider it a point well taken with regard to many of the issues before us.

[6] "[A]n appellate court will not review the proceedings of an administrative agency until the agency has taken final action." *Harris v. Revenue Div. of Taxation & Rev. Dep't*, 105 N.M. 721, 722, 737 P.2d 80, 81 (Ct.App.1987). In this case, of course, the Commission has issued its final order. However, as is apparent from examination of many of the issues raised here, a final order is not necessarily determinative of whether final action has been taken. The determination of finality must be based on pragmatic consideration of the matters at issue and analysis of whether the administrative body has in fact finally resolved the issues. *See Abbott Laboratories*, 387 U.S. at 149–51, 87 S.Ct. at 1515–17. In this context, the Commission's admonition that we should closely examine which issues it decided and which it reserved for later consideration in the two sibling cases has raised significant issues regarding the role of this court in reviewing administrative activity.

"The basic purpose of ripeness law is and always has been to conserve judicial machinery for problems which are real and

present or imminent, not to squander it on abstract or hypothetical or remote problems." 4 K. Davis, *Administrative Law Treatise* § 25.1 (2d ed. 1983). In *Abbott Laboratories*, the Court explained the basic rationale of the ripeness doctrine as being:

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

387 U.S. at 148–49, 87 S.Ct. at 1515–16.[3]

[7, 8] Thus, several issues of direct relevance to this appeal are raised. We must determine whether certain issues will be revisited by the Commission in its subsequent hearings and thus should be reserved for its initial discretionary determination. Our analysis involves whether further fact finding by the Commission will elicit more evidence illuminating the issues, whether further agency decisions may moot some of the contentions, and whether the parties will suffer imminently the effects of the final order. The ultimate question, however, is whether agency action is sufficiently final or definitive so that there is no judicial interest in awaiting a more concrete formulation of the issues. *See Midwestern Gas Transmission Co.*, 589 F.2d at 618. We will not wait for the Commission's final decision if the issue will return to us without alteration. One factor that weighs heavily on our resolution of these issues is what the Commission has said it has done and will do. *See id.* at 620. Because of the Commission's great discretion in initially determining the issues before it, *see Attorney General v. New Mexico Pub. Serv. Comm'n*, 101 N.M. 549, 553, 685 P.2d 957, 961 (1984), we believe that, if it reasonably states that it has not finally resolved an issue or will return to it, it should be allowed the opportunity to exercise its discretion.

Prefacing its discussion of the statement of the law in the final order, the Commission stated:

> In determining the law that applies to the circumstances of this case, we have kept a paramount fact in mind (of which we were called upon with some frequency to remind the participants): This is neither a prudence nor a rate case.
>
> As the caption to this case clearly shows, this proceeding is limited to the adjudication of alternatives to the Inventory ratemaking methodology, and/or plans for the phasing in of PNM's excess generating capacity.

Final Order, 101 Pub.Util.Rep. (PUR) 4th at 144.

In its answer brief, the Commission described as a "key determination" in its resolution of the excess capacity problem "whether all or some portion of the excess capacity should be retained for use in the future, or whether it should be completely and permanently cut loose from Commission jurisdiction because such excess capacity is not presently needed by, and is too costly for, today's ratepayers." The final order, too, makes clear that in some ways the decision constituted a threshold determination of what capacity would not possibly be required to insure stability for New Mexico's energy future; inclusion in this sense did not indicate a determination that the capacity was needed immediately, but that exclusion and permanent loss of jurisdiction over the capacity would not be pru-

3. Review of the relevant statutory provisions indicates that our legislature, in a manner similar to Congress, was concerned that the Commission should be allowed to finally determine the issues before it. *Compare* NMSA 1978, Section 62-11-1 (Repl.Pamp.1984) (allowing review of final Commission orders) *with* 5 U.S.C. § 704 (1988) ("preliminary, procedural, or intermediate" action not generally subject to judicial review until agency action is final). We also find that the concerns that judicial resources should be conserved and that administrative determinations should be free from judicial interference prior to final actions are relevant to our deliberations. Accordingly, we will apply the doctrine of ripeness as enunciated in the federal courts as guidance in our evaluation of the issues presented to us here.

dent. In essence, the Commission decided not to exclude permanently that capacity whose effect on rates appropriately yet may be considered in the rate case. *See Final Order,* 101 Pub.Util.Rep. (PUR) 4th at 175.

In the final order the Commission concluded that "the inventory stipulation should be terminated and [certain] capacity should be excluded from New Mexico jurisdictional rates." *Id.* at 178. It determined that the amount excluded was within its previously determined acceptable range, and that the exclusion of more "would not be in the best interests of either ratepayers or investors." *Id.*

> The Commission finds that PVNGS Units 1 and 2 are not presently used and useful in rendering service to PNM's ratepayers, but that the exclusion of both these units should be rejected for the previously stated reasons [that the Commission is not bound solely by what capacity is now used and useful; it must consider factors affecting financial health and balance investor and ratepayer interest]. This finding takes into account PNM's possible future load growth. The record in this proceeding, however, is not sufficient for the Commission to decide the rate treatment that will be applied to these units.
>
> The forthcoming rate case will establish, in conjunction with [the prudence case], the valuation of generating capacity sources being added in base rates (PVNGS Units 1 and 2 and 147 MW of SJ–4) and the ratemaking treatment to be given these units. For example, it has been determined in this case that PVNGS Units 1 and 2 will be included in base rates, but it has *not* yet been determined whether these units will start recovery *of* investment immediately or whether the recovery *of* asset investment will be phased in over a period of time. It is also undetermined whether there will be full return *on* the included PVNGS investment or whether all or a portion of return *on* the investment will be disallowed for some period of time in the rate case.
>
> It has been determined in this case that 147 MW of SJ–4 will be included in rate base on the effective date for new rates [in the rate case]. A full return *on* the 147 MW share of investment will begin at that time.

Id. at 179.

The Commission's statements that the record before it was insufficient to allow it to determine rate treatment for the included capacity, and its express reservation of the timing of phasing in of the investment and the determination of whether all of the investment will be phased in are significant to our disposition of these issues.

A. *Is the Determination that Total Exclusion Would be Unfair to Shareholders Arbitrary and Capricious and Unsupported by Substantial Evidence?*

1. The Corporate Financial Model (CFM).

[9] The attorney general argues that the Commission improperly relied on the CFM submitted by PNM to conclude that corporate earnings would be too low under total exclusion, raising several claims regarding the validity of the model, its underlying assumptions, and its fitness for the purpose for which it was used.

The merits of this issue are not yet ripe for our review. The question of corporate earnings will be considered again, and in greater depth, in the rate case, where PNM's financial health will be considered as a factor in determining reasonable rates. *See Final Order,* 101 Pub.Util.Rep. (PUR) 4th at 159–60. Thus, the issues of the return to investors and earnings under different capacities will recur, giving the attorney general and others the opportunity to contest the model's efficacy, offer alternatives, and present new evidence on the issue. Although the question can be presented solely in legal terms, *i.e.,* was the Commission's reliance arbitrary, capricious, and unsupported by substantial evidence, fact finding has not been completed on the issue, additional evidence may change the tenor of the arguments or moot them entirely, and the Commission has not yet exercised the full breadth of its discre-

tion. Critical to this question is that, although the Commission has determined not to exclude the capacity, it has not yet determined either its prudence or the timing of its inclusion (the phase-in issue). *See id.*

The attorney general contends that: "While it is true that the Commission did not use the CFM's to set rates, they were using them to conclude, in effect, that rates set under this particular alternative would produce earnings which were too low." This, however, is precisely why this issue is not fit for review—it will come into much greater focus after the Commission has decided what the rates will be and how capacity will be phased in.

Under the *Abbott* test, a court also must determine the potential hardship to the parties caused by postponing review. For this issue, as for the others to be examined, no harm results from delayed review. The final order has no immediate effect on consumers—no rates will go into effect until after the conclusion of the final hearing of this trilogy. *See, e.g., Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967) (case not ripe despite final agency action, when regulations, prior to enforcement, did not force a change in petitioner's position); *Midwestern Gas Transmission Co.*, 589 F.2d at 622-25 (D.C.Cir.1978) (administrative action not cause of hardship when effect will not be felt until conclusion of entire agency proceedings; preliminary order did not cause parties to alter position).

2. The Standard of Fairness was Applied in an Arbitrary and Capricious Manner.

[10] The attorney general and NMIEC argue that the Commission based its decision in part on fairness to shareholders without defining fairness. By relying on an undefined standard, the Commission is alleged to have acted arbitrarily and capriciously when it applied the standard to the facts that it found. Much of the final order is devoted to explanation of why shareholder interest is not paramount and to analysis of risk allocation whereby the risk of investment in excess capacity is assumed by investors, as well as to why the Commission is not required to provide rates that compensate for loss caused by PNM's own actions. Nonetheless, the Commission concluded that the return to investors would be too low and unfair under total exclusion, and this decision is asserted to have been in error.

Our analysis indicates that this issue, too, is not yet ripe for review. The ultimate question of fairness to shareholders cannot be resolved until rates are set.[4] After the Commission has finally determined rates, having again entertained evidence on the issue, if the parties still believe that the Commission has not properly defined its standards, the issue will be reviewable to determine whether the conclusions were arbitrary and capricious. Until that time, although a legal issue has been presented, we have no basis to determine if the Commission's decision was arbitrary or capricious, because no final decision has been made. The Commission merely determined that, as a threshold matter, total exclusion would be unfair. It has not determined, however, what rates will be fair, and we do not feel it appropriate at this point interfere with its exercise of discretion.[5]

In *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 109 S.Ct. 609, 619, 102 L.Ed.2d

4. The error in this argument is demonstrated by the characterization of the issue. NMIEC claims that "this case confronts the issue of whether, and to what extent, ratepayers may be made to pay for costs incurred beyond that necessary to provide service." In reality, no decisions have been made regarding what costs ratepayers will bear.

Our consideration of this issue is guided by the Commission's statement that it addressed the legal issues only within the parameters of the excess capacity hearing, not prudence or rate. 101 PUR 4th at 144. From that limited perspective, it appears that the Commission's discussion of the balancing of ratepayer, investor and company interests, and the various possible tests used to facilitate such an analysis, was not intended to be dispositive of rates. It was used to determine the threshold question of exclusion, bearing in mind that exclusion of certain capacity could not be determined without consideration of the factors that would arise in the rate hearing and a determination of the public interest.

5. We are aware that "fairness" is an imprecise term and that the Commission must decide is-

646 (1989), the Court, with respect to an alleged confiscatory rate methodology, stated:

> [A]n otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it. "It is not theory, but the impact of the rate order which counts." The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.

(quoting *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S.Ct. 281, 288, 88 L.Ed. 333 (1944)); *see also State v. Mountain States Tel. & Tel. Co.*, 54 N.M. 315, 337, 224 P.2d 155, 170 (1950) (adopting "end results" test as articulated in *Hope*).

This analysis is relevant to whether the fairness issue is properly before us at this time. Although we do not face the question of whether a rate is confiscatory—the issue is whether the Commission was overly generous to investors without adequately explaining its reasoning—we cannot evaluate a rate until it is set. The Commission, in further exercise of its discretion may balance out or alter, in the face of new evidence, the perceived error in its methodology, and we leave to it that opportunity to exercise its good judgment.

3. The Commission Arbitrarily and Capriciously Failed to Distinguish Between Prudent and Imprudent Investment.

The attorney general has combined several claims under this general assertion. He argues that the Commission determined fairness and acceptability of an excess capacity plan without considering the prudence of investment decisions that created the excess. The attorney general contends that "'fairness' is necessarily dependent upon the prudence of the plant in question" and the decision was therefore arbitrary and capricious. He also alleges a violation of due process in that he was unable to present evidence on this point.

[11] We resolve this issue through a combination of our deference to the Commission's discretion and the ripeness doctrine. The Commission decided to trifurcate the proceedings based on the magnitude of the evidence and the size of the record generated by the proceeding. *See Final Order*, 101 Pub.Util.Rep. (PUR) 4th at 131. The Commission acted reasonably in breaking this case into manageable parts, and we will not review further the decision to sever in light of its legislative mandate to determine reasonable rates within statutory time constraints. *See* NMSA 1978, §§ 62–8–1, –7(C) (Repl.Pamp. 1984); *Otero County Elec. Coop., Inc. v. New Mexico Pub. Serv. Comm'n*, 108 N.M. 462, 465, 774 P.2d 1050, 1053 (1989); *see also* NMSA 1978, Section 62–10–6 (Repl. Pamp.1984) (Commission has discretion to order separate hearings on separate matters).

[12, 13] Moreover, the ongoing nature of these proceedings makes our review at this juncture inappropriate. The Commission expressly stated in the final order that the prudence hearing will continue and that the impact of this case on the prudence analysis cannot be determined until that case is heard. 101 Pub.Util.Rep. (PUR) 4th at 180–81. We do not perceive any due process violations when, as here, the attorney general will be able to present evidence on the question of prudence at the prudence hearing. We find the attorney general's other claims speculative—the Commission has not yet determined if and to

sues based on evidence in the record and not on its ephemeral conceptions of fairness or equity. However, the posture of this case makes it improper for us to delve into this matter at this time, and we reserve judgment until the record has been developed further.

what extent investment in any plant is imprudent, or how imprudence would effect its rate treatment. It certainly has not, by its actions in this case, determined that ratepayers must pay for imprudent investment. Consequently, we find that the factual record is not adequately developed on this question to allow review, and we leave it to the Commission to determine in the first instance its treatment of this matter.

[14] The attorney general also argues that the Commission improperly changed its methodology by bringing plant into rates in a manner other than based on the most recent in-service date. We find it impossible to evaluate this alleged change in methodology, because the phase-in of specific capacity into rates has not yet been determined. It is true that the Commission excluded 130 MW of SJ–4, which the attorney general argues was more recent than PVNGS and should therefore not be excluded before PVNGS. It is not clear that the Commission is bound to a "first-in" methodology. Even if it were, however, we cannot discern any arbitrary or capricious action at this time, because the Commission has not yet determined how, or even if, PVNGS Units 1 and 2 will be phased into rate base.

B. *Is the Commission's Justification for Rejecting Total Exclusion Supported by Substantial Evidence?*

1. Total Exclusion Would Provide Adequate Capacity to Provide Service.

The attorney general asserts that the Commission: determined without ample evidence in the record that total exclusion would not provide sufficient generating capacity over a reasonable planning period to maintain an acceptable reserve margin of twenty percent; changed its definition of the reasonable planning period of ten years by adding an extra year to the period; ignored evidence of the availability of alternative sources to be purchased, and relied on a PNM forecast that it has previously characterized as unreliable.

[15] These issues ask us to apply substantial evidence review when the Commission has not yet finished taking evidence on these questions. What these contentions ignore is that the Commission has not yet determined how capacity will be phased into rates. The timing of inclusion has not yet been finally determined. Thus, the argument that the Commission changed its definition of the relevant time period to determine sufficient capacity fails as premature—it is not yet apparent to what purpose this alleged extension was used. Because this hearing was in essence a threshold determination, binding over certain capacity for further examination to determine if it was necessary to protect New Mexico's energy future, the Commission acted only to protect its options by considering future possibilities. At this time, however, it has not taken any final action that implicates the alleged "extra year," and we cannot determine whether it acted improperly. This conclusion is bolstered by the lack of evidence showing that the Commission *relied* in any way on evidence regarding the extra year.

The same concerns, namely the lack of final Commission action regarding phasing in of capacity and the narrow scope of the final order as a threshold determination pending the outcome of the prudence and rate hearings, dispose of the other two arguments. The attorney general claims that reliance on PNM's August 1988 load forecast was misplaced in light of the Commission's skepticism regarding the forecast's reliability. *See Final Order*, 101 Pub.Util.Rep. (PUR) 4th at 165. First, it is not clear that the Commission abused its discretion in considering a forecast that was submitted on the record and subject to examination by the parties. *See, e.g., Attorney General v. New Mexico Pub. Serv. Comm'n*, 101 N.M. 549, 553, 685 P.2d 957, 961 (1984) (Commission has discretion in considering conflicting evidence). More importantly, no final action in reliance on the forecast has been made, and any decision we would make on this issue at this point would be premature and would subject us to potentially duplicative or unnecessary decision making. Similarly, any argument that more contract purchases, rather than use of PNM's own available resources,

should be used can be presented at the subsequent hearings.

2. Decertification.

[16] The Commission stated, as a *further* reason militating against total exclusion, that *if* it had determined that total exclusion of PVNGS was appropriate, in fairness to PNM it *would have had* to decertify the units, thus forever losing jurisdiction. The attorney general contends that the determination is wrong—that the Commission would not be *required* to decertify the PVNGS units.

The attorney general has not shown, however, how it would be beyond the Commission's discretion to decide that decertification would be appropriate in these circumstances. Moreover, the Commission has not made any decision in this regard. It only stated, as one factor, that decertification would have been fair. It has not determined that decertification should be done, in which case we would be able to evaluate the reasonableness of its decision, and it has not decided that total exclusion was inappropriate *because* of decertification. Accordingly, we find no reviewable decision before us.

C. *Is the Mix of Generating Plant Included in Base Rate Arbitrary and Capricious and not Supported by Substantial Evidence?*

NMIEC contends that the Commission acted arbitrarily and capriciously and without support of substantial evidence when it adopted the mix of generating plant to be included in rates, arguing that no party advocated the specific mix chosen by the Commission and that no evidence was presented with regard to the impact of the mix chosen on ratepayers, investors or earnings. Rather than relying on methodologies and proposals for exclusion advocated by various witnesses, NMIEC maintains that the Commission unilaterally formulated its own proposal, combining aspects of the various proposals presented, without a methodology supporting the mix chosen and without regard to the diverse theoretical underpinnings of the testimony upon which it relied. Having rejected all of the proposals offered, NMIEC contends that the Commission was compelled to reopen the record rather than to unilaterally formulate its own position.

We resolve this issue based on the scope of the Commission's authority and discretion, as well as in part on ripeness grounds. In a hearing on rates, if "the commission finds any such proposed rate or rates to be unjust, unreasonable or in any wise in violation of law, the commission shall determine the just and reasonable rate or rates to be charged or applied by the utility for the service in question and shall fix the same by order to be served upon the utility." NMSA 1978, Section 62-8-7(D) (Repl. Pamp.1984).[6]

The Commission is vested with broad discretion to pursue its statutory mandate to set "just and reasonable rate or rates," and it must exercise that discretion when proposed rates are found to be unjust or unreasonable. NMSA 1978, Section 62-8-7(D) (Repl.Pamp.1984); *see Attorney General v. New Mexico Pub. Serv. Comm'n*, 101 N.M. 549, 553-54, 685 P.2d 957, 961-62 (1984). As we stated in *Mountain States Telephone and Telegraph Co. v. New Mexico State Corp. Commission*, 90 N.M. 325, 331, 563 P.2d 588, 594 (1977):

> The Commission has a duty to be a prime mover in the procedure to see that the public interest is protected by establishing reasonable rates and that the utility is fairly treated so as to avoid confiscation of its property. Considering this broad mandate it could hardly be envisioned that the Commissioners would sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a "thumbs-up or thumbs-down" judgment after the dust of battle settles in the arena.[7]

[17] Although the Commission cannot arbitrarily reject the testimony of any par-

6. Admittedly, the hearing at issue was not directed specifically at establishing rates. Nonetheless, it was part of the ratemaking process.

7. *Mountain States* was concerned with the Corporation Commission, but we find its discussion relevant to the powers of the Public Service

ticular witness, neither is it required to accept testimony. It must weigh the conflicting evidence of witnesses, using its discretion to ultimately reach a decision within its mandate. *See Alto Village Servs. Corp. v. New Mexico Pub. Serv. Comm'n*, 92 N.M. 323, 587 P.2d 1334 (1978). When it weighs the evidence, accepting certain testimony while rejecting other, the Commission's decision nevertheless may be supported by substantial evidence. "[E]vidence of two conflicting opinions in the record does not mean that the decision arrived at is unsupported by substantial evidence." *Attorney General v. New Mexico Pub. Serv. Comm'n*, 101 N.M. at 553, 685 P.2d at 961.

[18] We are mindful that under this analysis, the parameters set by the various plans that the parties supported by evidence may not be effective when the methodologies upon which those plans are set are altered. Thus, choosing various portions of disparate plans may make the assumptions regarding costs and returns inherent in any one or another methodology inappropriate. However, to reiterate our ripeness analysis, this was not a rate hearing. We are not in the position where we can evaluate the decisions made in the hearing as they affect rates, because the Commission has not yet determined rates. This question remains open before the Commission, and we will not act upon it until the Commission has made a final determination and considered all of the evidence.

Accordingly, we affirm the Commission's final order. As our discussion has indicated, should the issues that we deem not yet ripe for our consideration recur, we will entertain their appeal when the factual record is fully developed and after the Commission has exercised its discretion in considering them.

IT IS SO ORDERED.

SOSA, C.J., and RANSOM, J., concur.

Commission, which is vested with equally broad ratemaking discretion.

808 P.2d 606

In the Matter of the Prudence of Costs Incurred by Public Service Company of New Mexico in Construction of Palo Verde Nuclear Generating Station.

ATTORNEY GENERAL OF the STATE OF NEW MEXICO, Appellant,

v.

NEW MEXICO PUBLIC SERVICE COMMISSION and Public Service Company of New Mexico, Appellees.

No. 19046.

Supreme Court of New Mexico.

March 21, 1991.

Rehearing Denied April 11, 1991.

Appeal was taken from order of the Public Service Commission (PSC) entered in proceeding to consider rate treatment of utility's ownership interest in nuclear power plant. The Supreme Court, Sosa, C.J., held that: (1) Attorney General was given sufficient opportunity to participate in hearing to satisfy due process standards; (2) PSC staff had capacity to conduct settlement negotiations; and (3) PSC's final order promoted and served public good and would be upheld.

Affirmed.

1. Constitutional Law ⇐298(7)
Electricity ⇐11.3(6)

Attorney General was given sufficient opportunity to participate in hearing before the Public Service Commission (PSC) held to determine rate treatment of utility's ownership interest in nuclear power plant to satisfy due process standards; even if Attorney General was excluded from settlement negotiations, Attorney General was given opportunity to participate and did fully participate in five weeks of hear-

the greater hazard to the greater number of owners, and the State in the dissipation of its natural resources by excessive drilling.' * * * * *". Landowners, Oil, Gas & Roy Own. v. Corporation Com'n, Okl., 415 P.2d 942, 950 (1966), referring to Panhandle Eastern Pipe Line Co. v. Corporation Com'n, Okl., 285 P.2d 847 (1955).

See also Grace v. Oil Conservation Com'n; Ward v. Corporation Commission, Okl., 470 P.2d 993 (1970).

[6] Nothing we have said to now is contrary to Continental Oil, supra. When the Commission exercises its duty to allow each interest owner in a pool "his just and equitable share" of the oil or gas underlying his property, the mandate to determine the extent of those correlative rights, as prescribed by § 65-3-29(H), N.M.S.A. 1953, is subject to the qualification "as far as it is practicable to do so." See Grace v. Oil Conservation Com'n. While the evidence lacked many of the factual details thought to be desirable in a case of this sort, it was because the appropriate data was as yet unobtainable. We cannot say that the exhibits, statements and expressions of opinion by the applicant's witness do not consitute "substantial evidence" or that the orders were improperly entered or that they did not protect the correlative rights of the parties "so far as [could] be practicably determined" or that they were arbitrary or capricious.

The Commission established a participation formula giving each owner in the unit a share in production in the same ratio as his acreage bears to the acreage of the whole units. We think such a formula is a reasonable and logical one, if perhaps not the most complete or accurate method that may be used when more subsurface information becomes available.

Having found no cause for reversal of the orders appealed from, they are hereby affirmed.

It is so ordered.

OMAN and MONTOYA, JJ., concur.

532 P.2d 588

David FASKEN, Petitioner-Appellant,

v.

OIL CONSERVATION COMMISSION of the State of New Mexico, Respondent-Appellee.

No. 9958.

Supreme Court of New Mexico.

Feb. 28, 1975.

The District Court, Eddy County, D. D. Archer, J., entered judgments which affirmed orders of the Oil Conservation Commission, and appeal was taken. The Supreme Court, Stephenson, J., held that in absence of sufficient findings disclosing reasoning of the Oil Conservation Commission in reaching its ultimate findings, reversal was required.

Reversed and remanded with directions.

1. Mines and Minerals ⇐92.21

On appeal from judgments affirming orders of the Oil Conservation Commission, the Supreme Court is not a fact finder or weigher; rather will consider whether, as a matter of law, the action of the commission was consistent with and within the scope of its statutory authority and whether the administrative order is supported by substantial evidence.

2. Mines and Minerals ⇐92.17

The Oil Conservation Commission must make findings of ultimate facts which are material to the issues.

3. Mines and Minerals ⇐92.21

In absence of sufficient findings disclosing reasoning of the Oil Conservation Commission in reaching its ultimate findings, reversal was required.

Montgomery, Federici, Andrews, Hannahs & Buell, Santa Fe, for petitioner-appellant.

William F. Carr, Special Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

STEPHENSON, Justice.

This appeal is from two summary judgments entered by the Eddy County District Court which affirmed two orders of the Oil Conservation Commission (Commission). Appellant (Fasken) had filed two applications with the Commission seeking either the establishment of certain property (under lease to Fasken) within the Indian Basin-Morrow Gas Pool as a separate and distinct pool with special pool rules for production or, as an alternative, the exemption of Fasken's wells from prorationing within the Indian Basin-Morrow Gas Pool and the establishment of special production allowables. After a trip up the statutory hearing ladder (see §§ 65-3-11.1, 65-3-22(a), (b), N.M.S.A.1953) resulting in the denial of the applications, Fasken appeals, complaining first, that the findings of fact relied upon by the Commission are not supported by substantial evidence and second, that the Commission's orders are invalid because they do not contain any findings to show the reasoning behind the determination that waste was not occurring.

Fasken elicited evidence from his sole witness indicating that the northern portion of the Indian Basin-Morrow Gas Pool was a separate and distinct source of supply from the southern portion of the same pool. The witness attempted to support this assertion by proof of a "saddle" or "trough" in the Morrow sand dividing the pool. It was also asserted that because of the pressure differentials between the northern and sourthern portions of the pool, the water plug in the "saddle" was migrating south causing a premature watering out of wells on the north flank of the southern portion of the pool. Additionally, the witness testified that gas from the north pool was being trapped in the water making it non-recoverable and, consequently, gas was being wasted.

The Commission did not put on any testimony. Some of the Commission's expert staff cross-examined Fasken's witness but, other than emitting a general tenor of suspicion and disbelief of the proffered testimony, the record fails to provide any illumination as to why the testimony was wrong and should be disregarded. Nevertheless, the Commission found there was a single common source of supply, that granting the applications would violate correlative rights, and, that their denial was necessary to prevent waste.

Fasken acknowledges he has the burden of establishing the invalidity of the Commission's orders. § 65-3-22(b), N.M.S.A. 1953. But he contends that the Commission could not summarily disregard the uncontradicted evidence, enter the orders and maintain they are supported by substantial evidence. Medler v. Henry, 44 N.M. 275, 101 P.2d 398 (1940); Board of Education v. State Board of Education, 79 N.M. 332, 443 P.2d 502 (Ct.App.1968). He dwells on the Commission's failure to put on any evidence. The Commission says that the Fasken testimony was tainted with all of the deficiencies which, according to Medler, justify disregarding it, that Fasken failed in his proof, and the orders have sustaining support.

In their argument in this court, each party attempts to explain precisely what is transpiring 5700 feet below the surface of Eddy County. Certainly we do not want for theories. We suffer from a plethora of theories. The theories of each party sound equally logical and reasonable and each is diametrically opposed to those of the other party. The difficulty with them is that they emanate from the lips and pens of counsel and are not bolstered by the expertise of the Commission to which we give special weight and credence (Grace v. Oil Conservation Com'n, 87 N.M. 205, 531 P.2d 939 [decided January 31, 1975]); (Rutter & Wilbanks Corporation v. Oil Conservation Com'n, 87 N.M. 286, 532 P. 2d 582 [decided February 21, 1975]), nor included in its findings.

[1] We will not attempt to traverse this bog. We are not fact finders or weighers. Rather, we consider whether, as

SANTA FE EXPLORATION COMPANY, Petitioner-Appellant, vs. OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent-Appellee, and STEVENS OPERATING CORPORATION, Petitioner-Cross-Appellant, v. OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent-Cross-Appellee.

No. 19,707
SUPREME COURT OF NEW MEXICO
835 P.2d 819, 114 N.M. 103, 31 N.M. St. B. Bull. 815, 1992 N.M. LEXIS 233
July 27, 1992, FILED

Appeal from the District Court of Chaves County. W. J. Schnedar, District Judge.

COUNSEL

For Appellant: Padilla & Snyder, Ernest L. Padilla, Santa Fe, New Mexico, Brown, Maroney & Oaks Hartline, K. Douglas Perrin, Dallas, Texas.
For Oil Conservation Commission: Robert G. Stovall, Santa Fe, New Mexico.
For Stevens Operating Corporation: Campbell, Carr, Berge & Sheridan, William F. Carr, Santa Fe, New Mexico.

JUDGES

BACA, RANSOM, HARRIS
AUTHOR: BACA

OPINION

BACA, Justice.

*{*105}* This appeal involves a series of orders issued by the New Mexico Oil Conservation Commission (the "Commission") and the New Mexico Oil Conservation Division (the "Division"). These orders established and govern the production of oil from the North King Camp Devonian Pool (the "Pool") in which appellant, Santa Fe Exploration Company ("Santa Fe"), and cross-appellant, Stevens Operating Corporation ("Stevens"), owned interests. After the Division approved Steven's request to drill a *{*106}* well at an unorthodox location and limited production from the well, both Santa Fe and Stevens petitioned the Commission for a de novo review. After consolidation of the petitions, the Commission, in its final order, approved the Stevens well, placed restrictions on Stevens's production from this well, and limited oil production from the entire Pool. Pursuant to NMSA 1978, Section 70-2-25 (Repl. Pamp. 1987), both Santa Fe and Stevens appealed the final order of the Commission to the district court, which affirmed. Both parties appeal the decision of the district court. We note jurisdiction under Section 70-2-25 and affirm.

I

In December 1988, at the request of Santa Fe, the Division issued Order No. R-8806, which established the Pool and the rules and regulations governing operation of the Pool. These rules established standard well spacings and a standard unit size of 160 acres; regulated the distances that wells could be placed from other wells, the Pool boundary, other standard units, and quarter-section lines; set production limits for wells in the Pool; and outlined procedures for

obtaining exceptions to the rules. The order also approved Santa Fe's Holstrom Federal Well No. 1 (the "Holstrom well") for production, which Santa Fe began producing at the rate of 200 barrels per day.

In April 1989, Curry and Thornton ("Curry"), predecessors in interest to Stevens, applied to the Division to drill a well in the Pool and for an exception to the standard spacing and well location rules. Curry requested the non-standard spacing because it claimed that geologic conditions would not allow for production of oil from their lease from an orthodox well location. Santa Fe[1] opposed the application, claiming that the well would impair its correlative rights to oil in the Pool. In its Order No. R-8917, the Division approved Curry's application to drill the well at the unorthodox location but imposed a production penalty limiting the amount of oil that Curry could produce from the well to protect correlative rights of other lease holders in the Pool.

In May, Stevens, which had replaced Curry as an operator in the Pool, applied to the Division for an amendment to Order No. R-8917. Stevens requested that, instead of drilling the well authorized by Order No. R-8917, it be allowed to enter an existing abandoned well and drill directionally to a different location. The requested well, if approved and drilled, would also be at an unorthodox location. Santa Fe opposed the amendment and objected to the original production penalty, which it contended should have allowed less production from the Stevens well. The Division approved Stevens's application and issued Order No. R-8917-A amending Order No. R-8917. The amended order, while allowing directional drilling to an unorthodox location, required Stevens to otherwise meet the requirements of the original order, including the original production penalty.

Stevens proceeded to drill the well authorized by the amended order. When the well failed to produce oil, Stevens contacted the Division Director and requested approval to re-drill the well to a different location and depth. The Director permitted Stevens to continue drilling at its own risk and subject to subsequent orders to be entered after notice to all affected parties and a hearing. Stevens drilled and completed this well (the "Deemar well") and filed an application for a de novo hearing by the Commission to approve production from the well and to consider the production penalty. **See** NMSA 1978, § 70-2-13 (Repl. Pamp. 1987) (decisions by the Director may be heard de novo by the Commission). Santa Fe also filed an application for a de novo hearing opposing Stevens's application or, in the alternative, urging that a production penalty be assessed against the Stevens well.

The Commission consolidated the petitions and, after notice to the parties and a *{*107}* hearing, entered Order No. R-9035. This order estimated the total amount of oil in the Pool and the amount of oil under each of the three tracts in the Pool.[2] The order set the total allowable production from the Pool at the existing production rate of 235 barrels per day,[3] and allocated production to the two wells in accordance with the relative percentages of oil underlying each of the three tracts. Under this formula, Stevens was allowed to produce 49 barrels per day from its Deemar well, Santa Fe was allowed to produce 125 barrels per day from its Holstrom well, and the undeveloped tract left in the Pool would be allowed to produce 61 barrels per day, if developed. The order also allowed the production to be increased to 1030 barrels per day if all operators voluntarily agreed to unitize operation of the Pool.

Pursuant to NMSA 1978, Section 70-2-25(A), both Santa Fe and Stevens applied to the Commission for a rehearing. Santa Fe contended that the second attempt at directional drilling was unlawful; that it was denied due process and equal protection by the ex parte contact between Stevens and the Division Director; that the findings of the Commission apportioning

production were not supported by the evidence; that the reduction of production was not supported by the evidence and was erroneous, capricious, and contrary to law; and that the unitization was illegal and confiscatory to Santa Fe. Stevens argued that the order was contrary to law because it would result in the drilling of an unnecessary well on the undeveloped tract, which would result in waste; that the order was arbitrary, capricious, unreasonable, and contrary to law because it exceeded the Commission's statutory authority; that the order violated its due process rights; and that the findings regarding recoverable reserves were contrary to the evidence and arbitrary and capricious. When the Commission took no action on the applications for rehearing, the petition was presumed to be denied and each party appealed to the district court, which consolidated the appeals. **See** NMSA 1978, Section 70-2-25.

On appeal to the district court, Santa Fe contended that Order No. R-9035 was arbitrary and capricious, that it was not supported by substantial evidence, that the Commission exceeded its statutory authority, and that the Commission Chairman's bias against Santa Fe denied it due process. Stevens contended that the order was arbitrary, capricious, and unreasonable; that it was contrary to law; and that it denied Stevens' rights to due process. The trial court, after a review of the evidence presented at the Commission's hearings, affirmed the Commission's order. The trial court also dismissed, with prejudice, Santa Fe's contention of bias.

Pursuant to Section 70-2-25, both Santa Fe and Stevens appeal the district court decision to this Court. Santa Fe contends (1) that it was denied procedural due process because the Commission was biased; (2) that the district court erred when it failed to consider the question of bias; (3) that the Division violated its own regulations and procedures; (4) that the Commission abused its discretion when it lowered allowable production from the Pool; and (5) that the Commission decision was not supported by the evidence and was arbitrary and capricious. Stevens contends (1) that the Commission exceeded its authority when it reduced allowable production in an attempt to unitize operation of the Pool; (2) that the order violated the Commission's statutory duty to prevent waste; (3) that the order was not supported by substantial evidence; and (4) that its rights to due process were violated. Because of a substantial overlap of issues *{*108}* raised by Santa Fe and Stevens, we consolidate these issues and address the following: (1) whether the Commission's actions violated due process rights of either Santa Fe or Stevens; (2) whether by issuing Order No. R-9035 the Commission exceeded its statutory authority or violated any of its own rules; (3) whether the Commission's order was supported by substantial evidence; and (4) whether the Commission's order was arbitrary and capricious.

II

Before addressing the substance of this appeal, we first must address an issue of appellate procedure. Santa Fe contends that the Commission, in its answer brief, has disregarded SCRA 1986, 12-213 (Cum. Supp. 1991), by failing to provide proper citation to the record proper, transcript of proceedings, and exhibits on which it relied. In light of this failure, Santa Fe urges us to disregard the Commission's arguments or, in the alternative, to accord the Commission's arguments less weight.

We agree with Santa Fe that the Commission failed to provide proper citations in its answer brief. Rule 12-213(B) requires an answer brief to meet the same requirements as the brief in chief, which include "citations to authorities and parts of the record proper, transcript of proceedings or exhibits relied on." Rule 12-213(A)(3). The Commission's answer brief contains numerous factual statements without a single citation to the record below, except for a passing reference to several findings made by the Commission (but without citation to where such findings appear in the Record Proper) and one citation to the record in which the Commission's

brief quoted Santa Fe's brief in chief and citation. The Court of Appeals, in addressing a similar violation, stated:

> We caution [appellant's] counsel regarding violations of our appellate rules. [Appellant] provided no citations to the parts of the record and transcript he relied on, a violation of SCRA 1986, 12-213(A)(1)(c) and (A)(2). Technically, we have no duty to entertain any of [appellant's] contentions on appeal due to this procedural violation. **See Bilbao v. Bilbao**, 102 N.M. 406, 696 P.2d 494 (Ct. App. 1985). [Appellant's] counsel also failed to provide case authority for several of his issues, a violation of Rule 12-213(A)(3). We remind counsel that we are not required to do his research. **In re Adoption of Doe** [, 100 N.M. 764, 676 P.2d 1329 (1984)]. We will not review issues raised in appellate briefs and unsupported by cited authority. **Id.**

Fenner v. Fenner, 106 N.M. 36, 41-42, 738 P.2d 908, 913-14 (Ct. App.), **cert. denied**, 106 N.M. 7, 738 P.2d 125 (1987). As the Court of Appeals advised appellant's counsel in **Fenner**, we advise counsel for the Commission "to read and follow the appellate rules to avoid future violations." **Id.** at 42, 738 P.2d at 914.

III

We turn now to the due process claims of Santa Fe and Stevens. Santa Fe claims that it was denied procedural due process for three separate reasons: (1) the Commission was biased by the ex parte communication between the Division Director and Stevens thereby tainting its decision; (2) the Division Director's approval of the second directional drilling attempt was given prior to notice and a hearing; and (3) the Commission failed to give notice that it was going to consider limiting allowable production from the Pool. Stevens, while contesting Santa Fe's charge of bias, contends that its procedural due process rights were violated because the Commission failed to give adequate notice of its intent to limit production from the entire field. Stevens also claims that its substantive due process rights were violated by the Commission's allegedly erroneous determination of the recoverable reserves underlying the Pool. We address each contention below.

A

Santa Fe argues that its procedural due process rights were denied because the Division Director had ex parte contact with Stevens prior to Stevens's second directional drilling attempt, conditionally approved the drilling, and then participated in the *{*109}* affirmance of this decision as a member of the Commission. This action, Santa Fe contends, gives the appearance of impropriety and irrevocably taints the Commission's decision, and, as such, renders the decision voidable. **See, e.g., Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.**, 685 F.2d 547, 564 (D.C. Cir. 1982). Santa Fe also contends that the district court erred when it dismissed its claim of bias with prejudice. Santa Fe argues that the court should have allowed its discovery motion on the issue of bias rather than dismissing with prejudice. These actions, Santa Fe concludes, violated its rights to procedural due process.

At a minimum, procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of the possible deprivation and an opportunity to defend. **Reid v. New Mexico Bd. of Examiners in Optometry**, 92 N.M. 414, 415-16, 589 P.2d 198, 199-200 (1979). In addition, the trier of fact must be unbiased and may not have a predisposition regarding the outcome of the case. **Id.** at 416, 589 P.2d at 200. Our cases also

require the appearance of fairness to be present. **Id.**

> The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

Id. The above principles are applicable to administrative proceedings, such as the instant case, where the administrative agency adjudicates or makes binding rules that affect the legal rights of individuals or entities. **Id.** Due process safeguards are particularly important in administrative agency proceedings because "many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed." **Id.**

In **Reid**, the Board of Examiners in Optometry initiated disciplinary proceedings against Dr. Reid for alleged misconduct. Prior to the hearing and pursuant to a statute, Reid disqualified two of the five Board members. At the hearing, Reid moved to disqualify one of the remaining Board members, Dr. Zimmerman, on the basis of bias. Reid based his motion on Zimmerman's prior statements that Reid would lose his license after the hearing. After Zimmerman testified that he could render a fair and impartial decision, the Board denied Reid's request to disqualify Zimmerman. The Board revoked Reid's license to practice and he appealed to the district court, which affirmed. **Id.** at 415, 589 P.2d at 199. On appeal to this Court, Reid claimed that Zimmerman's testimony indicated prejudgment and that the failure to disqualify Zimmerman deprived him of his right to due process. We agreed and held that the Board's failure to disqualify Zimmerman violated Reid's due process rights because Zimmerman's prior statements indicated bias against Reid. **Id.** at 416, 589 P.2d at 200.

The instant case is distinguishable from the **Reid** case. Unlike the appellant in **Reid**, Santa Fe failed to raise the issue of the Division Director's bias at the Commission hearing, even though it was aware of the prior ex parte contact. Unlike the Board member in **Reid**, the Director in the instant case did not express an opinion regarding the outcome of the case prior to the hearing. The Director merely permitted Stevens to drill a second exploratory well at its own risk and conditioned approval of production from the well on further Commission action. He made no comment on the probability of Commission approval or on the possible production penalties that could be assessed. Additionally, at the original hearing, the Director could have approved Stevens's request to drill the well to a different depth. Moreover, by statute, the Director is a member of the Commission, NMSA 1978, Section 70-2-4 (Repl. Pamp. 1987), and has a duty to prevent waste, NMSA 1978, Sections 70-2-2, -3 (Repl. Pamp. 1987) (defining and prohibiting waste); NMSA 1978, Section 70-2-11 (Repl. Pamp. 1987) (setting out duties). Here, the Director avoided waste by allowing the second well to be drilled, which *{*110}* eliminated the expense of removing the drilling rig from the drilling site and moving the rig back after approval was obtained. As **Reid** is distinguishable, we hold that the Commission did not violate Santa Fe's procedural due process rights by virtue of bias.

In addition, Santa Fe was not denied due process when the district court dismissed its claim of bias with prejudice. The court allowed briefing on the question of whether to vacate the claim of bias and whether dismissal of the bias claim should be with or without prejudice. More is not required. **See Lowery v. Atterbury**, 113 N.M. 71, 73, 823 P.2d 313, 315 (1992). **See also, Jones v. Nuclear Pharmacy, Inc.**, 741 F.2d 322, 325 (10th Cir. 1984) (procedural due process not

violated where petitioner given opportunity to address issue by memorandum).

B

We next address other claims by the parties that their respective rights to procedural due process were denied. Santa Fe contends that the Commission's actions impaired its constitutionally protected property rights with neither adequate notice nor an opportunity to be heard regarding two separate issues: (1) whether the Commission should grant permission for Stevens's second directional drilling attempt; and (2) whether the Commission should reduce the Pool wide allowable production. Stevens also contends that it was denied procedural due process when the Commission failed to provide notice prior to the hearing that Pool wide allowables might be reduced as a consequence of the hearing.

1

Santa Fe's first argument is that, by allowing Stevens to drill the second well without notice or a prior hearing, the Commission denied Santa Fe due process. Before due process is implicated, the party claiming a violation must show a deprivation of life, liberty, or property. **Reid**, 92 N.M. at 415-16, 589 P.2d at 199-200. In the instant case, the property right implicated is Santa Fe's right to produce the oil underlying its tract in the Pool. This right was not implicated by virtue of Stevens drilling a well, but rather would be implicated by Stevens being allowed to produce oil from the well. Santa Fe had notice and an opportunity to be heard before the Commission granted Stevens permission to produce oil from the Deemar well. Because no due process right was implicated, we find no violation of due process.

2

Citing **Jones** and **McCoy v. New Mexico Real Estate Comm'n**, 94 N.M. 602, 614 P.2d 14 (1980), both Santa Fe and Stevens claim that the Commission deprived them of procedural due process. They argue that the Commission failed to give adequate notice that it would consider limiting production from the Pool. Both claim that the only issues before the Commission were whether the Deemar well should be approved and what production penalty should be imposed. Because the Commission went beyond these issues and decided an issue of which the parties neither had notice nor an opportunity to be heard, both parties conclude that the Commission violated their due process rights.

Curiously, none of the parties cited **National Council on Compensation Insurance v. New Mexico State Corporation Commission**, 107 N.M. 278, 756 P.2d 558 (1988), which we find controlling. In **National Council**, the National Council on Compensation Insurance ("NCCI") filed a premium rate increase for all worker's compensation carriers operating in New Mexico with the State Insurance Board. Prior to a hearing considering the rate increase, the Insurance Board, by letter and a subsequent mailed notice, informed NCCI that a hearing had been scheduled to allow public written and oral comments regarding the proposed rate increases and to allow NCCI to present its filing. The notice provided that the hearing would consider whether the proposed rate increase was excessive, inadequate, or unfairly discriminatory. After the hearing, the Insurance Board denied NCCI's rate increase request, and NCCI appealed. **Id.** at 280-82, 756 P.2d at 560-62. *{*111}* On appeal, NCCI contended that its procedural due process rights were denied because the notice provided was not sufficiently specific to allow NCCI to prepare for issues to be addressed at the hearing. **Id.** at 283, 756 P.2d at 563. We disagreed and held that the notice provided comported with due process requirements because "the notice provided NCCI an opportunity to be heard by reasonably informing NCCI of the matters to be addressed at the hearing so that it was able to meet the issues involved." **Id.** at 284, 756 P.2d at 564. In other

words, general notice of issues to be presented at the hearing was sufficient to comport with due process requirements.

Like the notice given to NCCI in **National Council**, both Santa Fe and Stevens were reasonably informed as to the issues that the Commission would address at its hearing on the consolidated petitions. The parties themselves had each requested a de novo review by the Commission of Stevens's application for a non-standard well location. Santa Fe requested that the Commission deny the application or, in the alternative, impose a production penalty to protect its correlative rights. Stevens requested approval of its Deemar well for production and asked the Commission to reconsider the production penalty. At the hearing, the parties presented the evidence and requested that the Commission provide them the relief that each sought: the right to produce its proportionate share of the oil from the Pool. The parties knew, prior to the hearing, that the Commission would be considering production rates from the various wells and the correlative rights of all parties concerned.

The cases relied upon by the parties are either distinguishable or support the result we reach today. In **McCoy**, we considered whether a realtor's right to procedural due process was violated when her license was revoked by the Real Estate Commission. In that case, the district court based its decision on an issue raised by the Real Estate Commission for the first time on appeal. Because the realtor was denied notice and any opportunity to prepare her case and be heard on that issue in the district court, we held that the district court's decision violated due process. **McCoy**, 94 N.M. at 603-04, 614 P.2d at 15-16. In **Jones**, the appellant claimed that he was denied due process when the trial court did not allow him to present testimony at a hearing to determine whether a settlement agreement should be approved. The Tenth Circuit disagreed, and, held that, because the appellant was given notice and had the opportunity to be heard by submitting a lengthy memorandum, he was not denied due process. **Jones**, 741 F.2d at 325.

Unlike the appellant in **McCoy**, the parties in the instant case had adequate notice of the issues that were going to be addressed to allow them to prepare their cases. In fact, the evidence presented by the parties at the Commission's hearing shows that they had notice of the very issues that the Commission eventually considered: allocation of production from the Pool, protection of the correlative rights of Pool members, and prevention of waste in the Pool. The parties presented evidence of the size, shape, location, and structure of the reservoir. The parties presented evidence that the Stevens well was located so that it could effectively drain the entire reservoir and destroy correlative rights of the other parties unless a production penalty was assessed. The parties presented evidence of the efficient production rate of the Santa Fe well. Expert testimony presented at the hearing demonstrated that the oil in the Pool could be produced more efficiently under unitized operation. While the Commission crafted a unique solution to the problem presented to it, the **process** by which the Commission reached this solution was not unique. The parties had general notice of the issues to be determined, and evidence was presented at a hearing before the Commission made its final decision. Under these circumstances, we hold that Stevens and Santa Fe had adequate notice so as to be reasonably informed of the issues to be decided by the Commission. Thus, we find no violation of procedural due process here.

*{*112} C*

The final due process argument that we discuss is whether Stevens's substantive due process rights were violated by the Commission's determination of the recoverable reserves underlying the Pool. Stevens argues that the setting of low allowable production from the well was an arbitrary decision that will deprive it of a valuable property right. Stevens, citing **Schware v. Board of Bar Examiners**, 60 N.M. 304, 291 P.2d 607 (1955), **rev'd**, 353 U.S. 232 (1957),

claims that this is a violation of substantive due process. We disagree. As discussed in Section VI, **infra**, the Commission did not act in an arbitrary or capricious manner. Moreover, as demonstrated in Section IV, **infra**, the Commission's actions were consistent with its statutory duties to prevent waste and protect the correlative rights of other producers in the Pool.

IV

The next issue that we address is whether the Commission exceeded its statutory authority or violated its rules when it issued Order No. R-9035. Both Santa Fe and Stevens contend that Order No. R-9035, while not requiring unitization, effectively unitizes operation of the Pool. They argue that the Commission does not have the statutory authority to require unitization of the Pool because, under the Statutory Unitization Act, NMSA 1978, Sections 70-7-1 to -21 (Repl. Pamp. 1987), unitization is available only in fields that are in the secondary or tertiary recovery phase. They assert that, because the Commission order effectively unitizes the Pool, a field in the primary development phase, the Commission exceeded its statutory authority. In addition, Santa Fe contends that the Commission violated its own rules when it allowed Stevens's second directional drilling attempt and that Order No. 9035 is void. The Commission argues that its actions were proper under the Oil and Gas Act, NMSA 1978, Sections 70-2-1 to -36 (Repl. Pamp. 1987 & Cum. Supp. 1991), and argues that the Statutory Unitization Act is inapplicable to the instant case.

A

"The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it." **Continental Oil Co. v. Oil Conservation Comm'n**, 70 N.M. 310, 318, 373 P.2d 809, 814 (1962). The Oil and Gas Act gives the Commission and the Division the two major duties: the prevention of waste and the protection of correlative rights. NMSA 1978, § 70-2-11(A); **Continental Oil Co.**, 70 N.M. at 323, 373 P.2d at 817. Correlative rights are defined as

> the opportunity afforded . . . to the owner of each property in a pool to produce without waste his just and equitable share of the oil . . . in the pool, being an amount, so far as can be practicably determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil . . . under the property bears to the total recoverable oil . . . in the pool and, for such purpose, to use his just and equitable share of the reservoir energy.

NMSA 1978, § 70-2-33(H). In addition to its ordinary meaning, waste is defined to include "the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil . . . ultimately recovered from any pool." NMSA 1978, § 70-2-3(A).

The broad grant of power given to the Commission to protect correlative rights and prevent waste allows the Commission "to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties." NMSA 1978, § 70-2-12(B)(7). In addition, the Division and the Commission are "empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." NMSA 1978, § 70-2-11.

In the instant case, evidence presented to the Commission indicated that the Pool was located

under three separate tracts of land. *{*113}* The Commission was called upon to determine the total amount of oil in the Pool and the proportionate share underlying each tract. Stevens's Deemar well was located so that it could produce oil from the top portion of the Pool, thereby avoiding waste that would have occurred unless the well was allowed. However, the well was located so that it could effectively drain the entire Pool. The Commission, charged with the protection of correlative rights of the other lease owners in the Pool, placed a production penalty on the well to protect these rights. Thus, the Commission attempted to avoid waste while protecting correlative rights. We hold that, under the facts of this case, the Commission did not exceed the broad statutory authority granted by the Oil and Gas Act.

Moreover, we are unpersuaded by the argument of both Stevens and Santa Fe that the Statutory Unitization Act prohibits the Commission's actions. They argue that, by enacting the Statutory Unitization Act, the legislature intended to limit the availability of forced unitization to secondary and tertiary recovery only. Both Santa Fe and Stevens quote the following language from the Statutory Unitization Act to support their argument:

> It is the intention of the legislature that the Statutory Unitization Act apply to any type of operation that will substantially increase the recovery of oil above the amount that would be recovered by **primary recovery alone** and not to what the industry understands as exploratory units.

Section 70-7-1 (emphasis added by Stevens and Santa Fe). They assert that this section precludes unitization of a field in primary production such as the Pool. We disagree.

We read the above quoted language from Section 70-7-1 merely to say that the Statutory Unitization Act is not applicable to fields in their primary production phase, such as the Pool in the instant case. Nothing contained in the Statutory Unitization Act, including the above quoted section, however, limits the authority of the Commission to regulate oil production from a pool under the Oil and Gas Act. The Commission still must protect correlative rights of lease holders in the Pool while preventing waste. The Commission still has broad authority "to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." NMSA 1978, § 70-2-11(A). As discussed above, in the instant case the Commission's actions were within its statutory authority. We hold that the circumstances of this case do not implicate the Statutory Unitization Act and that the Commission's actions in effectively unitizing operation of the Pool were an appropriate exercise of its statutory authority under the Oil and Gas Act.

B

Santa Fe contends that, by issuing Order No. R-9035, the Commission abused its discretion by failing to follow the rules and regulations established by Order No. R-8806. That order established the Pool and set out special rules and regulations designed to prevent waste and protect correlative rights.[4] The order also established notice and hearing requirements before the Commission could allow a non-standard well to be drilled in the Pool. Santa Fe contends that, by allowing Stevens to drill a well at a non-standard location, **i.e.**, to within 70 feet of Santa Fe's lease line, without prior notice and a hearing, the Commission violated its own rules. Santa Fe also contends that lowering the allowable production from the Holstrom well to 125 barrels of oil per day without adequate notice is a violation of these rules. Santa Fe concludes that, because Order No. 9035 was issued in a manner inconsistent with these rules, the order is void and Order

Nos. 8917 and 8917-A should be reinstated. We disagree.

*{*114}* The Commission's actions in this case did not violate the Commission's rules established by Order No. 8806. While the Director did allow Stevens to make a second attempt to drill a well at an unorthodox location without notice to other lease holders in the Pool, the other lease holders had notice of the subsequent hearing to determine whether this well would be allowed to produce oil. In addition, this action was designed to further the Director's statutory duty to prevent waste by preventing added expense in the development of the field. Moreover, the Director could have approved drilling the second Stevens attempt at the hearing that it held prior to issuing Order No. 8917-A. Thus, the Commission's actions did not violate the rules established by Order No. 8806 and the Commission did not abuse its discretion in this matter.

V

The next issue that we address is whether the Commission's Order No. R-9035 is supported by substantial evidence. Stevens argues that the Commission, in determining correlative rights of Santa Fe, did not refer to the recoverable oil underlying the tract. Stevens claims that this resulted in the Commission apportioning more oil in the Pool to Santa Fe than Santa Fe deserves based on evidence introduced at the hearing. Santa Fe contends that the Commission ignored testimony of its expert witnesses that indicated that a greater portion of the Pool was under its tract. Santa Fe concludes that the Commission underestimated its proportionate share of oil in the Pool and that this estimate is not supported by substantial evidence.

Substantial evidence is relevant evidence that a reasonable mind would accept as sufficient to support a conclusion. **Rutter & Wilbanks Corp. v. Oil Conservation Comm'n**, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review, we view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. **National Council**, 107 N.M. at 282, 756 P.2d at 562. The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision. **Id.**

Stevens contends that the Commission did not consider the recoverable reserves underlying the Santa Fe tract, **see** NMSA 1978, Section 70-2-33(H) (correlative right based on recoverable reserves), thereby overestimating the amount of oil under the Santa Fe tract. Stevens also contends that the Commission ignored testimony by Stevens's expert witnesses indicating that more of the Pool was under Stevens's tract than the Commission ultimately concluded. Stevens concludes that the record lacks substantial evidence to uphold the Commission's estimate of Santa Fe's proportionate share of oil in the Pool. Santa Fe contends that the Commission underestimated its proportional share of oil because the Commission failed to accept as conclusive the engineering and geologic evidence presented by Santa Fe of the location and extent of the Pool, which would result in a higher proportion of the oil being allocated to Santa Fe. Santa Fe concludes that the Commission's estimate of Santa Fe's proportionate share of oil in the Pool is not supported by substantial evidence.

In any contested administrative appeal, conflicting evidence will be produced. In the instant case, the resolution and interpretation of such evidence presented requires expertise, technical competence, and specialized knowledge of engineering and geology as possessed by Commission members. **See** NMSA 1978, § 70-2-4 (commissioners to have "expertise in regulation of petroleum production by virtue of education or training"); NMSA 1978 § 70-2-5

(director is "state petroleum engineer" who is "registered by the state board of registration for professional engineers and land surveyors as a petroleum engineer" or "by virtue of education and experience [has] expertise in the field of petroleum engineering"). *{*115}* Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment. **Stokes v. Morgan**, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984); **Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n**, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984). We have reviewed the record and, in light of the standard of review detailed above, find that the decision of the Commission was reasonable and is supported by substantial evidence.

VI

The final issue raised by this appeal is whether the decision of the Commission is arbitrary and capricious.

> Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and "'is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the 'winnowing and sifting' process.'" **Garcia v. New Mexico Human Servs. Dep't**, 94 N.M. 178, 179, 608 P.2d 154, 155 (Ct. App. 1979) (quoting **Olson v. Rothwell**, 28 Wis. 2d 233, 239, 137 N.W.2d 86, 89 (1965)) [, **rev'd**, 94 N.M. 175, 608 P.2d 151 (1980)]. An abuse of discretion is established if the agency or lower court has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. **Le Strange v. City of Berkeley**, 26 Cal. Rptr. 550, 210 Cal. App. 2d 313 (1962). An abuse of discretion will also be found when the decision is contrary to logic and reason. **Newsome v. Farer**, 103 N.M. 415, 708 P.2d 327 (1985); **Sowders v. MFG Drilling Co.**, 103 N.M. 267, 705 P.2d 172 (Ct. App. 1985).
>
> **Perkins v. Department of Human Servs.**, 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987).

In the instant case, the action of the Commission is not arbitrary and capricious. As discussed in Section IV, **supra**, the Commission did not exceed its statutory authority nor violate its rules when it issued the final order in this case. As discussed in Section III, **supra**, the Commission did not deprive either Santa Fe or Stevens of their due process rights. As demonstrated in Section V, **supra**, the findings of the Commission were supported by substantial evidence. The Commission considered the evidence presented by the parties, and, in light of its statutory duties to protect correlative rights and avoid waste, fashioned a creative solution to resolve this dispute. While the Commission's solution was unique, such a result is not arbitrary or capricious "if exercised honestly and upon due consideration, even though another conclusion might have been reached." **Perkins**, 106 N.M. at 655-56, 748 P.2d at 28-29 (citing **Maricopa County v. Gottsponer**, 723 P.2d 716 (Ariz. App. 1986)). In accordance with the foregoing discussion, we hold that Order No. R-9035 is not arbitrary and capricious.

The judgment of the trial court is AFFIRMED.

IT IS SO ORDERED.

JOSEPH F. BACA, Justice

WE CONCUR:

RICHARD E. RANSOM, Chief Justice

JAY G. HARRIS, District Judge

OPINION FOOTNOTES

1 Santa Fe and Exxon USA were co-owners of both the lease and the production from the Holstrom well. While both Santa Fe and Exxon USA contested the application, for the sake of simplicity we will refer to them collectively as "Santa Fe."

2 The order estimated oil productive rock volume in the Pool to be 10,714 acre-feet and allocated the oil as follows: 21% to the tract on which Stevens held the lease and where the unorthodox well was located (E/2 W/2 of section 9); 53% to the tract on which Santa Fe held the lease and where the Holstrom well was located (SE/4 of section 9); 26% to the tract on which Santa Fe held the lease and where no producing well was located (NE/4 of section 9).

3 At the time, Santa Fe was producing 200 barrels per day of oil from its Holstrom well. Under the production penalty formula imposed by the prior Division order, Stevens would have been allowed to produce 35 barrels per day from its Deemars well.

4 These rules provided that the standard size for proration unit was to be 160 acres, that a well could not be located closer than 660 feet from the outer boundary of a proration unit nor nearer than 1320 feet from the nearest well in the Pool, and that the maximum production allowed from a standard production unit would be 515 barrels per day.

In sending Marlin to the bank to close the transaction, the record is clear that Villines did not specify who really was entitled to the money. Marlin presented himself to the bank with the "green slip," received the money order made out to Louis Motors and, as previously stated, cashed it and left. The bank was negligent in not deciphering for whom the money was meant and this conclusion is substantiated by the bank's own witness, a Mr. Nabours, who testified: "He did not purport to be from Louis Motors. He purported to be Ray Marlin." This same witness did not know Louis Villines or Ray Marlin and merely assumed he was giving the money to the proper person.

The trial court held:

"That third party defendant was negligent in giving Defendant, Marlin, cash for said check [money order] payable to Louis Motors, and such negligence was the proximate cause of the loss by Defendant, Villines, of the money represented by said check [money order]."

Questions as to the existence of negligence or contributory negligence are generally to be resolved by the trier of fact. Montoya v. Williamson, 79 N.M. 566, 446 P.2d 214 (1968); Lujan v. Reed, 78 N.M. 556, 434 P.2d 378 (1967). Findings of fact made by a trial court will not be disturbed on appeal if supported by substantial evidence. Williams v. New Mexico Department of Corrections, 84 N.M. 421, 504 P.2d 631 (1972).

The points discussed above are dispositive of this appeal; others raised by appellant and cross-appellant need not be discussed. Further, in view of our holdings above, it is unnecessary to rule on University Ford's motion to dismiss the cross appeal of defendant Villines as to University Ford.

The judgment of the trial court is affirmed.

It is so ordered.

OMAN and STEPHENSON, JJ., concur.

531 P.2d 939

Michael P. GRACE, II, and Corinne Grace, Petitioners-Appellants,

v.

OIL CONSERVATION COMMISSION OF NEW MEXICO, Respondent-Appellee,

and

Cities Service Oil Company, and the City of Carlsbad, Intervenors-Appellees.

No. 9821.

Supreme Court of New Mexico.

Jan. 31, 1975.

Appeal was taken from a judgment of the District Court, Eddy County, Paul Snead, D. J., affirming an order of the Oil Conservation Commission prorating a gas pool. The Supreme Court, Stephenson, J., held that the Commission had jurisdiction of the subject matter; that evidence was sufficient to sustain finding that wells were producing from same pool; that evidence was sufficient to sustain findings that amount of recoverable gas under each producer's tract could be practically determined in the pool by formula which considers effective feet of pay, porosity, and water saturation and that 100% surface acreage formula should be adopted for allocating allowable production in the pool; and that Commission was not required, as prerequisite to entry of valid proration order, to first determine amount of gas underlying each producer's tract and in the pool, where Commission's findings demonstrated that such determinations were impracticable and such findings were sustained by the record.

Judgment sustained.

1. Administrative Law and Procedure ⇐683

On appeal from an order of the district court affirming an order of administrative agency, appellate court would review the record of administrative hearing to determine if administrative order was substantially supported by evidence and by applicable law.

2. Evidence ⇐584(1)

"Substantial evidence" means such relevant evidence as reasonable mind might accept as adequate to support the conclusion.

See publication Words and Phrases for other judicial constructions and definitions.

3. Administrative Law and Procedure ⇐784, 793

In reviewing an order of an administrative agency, court would not weigh the evidence; court's inquiry would be whether, on the record, administrative body could reasonably make the finding.

4. Mines and Minerals ⇐92.61

In considering an order of the Oil Conservation Commission prorating a gas pool, court would give special weight in credence to experience, technical competence, and specialized knowledge of the Commission. 1953 Comp. §§ 4–32–22, subd. A, 65–3–22(b).

5. Courts ⇐1

A "lack of jurisdiction" means entire lack of power to hear or determine case and absence of authority over subject matter or parties.

See publication Words and Phrases for other judicial constructions and definitions.

6. Mines and Minerals ⇐92.59

In entering order prorating gas pool, Oil Conservation Commission had jurisdiction of the subject matter, which was conservation of gas. 1953 Comp. §§ 65–3–5, 65–3–13(c).

7. Mines and Minerals ⇐92.64

On appeal from an order of the Oil Conservation Commission prorating gas pool, allegations that there was lack of substantial evidence that wells were producing from same pool, that Commission failed to determine amount of recoverable gas under each producer's tract or in the pool, and that the order entered by Commission deprived each producer of opportunity to produce his share of reserves in quantity proportionate to reserves in pool were not jurisdictional but rather were "foundationary matters" which were prerequisites, together with support in the record, to sustain Commission's order. 1953 Comp. §§ 65–3–5, 65–3–13(c), 65–3–22(b).

8. Mines and Minerals ⇐92.59

Upon application to prorate gas pool, evidence that, inter alia, although there was no one pay zone common to every well in the pool, nevertheless there was no one well producing from zone wholly isolated from every other producing well in the field was sufficient to sustain finding that wells were producing from the same pool, despite contention that there was no subsurface communication between wells and that they didn't draw from common source of supply. 1953 Comp. § 65–3–13(c).

9. Mines and Minerals ⇐92.62

On appeal from order of the Oil Conservation Commission prorating gas pool, court would not consider contention that Commission could have determined gas reserves by other methods, which contention merely argued weight of evidence. 1953 Comp. §§ 65–3–13(c), 65–3–22(b).

10. Mines and Minerals ⇐92.59

Upon application to prorate gas pool, evidence was sufficient to sustain findings that the amount of recoverable gas under each producer's tract could not be practically determined in the pool by formula which considers effective feet of pay, porosity, and water saturation and that a 100% surface acreage formula should be adopted, despite contention that amount of recoverable gas under each producer's tract or in the pool could be determined. 1953 Comp. §§ 65–3–13(c), 65–3–14, 65–3–22(b).

11. Mines and Minerals ⇐92.49

Prime objective of statutes relating to gas production restrictions is, in the interest of public welfare, to prevent waste of irreplaceable natural resource. 1953 Comp. §§ 65–3–3, 65–3–13(c).

12. Mines and Minerals ⇐92.52

In considering whether gas pool should be prorated, prevention of waste is paramount consideration, and private rights, such as prevention of drainage not

offset by counter-drainage and correlative rights, must stand aside until it is practical to determine amount of gas underlying each producer's tract or in the pool. 1953 Comp. §§ 65-3-3, 65-3-13(c).

13. Mines and Minerals ⇐92.59

Oil Conservation Commission was not required, as prerequisite to entry of valid proration order, to first determine amount of gas underlying each producer's tract and in the pool, where Commission's findings demonstrated that such determinations were impracticable and such findings were sustained by the record. 1953 Comp. §§ 65-3-3, 65-3-13(c), 65-3-14.

14. Appeal and Error ⇐458(2)

Fact that gas producers appealed from judgment of district court affirming order of Oil Conservation Commission prorating gas pool did not entitle them to stay of district court's judgment. 1953 Comp. §§ 65-3-13(c), 65-3-22(b, c).

Marchiondo & Berry, Mary C. Walters, Albuquerque, Ferrill H. Rogers, Oklahoma City, Okl., for petitioners-appellants.

Losee & Carson, Artesia, David L. Norvell, Atty. Gen., William F. Carr, Sp. Asst. Atty. Gen., Jason Kellahin, Santa Fe, for appellees.

OPINION

STEPHENSON, Justice.

Appellants (the Graces) petitioned the district court for review of Oil Conservation Commission (the Commission) Order No. R-1670-L (the Order) which was entered on June 30, 1972, pursuant to § 65-3-22(b), N.M.S.A.1953. The district court affirmed the Commission. We affirm the district court.

The Order dealt with the South-Carlsbad Morrow Gas Pool (the Pool) in Eddy County. The Commission made eighty-six findings of fact from which it appears the pool is a relatively new one with little production history. The Commission's findings deal with all of the foundationary matters required to be found as prerequisite to a valid proration order under our leading case on this subject, Continental Oil Co. v. Oil Conservation Com'n, 70 N. M. 310, 373 P.2d 809 (1962). Complete and detailed findings were made on the subject of marketing facilities, production capacities, market demand, drainage and counter-drainage, correlative rights and waste. No assertion is made that the findings do not support the conclusions.

Based upon the findings, the Commission ordered the pool to be prorated effective September 1, 1972. Certain rules and regulations of the Commission were made applicable to the pool. The allowable production was provided to be allocated on a monthly basis by first deducting the total allowable assigned to marginal wells and allocating the remaining allowable among the non-marginal wells in the proportion that each well's acreage factor bore to the total of the acreage factors for all non-marginal wells in the pool.

The Graces filed an application for rehearing as provided by § 65-3-22(a), N. M.S.A.1953 asserting that, based upon the record, the Commission did not have jurisdiction to institute gas prorationing in the pool, and that the Commission improperly included acreage within the horizontal limits of the pool which has wells thereon not in communication with, or in the same common source of supply as the other wells in the area.

The motion for rehearing was denied by the Commission's failure to act thereon within ten days. § 65-3-22(a).

The Graces then petitioned the district court for review of the order. The grounds stated in the application for rehearing defined and limited the issues which could be reviewed on appeal to the district court. § 65-3-22(b), N.M.S.A. 1953. In its amended form, the petition asserted that there was no substantial evidence to support the Commission's jurisdictional findings that waste, as defined by § 65-3-3, N.M.S.A.1953, is occurring or will occur in the pool unless production there-

from is restricted pursuant to § 65-3-13(c), N.M.S.A.1953. It further claimed that the order contained no basic conclusions of fact required to support an order designed to protect the Graces' correlative rights and that it deprived them of their property without due process of law.

During the proceedings in district court, Cities Service Oil Company was granted leave to intervene as a respondent and the City of Carlsbad was granted leave to intervene as a petitioner. Ultimately, the district court, after recounting the proceedings before the Commission and summarizing the Commission's findings and actions, found, inter alia, that the Commission did not act fraudulently, arbitrarily or capriciously in issuing the order; that the transcript of the proceedings before the Commission contained substantial evidence to support its findings; that the Commission did not exceed its authority in issuing the order, and that the order was not erroneous, invalid, improper or discriminatory. Judgment was entered and the Graces appeal.

[1] The district court reviewed the record of the administrative hearing and concluded as a matter of law that the Commission's order was substantially supported by the evidence and by applicable law. We make the same review of the Commission's action as did the district court. El Paso Natural Gas Co. v. Oil Conservation Com'n, 76 N.M. 268, 414 P.2d 496 (1966).

[2, 3] Most of the arguments advanced by the Graces center upon the adequacy of the record to support the Commission's action. That resolves itself into a question of whether or not the findings of fact are supported by substantial evidence, there being no claim that the findings do not support the conclusions of law or that the conclusions of law do not support the order. "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Rinker v. State Corporation Commission, 84 N.M. 622, 506 P.2d 783 (1973). In resolving those arguments of the appellant, we will not weigh the evidence. By definition, the inquiry is whether, on the record, the administrative body could reasonably make the findings. See 4 Davis, Administrative Law Treatise, § 29.01 (1958).

[4] Moreover, in considering these issues, we will give special weight and credence to the experience, technical competence and specialized knowledge of the Commission. Cf., McDaniel v. New Mexico Board of Medical Examiners, 86 N.M. 447, 525 P.2d 374 (1974); § 4-32-22, subd. A., N.M.S.A.1953.

The Graces assert that the Commission did not have "jurisdiction" to institute gas prorationing in the pool based upon the record before it. There are frequent references to "jurisdiction" in the Graces' briefs and some of their argument is addressed to the jurisdictional issue.

[5] There is not a shred of a jurisdictional question here. A lack of jurisdiction means an entire lack of power to hear or determine the case and the absence of authority over the subject matter or the parties. 20 Am.Jur.2d, "Courts" § 87 (1965).

As we said in Elwess v. Elwess, 73 N.M. 400, 404, 389 P.2d 7, 9 (1964):

> "The word 'jurisdiction' is a term of large and comprehensive import. It includes jurisdiction over the subject matter, over the parties, and power or authority to decide the particular matters presented, * * *."

[6] Certainly the Commission had jurisdiction of the subject matter—conservation of oil and gas—and it had authority to decide the matters presented. See § 65-3-5, N.M.S.A.1953. No question is raised concerning lack of jurisdiction over the parties.

> "The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction; * * *." State v. Patten, 41 N.M. 395, 399, 69 P. 2d 931, 933 (1937).

See Houston Fire and Casualty Insurance Co. v. Falls, 67 N.M. 189, 354 P.2d 127 (1960).

[7] The substance of appellant's argument is that the order was arbitrary, unreasonable, unlawful and capricious, because (a) in the first instance there was lack of substantial evidence that the wells were producing from the same pool; (b) the Commission failed to determine the amount of recoverable gas under each producer's tract or in the pool, and (c) the Order entered by the Commission deprives each producer of the opportunity to produce his fair share of the reserves in a quantity proportionate to the reserves in the pool.

These alleged shortcomings are said to be "jurisdictional." For the reasons mentioned, they are not. Rather, they are what Justice Carmody characterized in Continental Oil Co. v. Oil Conservation Com'n, supra, as "foundationary matters." By this he meant "basic conclusions of fact" which were held to be a prerequisite, together with support in the record, to sustain orders made by the Commission.

This court has in the past improperly phrased certain issues as jurisdictional. For example, in Sims v. Mechem, 72 N.M. 186, 382 P.2d 183 (1963) we held that the failure to find that a pooling order would prevent waste was "jurisdictional," and the case was incorrectly decided on that basis. Actually, the failure to find that the order would prevent waste in Sims was no more jurisdictional than would be a failure to find negligence in a negligence case. Both are matters of proof of an issue that has nothing to do with jurisdiction.

The words "jurisdiction" and "jurisdictional" are occasionally loosely used in Continental Oil (70 N.M. at 321, 373 P. 2d at 816). We understand that case to mean only that certain "basic conclusions of fact" must have been found as facts and supported by the record, and "are necessary requisites to the validity of an order" prorating production. El Paso Natural Gas Co. v. Oil Conservation Com'n, 76 N. M. 268, 414 P.2d 496 (1966).

We will consider the appellant's position upon the true issue presented, which is whether the findings in the order, which clearly comply with the mandate of Continental Oil, supra, are supported by substantial evidence in the record, devoid of any jurisdictional overtones.

[8] Appellants first contend there is not sufficient evidence that the pool is truly a pool. They assert that it was not shown that there is subsurface communication between the wells or that they draw from a common source of supply. This argument is without substance. The record shows that the Morrow member of the Pennsylvanian formation is non-homogenous, consisting of separate stringers varying in thickness and not continuous across the pool with a number of producing zones. The formation is characterized by thickening and thinning and discontinuity over short distances. There was evidence that, although there was no one pay zone common to every well in the pool, nevertheless, there was no one well producing from a zone wholly isolated from every other producing well in the field. There was thus evidence of communication between the wells and that the wells were producing from the same pool. On this record, we do not consider the trial court's sustaining of the Commission's findings to be unreasonable. The first subpoint is ruled adversely to the Graces.

[9, 10] In their second subpoint, the Graces complain that the Commission failed to determine the amount of recoverable gas under each producer's tract or in the pool. The argument has a dual thrust. The findings made by the Commission indicate that, for various reasons, determination of such reserves was not practicable. The Graces point to expert testimony adduced by them to the effect that such determination was possible.

We view this argument as an attack upon the findings of the Commission

which were sustained by the trial court. The findings disclose that the pool had been created by the Commission's order in the spring of 1969 and, thereafter, from time to time extended. At the time of the order, about five thousand four hundred and forty acres were included in the pool. By early 1972, only fourteen wells had been drilled in the entire pool and it had not been completely developed.

Bearing directly upon the contentions made by the Graces, the following findings were included among those made by the Commission:

"(70) That production from the Morrow formation in the subject pool is from many separate stringers which vary greatly in porosity, water saturation, and thickness, both within individual stringers and between stringers.

"(71) That the above-described stringers are not continuous across the pool, but are interconnected by the perforations in the various completions in the pool.

"(72) That due to the above-described variations in the stringers and the lack of continuity of the stringers, the effective feet of pay, porosity of the pay, and water saturation of pay underlying each developed tract cannot be practically determined from the data obtained at the wellbore.

"(73) That there are recoverable gas reserves underlying each of the developed 320 acre tracts within the horizontal limits of the subject pool; that there are 15 developed 320-acre tracts in the pool as defined by the Commission.

"(74) That due to the nature of the reservoir the amount of recoverable gas under each producer's tract cannot be practically determined in the subject pool by a formula which considers effective feet of pay, porosity, and water saturation.

"(75) That due to the nature of the reservoir the amount of recoverable gas under each producer's tract cannot be practically determined in the subject pool by a formula which considers only the deliverability of a well.

"(76) That the amount of gas that can be practicably obtained without waste by the owner of each property in the subject pool substantially in the proportion that the recoverable gas under his tract bears to the total recoverable gas in the pool can be practically determined best by allocating the allowable production among the wells on the basis of developed tract acreage compared to total developed tract acreage in the pool.

"(77) That considering the nature of the reservoir and the known extent of development, a proration formula based upon surface acreage will afford the owner of each property in the pool the opportunity to produce his just and equitable share of the gas in the pool so far as such can be practicably obtained without waste substantially in the proportion that the recoverable gas under such property bears to the total recoverable gas in the pool.

"(81) That considering the available reservoir information, a 100% surface acreage formula is presently the most reasonable basis for allocating the allowable production among the wells delivering to the gas transportation facilities.

"(83) That the adoption of a 100% surface acreage formula for allocating the allowable production in the subject pool will, insofar as is presently practicable, prevent drainage between producing tracts which is not equalized by counter-drainage.

"(85) That the adoption of a 100% surface acreage formula for allocating the allowable production in the subject pool will, insofar as is presently practicable, allow each operator the opportunity to produce his property ratably with all other operators connected to the same transportation facility."

There is evidence that development in this pool is such that data obtained at the well bore, such as effective feet of pay, water saturation and deliverability are not sufficiently reliable to practicably determine recoverable reserves under each tract. There is evidence that the only reasonably accurate method of making such a determination would be by use of a pressure decline curve based upon substantial withdrawals of gas, but that there has not been sufficient production from the field to obtain accurate results by this method. The first well did not commence production until September, 1969, and most of the wells were not connected until about six months prior to the hearing.

The Graces argue that it was possible to determine reserves by other methods, pointing to their expert testimony. One of their witnesses did purportedly compute reserves underlying three tracts. Apart from the fact that this merely argues the weight of the evidence, which we will not consider, it ignores the language of our statutes and the construction placed thereon by this court in Continental Oil, supra. Our statutes are not couched in terms of what is "possible" but speak of what is "practicable" or "practical." § 65-3-14, N.M.S.A.1953. In engineering contexts such as we here consider, what is practicable is of course possible, but what is possible may not be practicable. Cf., Pittsburg, C. C. & St. L. Ry. Co. v. Indianapolis, C. & S. T. Co., 169 Ind. 634, 81 N.E. 487 (1907). Upon this record, we do not find the trial court's approval of the subject findings of the Commission to have been unreasonable.

[11-13] The second part of the Graces' argument under this subpoint raises a pure legal question. They argue that, without qualification or exception, the Commission is powerless to enter a proration order without first having determined the amount of recoverable gas under each producer's tract and in the pool. They quote from Continental Oil, supra:

"The commission was here concerned with a formula for computing allowables, which is obviously directly related to correlative rights. In order to protect correlative rights, it is incumbent upon the commission to determine, 'so far as it is practical to do so,' certain foundationary matters, without which the correlative rights of the various owners cannot be ascertained. Therefore, the commission, by 'basic conclusions of fact' (or what might be termed 'findings'), must determine, insofar as practicable, (1) the amount of recoverable gas under each producer's tract; (2) the total amount of recoverable gas in the pool; (3) the proportion that (1) bears to (2); and (4) what portion of the arrived at proportion can be recovered *without waste*. That the extent of the correlative rights must first be determined before the commission can act to protect them is manifest." (Emphasis by the Court) 70 N.M. at 318-319, 373 P.2d at 814-815.

The Graces again ignore the phrase "insofar as practicable," which makes Continental Oil readily distinguishable. The Jalmat Pool involved in Continental had been in production for a considerable time. It had been prorated on a pure acreage formula in 1954. An application was made to change the formula and the Commission entered an order to modify the formula to take into account deliverability. The order from which that appeal was taken was entered in early 1958. The Jalmat pool therefore had a considerably longer production history and nothing appears in that opinion which would indicate existing geological problems camparable to those in this case.

"The commission made no finding, even *'insofar as can be practically determined,'* as to the amounts of recoverable gas in the pool or under the tracts." (Emphasis added). 70 N.M. at 319, 373 P.2d at 815

and:

"* * * Further, that portion of the same finding that there is a 'general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the recoverable gas in place under the tracts dedicated to said wells' is not tantamount to a finding that the new formula is based on the amounts of recoverable gas in the pool and under the tracts, *insofar as these amounts can be practically determined* and obtained without waste. *Lacking such findings,* or their equivalents, a supposedly valid order in current use cannot be replaced. Such findings are necessary requisites to the validity of the order, * * * ." (Emphasis added). 70 N.M. at 320, 373 P.2d at 815.

In Continental, no reason whatever appeared for the Commission's failure to determine the amount of recoverable gas under each producer's tract or in the pool and this court specifically recognized that this determination need only be made "insofar as these amounts can be practically determined." In this case, we are dealing with a very different situation and we have elaborate findings detailing reasons why the determination of such reserves was impracticable at the time of the hearing. We hold those findings valid.

The prime objective of the statutes under consideration is, "in the interest of the public welfare, to prevent waste of an irreplaceable natural resource." El Paso Natural Gas Co. v. Oil Conservation Com'n, supra. The Graces would have us hold that the Commission is powerless to enter proration orders in respect to newly discovered pools until sufficient data has been gleaned to make the reserve computations. We do not agree. Prevention of waste is paramount, and private rights, such as prevention of drainage not offset by counter-drainage and correlative rights must stand aside until it is practical to determine the amount of gas underlying each producer's tract or in the pool.

We hold that the Commission is not required as a prerequisite to the entry of a valid proration order, to first determine the amount of gas underlying each producer's tract and in the pool, in a case in which the Commission's findings demonstrate that such determinations are impracticable, and such findings are sustained by the record.

Other than the reservations expressed herein on Continental Oil's inaccurate use of the concept of jurisdiction, we reaffirm Continental Oil's requirements and continue to regard it as the primary oil and gas decision in New Mexico.

[14] As their final subpoint, the Graces argue that they have been deprived of the opportunity to produce their fair share of the reserves. What we have said adequately answers this contention. Nor do we deem it necessary to elaborate on their second point to the effect they were entitled to a stay of the district court's judgment. Section 65-3-22(c), N.M.S.A.1953 disposes of the contention.

The judgment of the district court is sustained.

It is so ordered.

JAMES A. MALONEY and STANLEY F. FROST, District Judges, concur.

the supervisor's directives and either failed or refused to comply. If respondent's understanding of what was required of him differed from that of the supervisor, respondent should have brought this discrepancy to the supervisor's attention in order to resolve it. Respondent neither complied with the supervisor's directives nor took steps to resolve any variance he perceived in what was required. Instead, respondent simply did nothing. Similarly, if respondent believed the time frame for the audit was too broad, he should have acted to obtain a resolution of the dispute. Instead, respondent failed to respond.

[2, 3] Additionally, the demands of respondent's other business do not justify his failure to comply with this Court's order imposing discipline. To retain the benefit of being on probation rather than being suspended from the practice of law, respondent must demonstrate strict compliance with the conditions of probation. *In re Schmidt*, 118 N.M. 213, 880 P.2d 310 (1994). In this case, respondent demonstrated indifference to his obligations and to retaining the privilege of practicing law and is no longer entitled to the benefit of having his indefinite suspension deferred.

NOW, THEREFORE, IT IS ORDERED that Victor R. Ruybalid is in contempt of this Court's order of August 18, 1994.

IT IS FURTHER ORDERED that the deferred status of the indefinite suspension imposed in the August 18, 1994, order hereby is revoked until such time when respondent can demonstrate to this Court that all conditions set forth in the conditional agreement not to contest and consent to discipline are satisfied.

IT IS FURTHER ORDERED that reinstatement shall be automatic upon a showing that all conditions have been met.

IT IS FURTHER ORDERED that should reinstatement occur before August 18, 1996, any balance of time remaining until then shall be on probationary status.

IT IS SO ORDERED.

897 P.2d 216

Albert R. FUGERE, Petitioner-Appellant,

v.

STATE of New Mexico, TAXATION AND REVENUE DEPARTMENT, MOTOR VEHICLE DIVISION, Respondent-Appellee.

No. 15649.

Court of Appeals of New Mexico.

April 6, 1995.

Certiorari Denied May 31, 1995.

Motorist was arrested for driving under the influence of alcohol, and he refused to submit to chemical test as ordered by police officer, alleging that test was unreliable and offering instead to take another test at police station. The District Court, Santa Fe County, Art Encinias, D.J., affirmed decision of Motor Vehicle Division of the Taxation and Revenue Department (MVD) revoking driver's license for one year for refusing to submit to breath test under New Mexico Implied Consent Act. Driver appealed. The Court of Appeals, Flores, J., held that: (1) driver's actions in refusing to submit to officer's test and requesting different test at police station constituted refusal to take breath test; (2) motorist did not cure refusal by consenting to take another test at police station; (3) motorist's due process rights were not violated; and (4) hearing officer did not act arbitrarily and capriciously in revoking driver's license.

Affirmed.

1. Automobiles ⇐144.2(3)

In reviewing administrative hearing officer's decision to revoke driver's license, state district court determines only whether reasonable grounds exist for revocation of driver's license based on record of administrative proceeding. NMSA 1978, § 66-8-112, subd. G.

2. Automobiles ⇐144.1(1.20)

Reasonable grounds for revocation of driver's license include (1) law enforcement officer must have had reasonable grounds to believe that person was driving or in actual physical control of motor vehicle within state while under influence of intoxicating liquor; (2) person must have been under arrest; (3) person must have refused to submit to chemical test upon request of law enforcement officer; and (4) law enforcement officer must have advised that failure to submit to test could result in revocation of privilege to drive.

3. Administrative Law and Procedure ⇐791

Standard of review for appeal from administrative agency is whether there is substantial evidence in record as whole to support agency's decision.

4. Administrative Law and Procedure ⇐791

For purposes of reviewing appeal from administrative agency, "substantial evidence" supporting agency's decision is evidence that reasonable mind might accept as adequate to support conclusion.

See publication Words and Phrases for other judicial constructions and definitions.

5. Automobiles ⇐144.2(3)

Determination of whether driver refused to submit to breath test is question of fact, not law.

6. Automobiles ⇐144.1(1.20)

Driver who repeatedly requested breath test on machine at police station while refusing to take test on machine at adult detention center effectively refused to take breath test within meaning of implied consent law which provides that motorist consents to chemical test of his breath or blood, as determined by law enforcement officer. NMSA 1978, § 66–8–107, subd. A.

7. Automobiles ⇐144.1(1.20)

Motorist's refusal to take law enforcement officer's breath test in officer's vehicle, accompanied by his consent to be tested on different machine at police station, was, at best, conditional consent, which was refusal to take test within meaning of implied consent law, which provides that motorist consents to chemical test of his breath or blood, as determined by law enforcement officer. NMSA 1978, § 66–8–107, subd. A.

8. Automobiles ⇐144.1(1.20)

In license suspension proceeding and subsequent appeal to district court, hearing officer and district court were not required to consider motorist's subjective intent in refusing to take breath test where officer repeatedly demanded that motorist comply with requirement of implied consent law that motorist submit to test determined by officer; when motorist declined to take test, he exhibited positive intention to disobey. NMSA 1978, § 66–8–107, subd. A.

9. Automobiles ⇐144.1(1.20)

Motorist will be allowed to rescind initial refusal to consent to breath test (1) when he does so before elapse of reasonable length of time it would take to understand consequences of his refusal; (2) when such test would still be accurate; (3) when testing equipment or facilities are still readily available; (4) when honoring request for test, following prior first refusal, will result in no substantial inconvenience or expense to the police; and (5) when individual requesting test has been in police custody and under observation for whole time since his arrest.

10. Automobiles ⇐144.1(1.20)

By failing to submit to breath test requested by police officer, motorist's actions constituted refusal to consent to breath test under implied consent law, and his offer to take test on different machine at police station instead did not cure his refusal. NMSA 1978, § 66–8–107, subd. A.

11. Automobiles ⇐144.1(1.20)

Under Implied Consent Act, motorist cannot refuse to take chemical test of breath or blood designated by law enforcement and as provided by statute merely because he believes such tests are unreliable; proper way for motorist to challenge reliability of test would be to take test designated by police officer, to take additional test of his own choosing, and to thereafter challenge

any disparate result. NMSA 1978, § 66–8–107, subd. A.

12. **Automobiles** ⇐414, 415

Under implied consent law, motorist cannot choose which breath or blood test will be administered; police officer will determine test to be given, a chemical test either of breath or blood. NMSA 1978, § 66–8–107, subd. A.

13. **Automobiles** ⇐411

Chemical test specified by implied consent statute to determine motorist's blood alcohol content may not be deemed unreliable as matter of law. NMSA 1978, § 66–8–107, subd. A.

14. **Obstructing Justice** ⇐8

Person has right to self-defense against police officer when excessive force is used to effect an arrest. U.S.C.A. Const.Amend. 5.

15. **Obstructing Justice** ⇐8

Right to self-defense against police officer when excessive force is used to effect an arrest exists whether arrest is lawful or unlawful. U.S.C.A. Const.Amend. 5.

16. **Obstructing Justice** ⇐3, 8

Although one has right to self-defense against use of excessive force by police officer making arrest, one must still submit to the arrest; legal challenges to the arrest can then be raised by following appropriate legal processes.

17. **Automobiles** ⇐414

Motorist arrested for driving while intoxicated must take test designated by law enforcement officer, and as provided by Implied Consent Act, and if motorist then wants to challenge reliability of chemical test taken, he or she can do so at driver's license revocation hearing. NMSA 1978, § 66–8–107, subd. A.

18. **Automobiles** ⇐411

Due process does not require hearing on reliability of breath test to be conducted on motorist in the field; there is no such requirement of immediacy because due process merely requires hearing within reasonable time period. U.S.C.A. Const.Amend. 5.

19. **Constitutional Law** ⇐251.2

Generally, where there is claim of denial of due process, there must be showing of prejudice. U.S.C.A. Const.Amend. 5.

20. **Automobiles** ⇐414

Constitutional Law ⇐287.3

Motorist's due process rights were not violated by police officer's order to submit to allegedly unreliable breath test; motorist arrested for driving while intoxicated must take test designated by law enforcement officer, and if motorist then wants to challenge reliability of chemical test taken, he or she can do so at driver's license revocation hearing.

21. **Automobiles** ⇐144.2(1)

Motorist wishing to challenge reliability of breath or blood test or accuracy of results of such test must do so at driver's license revocation hearing within reasonable 90–day time period prescribed under Implied Consent Act. NMSA 1978, § 66–8–112, subd. F.

22. **Automobiles** ⇐144.1(1.20)

Hearing officer's decision to revoke driver's license for refusing to take breath test ordered by police officer was not arbitrary and capricious where hearing officer did not exceed its statutory authority or violate its rules when it revoked license for one year, and hearing officer did not deprive motorist of his due process rights. NMSA 1978, § 66–8–107, subd. A.

Dan Cron, Rothstein, Donatelli, Hughes, Dahlstrom, Cron & Schoenburg, Santa Fe, for petitioner-appellant.

Tom Udall, Atty. Gen., Judith Mellow, Sp. Asst. Atty. Gen., DWI Legal Section, Santa Fe, for respondent-appellee.

OPINION

FLORES, Judge.

The opinion filed February 28, 1995 is withdrawn and the following substituted therefor.

Albert R. Fugere appeals from an order of the district court affirming the decision of the Motor Vehicle Division of the Taxation

and Revenue Department (MVD) revoking his driver's license for one year for refusing to submit to a breath test under the New Mexico Implied Consent Act, NMSA 1978, §§ 66–8–105 to –112 (Repl.Pamp. 1987 & Cum.Supp.1993) (the Act). We consolidate Fugere's issues on appeal and address them as follows: (1) whether Fugere's actions constituted a refusal to take a breath test and, if so, whether Fugere cured that refusal with a subsequent consent; (2) whether Fugere's due process rights were violated; and (3) whether the hearing officer acted arbitrarily and capriciously in revoking Fugere's driver's license. We affirm.

Before turning to the facts of the appeal, we first address Fugere's motion to strike certain exhibits, and any reference to them, which he contends were introduced as evidence for the first time on appeal. Fugere filed a motion to strike in response to the MVD's alleged improper attempt to supplement the record. The motion was held in abeyance pending submission of the case to a panel. Specifically, Fugere contends that a document from the Scientific Laboratory Division and a portion of the Driving While Intoxicated Prosecutor's Manual referred to by the MVD in its answer brief should be stricken because they were not introduced into evidence during any prior proceedings. *See Baca v. Swift & Co.*, 74 N.M. 211, 215, 392 P.2d 407, 411 (1964). After reviewing the record of the administrative hearing, we grant Fugere's motion and strike the exhibits. We note that neither of the exhibits referred to were relied upon by this Court in deciding this case on appeal. *See State ex rel. Alleman v. Shoats*, 101 N.M. 512, 517, 684 P.2d 1177, 1182 (Ct.App.1984) (matters not of record will not be considered on appeal).

FACTS

The following facts were established at the administrative hearing. On November 28, 1993, Fugere was stopped by Officer Roger Romero of the Santa Fe Police Department. Officer Romero stopped Fugere for failing to maintain his lane, accelerating rapidly, clipping a median, weaving, and nearly causing an accident by failing to yield to an oncoming vehicle. Fugere admitted to drinking three beers. After noticing a strong odor of alcohol on Fugere's breath, his blood-shot watery eyes, and his slurred speech, Officer Romero administered a field sobriety test. Based on the results of the field sobriety test, Officer Romero placed Fugere under arrest for driving while intoxicated. Fugere was then asked to take a breath test to determine his blood-alcohol content. Officer Romero advised Fugere that under the Act, he was required to submit to a breath test and that if he refused to take the test, he could lose his license for a period of one year.

At that point, Fugere refused to take the test on the RBT III Alco–Sensor (RBT) located in Officer Romero's vehicle, but stated that he would agree to take the breath test on the stationary breathalyzer machine located at the police station. Officer Romero advised Fugere that Fugere could not select what test was to be administered, but that if he took the RBT test, he could take any additional tests thereafter, if he chose to do so. Fugere was offered the breath test on the RBT several times but he continually responded that he wanted to take the test on the machine at the police station because he did not trust the RBT. Shortly thereafter, Officer Romero transported Fugere to the Adult Detention Center and, once again, offered Fugere the test on the RBT. Fugere again refused, stating that he wanted to take the test on the machine at the police station. Determining that Fugere's responses constituted a refusal, Officer Romero proceeded to cite, jail, and process Fugere. Fugere never took a chemical breath test to determine his blood-alcohol content.

Testimony established that the distance from the point where Fugere was stopped to the Adult Detention Center, where Fugere was incarcerated, was about two and a half miles, or approximately five minutes away. Also, Officer Romero testified that the Adult Detention Center and the police station were very close, approximately one minute apart. Officer Romero confirmed that Fugere was under his observation from the time Fugere was stopped to the time he was incarcerated. There was also testimony that there was a stationary breathalyzer machine at the police station and the Adult Detention Center. Of-

ficer Romero
the model at
not certified

At the lice
was qualified
cal testing f
alcohol in the
concerning th
that the RBT
purposes. T
(1) Officer R
to believe tha
vehicle under
liquor or drug
Fugere; (3)
than ninety c
tion; and (4)
chemical test
to do so could
license for or
determined th
reliability, or
devices was ir
took the brea

Fugere's dr
period of one
First Judicial
the license re
ment. Fuger

DISCUSSION

I. Applicab

Fugere was
November 28,
effect at that t
1993, but the
effective until
decide whethe
same under th
the Act. The
provided that
motor vehicle
deemed to hav
cal tests of hi
mined by a
Section 66–8–1
phasis added).
shall be admi
law enforceme
grounds to bel
driving a mot
while under th
quor or drug."

ficer Romero testified that he had never used the model at the detention center and was not certified to use it.

At the license revocation hearing, Fugere was qualified as an expert witness in chemical testing for alcohol and physiology for alcohol in the human body. Fugere testified concerning the factual basis for his opinion that the RBT was unreliable for evidentiary purposes. The hearing officer found that: (1) Officer Romero had reasonable grounds to believe that Fugere was driving a motor vehicle under the influence of intoxicating liquor or drugs; (2) Officer Romero arrested Fugere; (3) the hearing was held not later than ninety days after the notice of revocation; and (4) Fugere refused to submit to a chemical test after being advised that failure to do so could result in the revocation of his license for one year. The hearing officer determined that Fugere's experience on the reliability, or lack thereof, of breath test devices was irrelevant because Fugere never took the breath test requested of him.

Fugere's driver's license was revoked for a period of one year. Fugere appealed to the First Judicial District Court which affirmed the license revocation in an Order of Judgment. Fugere appeals that order.

DISCUSSION

I. Applicable Statutes

Fugere was stopped by Officer Romero on November 28, 1993, and we apply the law in effect at that time. The Act was amended in 1993, but the amendments did not become effective until January 1, 1994. We do not decide whether the outcome would be the same under the most recent amendments to the Act. The former and applicable Act provided that "[a]ny person who operates a motor vehicle within this state *shall be deemed to have given consent* ... to chemical tests of his breath or blood, *as determined by a law enforcement officer....*" Section 66–8–107(A) (Repl.Pamp.1987) (emphasis added). "A test of blood or breath *shall be administered at the direction of a law enforcement officer* having reasonable grounds to believe the person to have been driving a motor vehicle within this state while under the influence of intoxicating liquor or drug." Section 66–8–107(B) (emphasis added). If the motorist refuses to take the test designated by the officer, then the director of the MVD can revoke the motorist's driver's license for one year. Section 66–8–111(B). The Act further provides that in addition to any test performed at the direction of a law enforcement officer, a person being tested must also be given an opportunity to arrange for a chemical test by any qualified person of his choosing. Section 66–8–109(B).

II. Standard of Review

[1, 2] In reviewing the hearing officer's decision to revoke a person's driver's license, the district court determines "only whether reasonable grounds exist for revocation ... of the person's license ... based on the record of the administrative proceeding." Section 66–8–112(G). Reasonable grounds include:

> (1) the law enforcement officer must have had reasonable grounds to believe that the person was driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor; (2) the person must have been under arrest; (3) the person must have refused to submit to a chemical test upon request of the law enforcement officer[;] and (4) the law enforcement officer must have advised that the failure to submit to a test could result in revocation of his privilege to drive.

State, Dep't. of Transp., Motor Vehicle Div. v. Romero, 106 N.M. 657, 658–59, 748 P.2d 30, 31–32 (Ct.App.1987) (quoting *State, Dep't. of Motor Vehicles v. Gober*, 85 N.M. 457, 459, 513 P.2d 391, 393 (1973)). The findings made by the hearing officer at the revocation hearing establish that reasonable grounds existed for the revocation of Fugere's driver's license.

[3–5] The standard of review for an appeal from an administrative agency is whether there is substantial evidence in the record as a whole to support the agency's decision. *Romero*, 106 N.M. at 659, 748 P.2d at 32. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Rutter & Wilbanks*

Corp. v. Oil Conservation Comm'n, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). The determination of whether Fugere refused "to submit to a breath test is a question of fact, not of law." *Romero*, 106 N.M. at 659, 748 P.2d at 32. Since this is a factual question, the hearing officer's determination that Fugere's acts constituted a refusal may only be overturned if not supported by the record as a whole. *Id.* at 660, 748 P.2d at 33.

III. Refusal to Take Test

[6] Fugere contends that his actions did not constitute a refusal to take a breath test. He argues that by repeatedly requesting a breath test on the machine at the police station, he was not refusing to take a chemical breath test. This argument is without merit. The Act provides that a motorist consents to "chemical tests of his breath or blood, *as determined by a law enforcement officer.*" Section 66–8–107(A) (emphasis added.) To grant Fugere's contention would render this mandatory provision meaningless.

[7] Fugere's refusal to take Officer Romero's test, accompanied by his consent to be tested on the machine at the police station, was, at best, a conditional consent. A conditional consent is a refusal to take the test. *See Payne v. Director of Motor Vehicles*, 235 Cal.App.3d 1514, 1 Cal.Rptr.2d 528, 530 (1991) (consent to blood test on the condition that a physician administer it constituted a refusal); *Goerig v. State*, 121 Idaho 26, 822 P.2d 545, 548 (1991) (consent to take a breath test on the condition that handcuffs be removed is refusal); *Schroeder v. State Dep't. of Motor Vehicles & Pub. Safety*, 105 Nev. 179, 772 P.2d 1278, 1279–80 (1989) (per curiam) (consent conditioned on request to speak to attorney before taking a breath test is a refusal); *Skinner v. Motor Vehicles Div.*, 107 Or.App. 529, 812 P.2d 46, 47 (1991) (per curiam) (refusal to take breath test until attorney was present at test was refusal); *Croissant v. Commonwealth*, 114 Pa.Cmwlth. 601, 539 A.2d 492, 495 (1988) (anything less than unqualified assent to take a breath test constitutes a refusal); *Gibbs v. Bechtold*, 180 W.Va. 216, 376 S.E.2d 110, 112 (1988) (where conduct or words manifest reluctance or qualifies assent to take breath test for reasons unrelated to the procedure of the test, refusal is sufficiently established).

Furthermore, Fugere had the right to request that a test be administered by a number of other qualified individuals of his own choosing, in addition to the test administered by the officer. Section 66–8–109(B). Fugere could have exercised this right and challenged the results of Officer Romero's test thereafter.

[8] Fugere further asserts that under *Romero*, the hearing officer and the district court were required to consider Fugere's subjective intent and failure to do so was error. In *Romero*, we noted that we have never decided what constitutes refusal under the Act and observed that according to *Black's Law Dictionary* 1282 (6th ed. 1990), "'[r]efusal'" means "'[t]he declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey.'" *Romero*, 106 N.M. at 659, 748 P.2d at 32. Here, Officer Romero repeatedly demanded that Fugere comply with the requirement of law that Fugere submit to the test determined by Officer Romero. Fugere declined to do so and thereby exhibited a positive intention to disobey, regardless of any subjective intent.

Additionally, Fugere argues that even if his actions constituted a refusal, he cured it by agreeing to take a breath test on the machine at the police station. Fugere relies on *State v. Suazo*, 117 N.M. 785, 877 P.2d 1088 (1994), which allows a motorist, under certain circumstances, to rescind an initial refusal to take a chemical test with a subsequent consent. In *Suazo*, the defendant was arrested following a two-vehicle accident and was asked to take a breath test. *Id.* at 786, 877 P.2d at 1089. The defendant did not breathe hard enough or long enough to provide an adequate breath sample. *Id.* at 787, 877 P.2d at 1090. Determining that the defendant's actions were willful and amounted to a refusal to take the test, the officer informed the defendant that his license was revoked for one year. *Id.* After requesting to be taken to the hospital for medical treatment, the defendant spoke with his attorney.

Id. Thereafter, the defendant agreed to take a blood test and the test was administered three hours and forty-five minutes after the accident. *Id.* The defendant later claimed that he could not give an adequate breath sample because his mouth was injured in the accident. *Id.*

[9] In adopting a subsequent consent rule, our Supreme Court established a five-part test. A motorist will be allowed to rescind an initial refusal:

> (1) when he does so before the elapse of the reasonable length of time it would take to understand the consequences of his refusal;
>
> (2) when such a test would still be accurate;
>
> (3) when testing equipment or facilities are still readily available;
>
> (4) when honoring a request for a test, following a prior first refusal, will result in no substantial inconvenience or expense to the police; and
>
> (5) when the individual requesting the test has been in police custody and under observation for the whole time since his arrest.

Id. at 793, 877 P.2d at 1096. After establishing the factors to consider in determining subsequent consent, our Supreme Court concluded "as a matter of law that [the defendant's] change of mind after two hours and fifteen minutes was unreasonable." *Id.* at 794, 877 P.2d at 1097.

Although *Suazo* is somewhat factually similar to this case, we find it distinguishable. Fugere is correct in pointing out that in *Suazo* our Supreme Court did not consider the fact that the defendant agreed to take a test different than the one offered by the arresting officer. Instead, the Court's decision was based on the time period that elapsed between the initial refusal to take the breath test and the time that the blood test was eventually administered. *Id.* Fugere argues that by contrast, the time between his initial refusal and the time that he could have had a breath test administered on the stationary machine at the police station was only a matter of minutes. Nevertheless, unlike Fugere, the defendant in *Suazo* cooperated with the police officer and made three attempts to provide a breath sample. *Id.* at 786–87, 877 P.2d at 1089–90. However, he was unable to do so, presumably due to his injuries, and for that reason he offered to take a blood test instead. *Id.* Fugere, on the other hand, failed to cooperate with Officer Romero's request to take a breath test on the RBT and insisted on taking the test on a machine of his own choosing.

Moreover, the subsequent consent rule recognized in *Suazo* was initially adopted to alleviate the harshness of a bright-line rule that "would rigidly and unreasonably bind an arrested person to his first words spoken, no matter how quickly and under what circumstances those words are withdrawn." *Id.* at 789, 877 P.2d at 1092 (quoting *State v. Moore*, 62 Haw. 301, 614 P.2d 931, 935 (1980)). In adopting the subsequent consent rule, our Supreme Court noted that the test would answer the concerns of both advocates and opponents of a bright-line rule "by offering the flustered motorist a fair chance to understand his or her rights." *Id.* 117 N.M. at 793, 877 P.2d at 1096. Here, Fugere did not fall victim to a rash, unconsidered choice. Instead, he was consciously testing the limits of the law by attempting to choose his own test and in the process delaying the taking of the breath test requested of him.

[10] We determine that there is substantial evidence in the record as a whole to support the hearing officer's determination that Fugere refused to submit to a breath test. By failing to submit to the breath test requested by Officer Romero, Fugere's actions constituted a refusal under the Act, irrespective of his offer to take the test on the machine at the police station.

[11] Accordingly, we hold that under the Act, a motorist cannot refuse to take a chemical test of breath or blood designated by law enforcement and as provided by statute merely because he believes such tests are unreliable. *See In re Ball*, 11 Kan.App.2d 216, 719 P.2d 750 (1986) (refusal to take breath test based on the belief that breathalyzer machine was not working properly was unreasonable); *Elliott v. Dorius*, 557 P.2d 759, 762 (Utah 1976) (motorist's demand for

blood test after being informed that blood test was not available was not reasonable cause for refusal to submit to breath test under the statute); *In re Bardwell*, 83 Wis.2d 891, 266 N.W.2d 618 (1978) (motorist was not entitled to refuse to take a breath test because he believed that the breath machine was unreliable). Thus, in the instant case, the proper way for Fugere to have challenged the reliability of the RBT would have been for him to take the test designated by Officer Romero, to take an additional test of his own choosing, and to thereafter challenge any disparate results.

IV. Due Process Claim

Fugere argues that his due process rights were violated by Officer Romero's order to submit to an unreliable test, the hearing officer's failure to find that the RBT was unreliable, and the hearing officer's failure to require the State to provide a threshold showing that the RBT was reliable.

[12, 13] Fugere argues that due process "presumes that the chemical test determined by the law enforcement officer must be a reliable test." He further asserts that the mere fact that a police officer chooses a particular test does not mean that the test is reliable. Fugere seems to suggest that he has a due process right to choose the test administered to him if he believes that the test chosen by the police officer is unreliable. This argument is meritless. A motorist cannot choose which test will be administered. The statute specifies that the police officer will determine the test to be given, "a chemical [test, either] of ... breath or blood." Section 66–8–107(A). Moreover, "[a] chemical test specified by statute may not be deemed unreliable as a matter of law." *Elliott*, 557 P.2d at 762; *Bardwell*, 266 N.W.2d at 622.

[14, 15] Fugere further argues that his due process right to refuse to take a breath test he believes is unreliable is analogous to the right to self-defense against a police officer. A person has a right to self-defense against a police officer when excessive force is used to effect an arrest. *State v. Gonzales*, 97 N.M. 607, 610, 642 P.2d 210, 213 (Ct.App.1982); *State v. Kraul*, 90 N.M. 314, 318–19, 563 P.2d 108, 112–13 (Ct.App.), *cert. denied*, 90 N.M. 637, 567 P.2d 486 (1977). The right exists whether the arrest is lawful or unlawful. *Kraul*, 90 N.M. at 318–19, 563 P.2d at 112–13. Fugere infers that because "[l]egal precedent exists to allow citizens to disregard unreasonable actions by the police," he has a due process right to refuse to submit to a chemical test that is unreliable.

[16–20] Fugere's contention is misplaced. Although one has a right to self-defense against the use of excessive force by a police officer making an arrest, one must still submit to the arrest. Legal challenges to the arrest can then be raised by following the appropriate legal processes. *See State v. Doe*, 92 N.M. 100, 102–03, 583 P.2d 464, 466–67 (1978) (holding that one cannot use force to resist a search by a police officer in the performance of his duties whether or not the arrest is illegal but should submit peaceably and seek legal recourse). It logically follows that a motorist arrested for driving while intoxicated must take the test designated by law enforcement, and as provided by statute. If a motorist wants to then challenge the reliability of the chemical test taken, he or she can do so at the revocation hearing. To rule otherwise would substantially interfere with a police officer's ability to enforce the Act.

Contrary to what Fugere suggests, due process does not require a hearing on the reliability of the breath test to be conducted in the field. There is no such requirement of immediacy. Due process merely requires a hearing within a reasonable time. *State v. Chavez*, 102 N.M. 279, 281, 694 P.2d 927, 929 (Ct.App.1985) (revocation hearing must be held within reasonable time after probationer is taken into custody).

Generally, where there is a claim of denial of due process, there must be a showing of prejudice. *Deats v. State*, 80 N.M. 77, 80, 451 P.2d 981, 984 (1969). Here, Fugere has failed to show that he would have suffered any prejudice by taking the RBT test and later challenging its reliability. If anything, Fugere's argument that the RBT is unreliable would have been strengthened had he taken the test on the RBT, and then been

able to demonstrate a different result on the stationary breathalyzer at the police station.

Fugere further argues that his unchallenged, uncontradicted testimony concerning the RBT established a prima facie case that the RBT was unreliable. Citing *Duke City Lumber Co. v. New Mexico Environmental Improvement Board*, 95 N.M. 401, 403, 622 P.2d 709, 711 (Ct.App.1980), *cert. denied*, 95 N.M. 426, 622 P.2d 1046 (1981), he claims that the prima facie showing shifted the burden to the State to prove the RBT's reliability. Fugere asserts that absent such proof, the hearing officer was required to find that the RBT was unreliable. Instead, the hearing officer considered the reliability of the RBT to be irrelevant.

Just as the hearing officer considered the RBT's reliability to be irrelevant, we too determine that Fugere's expert opinion regarding the RBT's reliability is irrelevant because Fugere never took the RBT breath test. Fugere was under an obligation to take the breath test designated by Officer Romero. Section 68–8–107. As earlier stated, under the Act, citizens do not have the right to choose the test they will take. The test that will be administered is designated by law enforcement, as provided by statute. *See* §§ 66–8–107, –109(B). There was testimony at the revocation hearing that the RBT is an approved breath testing device under the regulations of the Scientific Laboratory division. Had Fugere taken the RBT test, the outcome may have been different. In that situation, Fugere could have challenged the RBT's reliability. Only then would the reliability of the RBT be relevant.

Additionally, Fugere asserts that because there was proper objection to the accuracy of the RBT breath test, the hearing officer had to require a threshold showing of the RBT's validity. *See Plummer v. Devore*, 114 N.M. 243, 245, 836 P.2d 1264, 1266 (Ct.App.) (upon proper objection, there must be threshold showing of validity of breath test results as foundation for admission of evidence), *cert. denied*, 114 N.M. 82, 835 P.2d 80 (1992). However, *Plummer* is distinguishable because the defendant in that case, unlike Fugere, took the designated test and challenged the validity of the results because of testimony that the machine had not been calibrated for five months at the time the defendant took the test. *Id.* at 244–45, 836 P.2d at 1265–66. In this case, Fugere never submitted to the breath test requested of him, so there are no results to challenge. Consequently, we reject Fugere's argument.

[21] Therefore, just as in the context of a probation revocation hearing, a motorist wishing to challenge the reliability of a breath or blood test or the accuracy of the results of such tests must do so at the license revocation hearing within the reasonable ninety-day time period prescribed under Section 66–8–112(F). A challenge may only be made after a motorist has taken the test designated by law enforcement.

V. Arbitrary and Capricious Action by Hearing Officer

[22] The final issue raised on appeal is whether the decision of the hearing officer to revoke Fugere's license is arbitrary and capricious.

> An abuse of discretion is established if the agency or lower court has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. An abuse of discretion will also be found when the decision is contrary to logic and reason.
>
> On appeal, the role of an appellate court in determining whether an administrative agency has abused its discretion by acting in an arbitrary and capricious manner, is to review the record to determine whether there has been unreasoned action without proper consideration in disregard for the facts and circumstances.

Perkins v. Department of Human Servs., 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct.App.1987) (citations omitted.)

As discussed above, the hearing officer did not exceed its statutory authority nor violate its rules when it revoked Fugere's driver's license for one year. Nor did the hearing officer deprive Fugere of his due process rights. Finally, the findings of the hearing officer are supported by the evidence and the decision is supported by the findings. Ac-

cordingly, we hold that the hearing officer's decision is not arbitrary or capricious.

CONCLUSION

For the foregoing reasons, we affirm the district court's Order and Judgment affirming the revocation of Fugere's driver's license for one year.

IT IS SO ORDERED.

PICKARD and BLACK, JJ., concur.

897 P.2d 225

STATE of New Mexico, Plaintiff–Appellee,

v.

Michael J. HANDA, Defendant–Appellant.

No. 15541.

Court of Appeals of New Mexico.

April 12, 1995.

Certiorari Denied May 31, 1995.

Defendant was convicted in the District Court, Santa Fe County, Bruce E. Kaufman, D.J., of two counts of assault with intent to commit violent felony on police officer, being a felon in possession of firearm, and being habitual offender. Defendant appealed. The Court of Appeals, Flores, J., held that: (1) defendant's guilty plea did not bar him from raising double jeopardy claim on appeal; (2) conviction and sentence on two counts of assault violated double jeopardy; (3) criminal reformation charging defendant as habitual offender was made part of the record; (4) trial court properly used conditional discharge to enhance defendant's sentence; and (5) trial court did not place defendant in double jeopardy by using prior felony to convict him as felon in possession of firearm and to enhance assault sentences.

Ordered accordingly.

1. Criminal Law ⇐1026.10(2.1)

Guilty plea generally waives defendant's right to appeal.

2. Courts ⇐100(1)

Ruling that conditional guilty plea or nolo contendere used to reserve specific issues for appeal must be in writing and must specify particular pretrial issue for appeal with approval of court and consent of prosecution applied to case on appeal when ruling was announced.

3. Criminal Law ⇐1026.10(5), 1045

One "preserves" issue for appeal by invoking ruling from court on question; one "reserves" issue for appeal by specifying issue as condition to guilty plea.

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐1026.10(5)

Although defendant pleaded guilty to two counts of assault on peace officer, defendant reserved right to raise double jeopardy defense on appeal, where it was obvious to trial court and state that defendant intended to seek appellate review on double jeopardy issue, neither trial court nor state indicated that they were opposed, defendant had no reason to doubt his right to raise issue on appeal since case calling right into doubt had not yet been decided, and charges in all three counts of indictment appeared to be identical. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

5. Double Jeopardy ⇐132.1

Factors used in determining whether acts are separate and distinct, for double jeopardy analysis, include the time between the criminal acts, location of victim at time of each criminal act, existence of any intervening event, distinctions in manner of committing criminal acts, defendant's intent, and number of victims. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15; NMSA 1978, § 30–1–10.

6. Double Jeopardy ⇐141

Assault arising from series of three successive shots to police officer, not separated by significant amount of time, and arising

120 N.M. 778, 907 P.2d 182 ZAMORA V. VILLAGE OF RUIDOSO DOWNS (S. Ct. 1995) 1995 N.M. Lexis 358

ROBERT ZAMORA, Plaintiff-Appellant,
vs.
VILLAGE OF RUIDOSO DOWNS, Defendant-Appellee.

No. 22,107
SUPREME COURT OF NEW MEXICO
120 N.M. 778, 907 P.2d 182, 1995 N.M. LEXIS 358
October 26, 1995, FILED
APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY. Richard A. Parsons, District Judge.

COUNSEL

Hawthorne & Hawthorne, P.A., Charles E. Hawthorne, Ruidoso, New Mexico, for Appellant.
J. Robert Beauvais, P.A., J. Robert Beauvais, Ruidoso, New Mexico, for Appellee.

JUDGES

JOSEPH F. BACA, Chief Justice, RICHARD E. RANSOM, Justice, GENE E. FRANCHINI, Justice, STANLEY F. FROST, Justice, PAMELA B. MINZNER, Justice, concur.
AUTHOR: BACA

OPINION

*{*779}* **OPINION**

BACA, Chief Justice.

{1} Appellant Robert Zamora appeals from a district court order granting a motion to dismiss in favor of Appellee Village of Ruidoso Downs. We address two issues on appeal: (1) Whether the district court erred when it concluded that the procedure to appeal a village personnel board's administrative decision was to petition the district court for a writ of certiorari, and (2) whether the district court erred when it concluded that Zamora failed to perfect a timely appeal. We review this case pursuant to SCRA 1986, 12-102(A)(1) (Repl. Pamp. 1992), affirm on the first issue, and reverse and remand on the second issue.

*{*780}* **I.**

{2} On November 13, 1986, Zamora was employed by the Village, and on March 1, 1987, he became a permanent employee. On February 25, 1990, Zamora was injured in a non-employment-related accident. Pursuant to Section 3-9-27 of the Ruidoso Village Ordinance, the mayor granted Zamora a six-month disability leave without pay.[1] On April 23 Zamora received a partial medical release and requested to be assigned to light-duty work. The mayor refused to assign light-duty work to Zamora until he received a full medical release.

{3} On September 17 the Village notified Zamora that his six-month disability leave had expired and that he was relieved of his duties. On October 2 Zamora filed a written request

before the Village Board of Trustees to appeal the Mayor's decision to terminate his employment. The Board of Trustees, sitting as the Ruidoso Downs Personnel Board, granted Zamora's request. On October 20, after hearing the appeal, the Board upheld the Mayor's decision to terminate Zamora's employment.

{4} On February 3, 1993, Zamora filed a complaint in district court for breach of employment contract and wrongful termination, alleging that the Ordinance required the Village to assign him to light-duty work.[2] On November 15 the Village filed a motion for summary judgment in which it conceded that the Ordinance was an implied employment contract but argued that there was no light-duty work available to which Zamora could be assigned. On January 5, 1994, the Village filed a motion to dismiss pursuant to SCRA 1986, 1-012(B)(6) (Repl. Pamp. 1991). The Village argued that absent a statute providing otherwise, Zamora can appeal the Board's administrative decision only by first petitioning the district court for a writ of certiorari. The Village also argued that the petition for a writ of certiorari must be filed within thirty days of the Board's administrative decision and that, by filing his complaint twenty-eight months after the fact, Zamora failed to perfect a timely appeal. On March 11 the district court filed an order granting the motion to dismiss. Zamora now appeals.

II.

{5} We address whether the district court erred by concluding the procedure to appeal a village personnel board's administrative decision was to petition the district court for a writ of certiorari. Zamora argues that the district court erred, and his argument proceeds on two points: (1) The Board lacks jurisdiction to hear his claim for breach of an implied employment contract, and (2) the scope of review at the district court is de novo. We disagree with Zamora and hold that, unless otherwise provided by statute, the correct procedure to appeal a personnel board's administrative decision is to petition the district court for a writ of certiorari.

{6} "Dismissal of a contract claim on a Rule 12(b)(6) motion is a legal, not evidentiary, determination . . . . '**The court must accept as true all the facts which are pled.**'" **Vigil v. Arzola,** 101 N.M. 687, 687-88, 687 P.2d 1038, 1038-39 (1984) (quoting **McCasland v. Prather,** 92 N.M. 192, 194, 585 P.2d 336, 338 (Ct. App. 1978)).

A.

{7} Zamora argues that the Board does not have jurisdiction to hear his breach of implied employment contract claim because "all cases dealing with wrongful discharge by breach of contract in New Mexico have been tried **de novo.** We disagree.

{8} The Board derives its authority over employment matters from NMSA 1978, Section 3-13-4(A) (Repl. Pamp. 1985), which authorizes municipalities, including the Village, to establish by ordinance a merit system for {*781} the hiring, promotion, and discharge of municipal employees. Municipalities are also authorized to create a personnel board to administer the ordinance, Section 3-13-4(A)(1), and to establish rules including methods of employment, promotion, demotion, suspension, and discharge, Section 3-13-4(A)(2)(e). The ordinance is a "contract of employment between the municipality and an employee . . . ." Section

3-13-4(C). Accordingly, the Village adopted an Ordinance that includes sections relating to employee discipline, termination for "just cause," and for appeal of discipline and termination decisions to the personnel board. Thus, the Board was acting within its jurisdiction afforded by statute.

{9} New Mexico courts have stated that an administrative body acts in a "quasi-judicial" capacity when it is "required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." **Dugger v. City of Santa Fe,** 114 N.M. 47, 50, 834 P.2d 424, 427 (Ct. App.) (quoting **Black's Law Dictionary** 1121 (5th ed. 1979)), **cert. quashed,** 113 N.M. 744, 832 P.2d 1223 (1992). Moreover, it has long been held that "quasi[-]judicial" capacity is determined by "the nature of the act to be performed rather than the . . . board which performs it . . . ." **State ex rel. Sisney v. Board of Comm'rs of Quay County,** 27 N.M. 228, 231, 199 P. 359, 361 (1921) (quoting 11 C.J. **Certiorari** § 67, at 121 (1917)). We find that the Board was acting in its quasi-judicial capacity when it convened to investigate the facts surrounding Zamora's discharge and to determine whether the Mayor's termination of Zamora violated the Ordinance.

{10} By arguing the Board has no jurisdiction to determine employment rights, Zamora has overlooked a fundamental distinction between public and private employment. A public employee who successfully can assert a property interest in employment is entitled to due process before he or she can be terminated. **Board of Regents v. Roth,** 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); **Perry v. Sindermann,** 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). On the other hand, private employees and public employees who cannot assert a property right in employment are not constitutionally entitled to the same procedures.

{11} At a minimum, due process must include notice and opportunity to respond prior to termination. **Cleveland Bd. of Educ. v. Loudermill,** 470 U.S. 532, 545, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). Due process "requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." 470 U.S. at 542 (quoting **Roth,** 408 U.S. 564 at 569-70). The pretermination hearing should be "a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." 470 U.S. at 545-46. When a public employee alleges that his employment was terminated in violation of an employment contract, he must be afforded an opportunity to respond at the required administrative hearing. See **Boespflug v. San Juan County (In re Termination of Boespflug),** 114 N.M. 771, 772, 845 P.2d 865, 866 (Ct. App. 1992); **see, e.g., Walck v. City of Albuquerque,** 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (stating that terminated city employee appealed termination to city personnel board); **Montoya v. City of Albuquerque,** 98 N.M. 46, 644 P.2d 1035 (1982) (same).

{12} In his complaint for breach of implied employment contract, Zamora argues that the Village, contrary to the Ordinance requirements, refused to assign him to light-duty work. Zamora, however, ignores the fact that this question was already considered by the Board. The Ordinance requires "just cause" before a regular employee may be dismissed, and the dismissal is "effective when endorsed by the [Board]." Section 3-7-10. The Board's task was to determine

whether there were "reasonable grounds" or "just cause" to uphold the Mayor's decision. The Ordinance provides a maximum six-month disability leave without pay. After having been on leave for more than six months, Zamora told the Board he had not yet received a full medical release to return to work and he did not know when he would {*782} obtain such a release. The Board, therefore, upheld the Mayor's decision.[3] Although the proceedings before the Board may not have been termed an action for breach of implied employment contract, those proceedings necessarily involved the question of whether the Ordinance--the basis of Zamora's alleged implied employment contract--was indeed violated.

B.

{13} As a second point, Zamora argues the scope of review at the district court is trial de novo. Here, too, we disagree.

{14} As we have noted above, the Board is delegated authority to administer matters relating to employment. In that capacity, the personnel board is an "administrative" body with authority to investigate and ascertain evidence in order to determine an individual's substantive rights in employment. Absent a statute providing otherwise, the Board's determinations are reviewable at the district court only by writ of certiorari for arbitrariness, capriciousness, fraud, or lack of substantial evidence.

> It is not the province of the reviewing court to interfere with a civil service commission's judgment and direct an order of affirmance or reversal of an order removing an officer, but the court is limited to a determination of whether the commission regularly pursued the authority conferred upon it, and the court may not reverse the case on the facts unless the commission acted arbitrarily or capriciously. In other words, the question of whether cause for discharge exists should generally be determined by the administrative agency and substantial deference must be given to its ruling.

4 Eugene McQuillen, **Municipal Corporations** § 12.266, at 675 (3rd ed. 1992). New Mexico has consistently followed this principle. **See Montoya v. City of Albuquerque,** 98 N.M. at 47, 644 P.2d at 1036 (quoting **Otero v. New Mexico State Police Bd.,** 83 N.M. 594, 595, 495 P.2d 374, 375 (1972) (stating rule that district court reviews administrative decision for arbitrariness, capriciousness, fraud, or lack of substantial evidence)); **Conwell v. City of Albuquerque,** 97 N.M. 136, 138, 637 P.2d 567, 569 (1981) (stating that judicial review of administrative decision is limited to determining "whether administrative body acted fraudulently, arbitrarily or capriciously, whether the order was supported by substantial evidence"); **Walck,** 113 N.M. at 535, 828 P.2d at 968 (same); **Tapia v. City of Albuquerque,** 104 N.M. 117, 120-21, 717 P.2d 93, 96-97 (Ct. App. 1986) (same); **Rowley v. Murray,** 106 N.M. 676, 679, 748 P.2d 973, 976 (Ct. App. 1987) (stating preferred rule that, absent a **specific** statutory provision, court is confined to record made in administrative proceeding), **cert. denied,** 106 N.M. 627, 747 P.2d 922 (1987).

{15} This appears to be the prevailing principle in other jurisdictions as well. **See. e.g., Matter of Larkin,** 415 N.W.2d 79, 81 (Minn. Ct. App. 1987) (stating standard of review on writ of certiorari of city civil service commission decision was arbitrary, capricious, or lack of substantial evidence); **Bates v. City of St. Louis,** 728 S.W.2d 232, 235 (Mo. Ct. App. 1987) (same).

{16} We have recognized de novo review at the district court of administrative decisions when such review is provided by statute. **See Keller v. City of Albuquerque,** 85 N.M. 134, 137, 509 P.2d 1329, 1332 (1973) (stating that when statute provides for trial de novo for appeals from Human Rights Commission, district court has right to make independent determination from facts) **overruled on other grounds by Green v. Kase,** 113 N.M. 76, 77, 823 P.2d 318, 319 (1992); **Linton v. Farmington Mun. Schs,** 86 N.M. 748, 749-50, 527 P.2d 789, 890-91 (1974) (same). This principle governs in other jurisdictions as well **See e.g., Turk v. Bradley (In re Bradley),** 75 Wyo. 144, 293 P.2d 678, 679 (Wyo. 1956). Interestingly, at least one jurisdiction has gone so far as to limit statutorily provided de novo review to a determination of whether an agency's ruling is illegal or not supported by {*783} substantial evidence. **Fire Dept. of Fort Worth v. City of Fort Worth,** 147 Tex. 505, 217 S.W.2d 664, 666-67 (Tex. 1949); **Richardson v. City of Pasadena,** 513 S.W.2d 1, 3 (Tex. 1974). We need not go so far, however.

{17} "A writ of certiorari . . . lies when it is shown that an inferior court or tribunal has exceeded its jurisdiction or has proceeded **illegally,** and no appeal or other mode of review is allowed or provided." **Rainaldi v. Public Employees Ret. Bd.,** 115 N.M. 650, 654, 857 P.2d 761, 765 (1993) (emphasis added). "Judicial review of administrative action . . . requires a determination whether the administrative decision is arbitrary, unlawful, unreasonable, capricious, or not based on substantial evidence." **Regents of Univ. of New Mexico v. Hughes,** 114 N.M. 304, 309, 838 P.2d 458, 463 (1992). An arbitrary and capricious administrative action is synonymous with an illegal action. **See id.** Zamora has not called our attention to a statute or any other provision that entitles him to a trial de novo in the district court.

{18} This Court has long held that "certiorari is the appropriate process to review the proceedings of bodies . . . acting in a judicial or quasi[-]judicial character. **State ex rel. Sisney,** 27 N.M. at 231, 199 P. at 361. Hence, the correct procedure to appeal the decision of the Board was to petition the district court for writ of certiorari.

{19} Zamora cites **Groendyke Transportation Inc. v. New Mexico State Corp. Commission,** 101 N.M. 470, 684 P.2d 1135 (1984), to argue that the scope of review at the district court is confined to the record of the administrative hearing only when the administrative agency possesses a "special expertise" and is entitled to deference. Zamora argues the Board has no such expertise and, therefore, he is entitled to a trial de novo. Zamora misinterprets **Groendyke.** In **Groendyke** the New Mexico State Corporation Commission, after a full evidentiary hearing, denied Groendyke a certificate of public convenience and necessity. 101 N.M. at 473, 684 P.2d at 1138. Groendyke petitioned the district court for a writ of mandamus and sought to introduce evidence that had not been before the Commission. **Id.** The district court denied the petition and the introduction of evidence. On appeal we explained that, unless a

statutory exception applies, "the district court is limited to the record before the Commission when reviewing the Commission order." **Id.** at 475, 684 P.2d at 1140. Although we recognized the Commission's "expertise," our decision was based on the absence of a statutory exception providing for de novo review. Even were we to have based our decision solely on the Commission's expertise, New Mexico nonetheless recognizes that a district court should not defer

> if the agency, rather than using its resources to develop the facts relevant to a proper interpretation, ignores the pertinent facts, or if the agency, rather than using its knowledge and expertise to discern the policies embodied in an enactment, decides on the basis of what it now believes to be the best policy.

High Ridge Hinkle v. City of Albuquerque, 119 N.M. 29, 40, 888 P.2d 475, 485 (Ct. App.), **cert. denied,** 119 N.M. 20, 888 P.2d 466 (1994).

{20} Zamora also cites **Mata v. Montoya,** 91 N.M. 20, 569 P.2d 946 (1977), arguing it established that unless a statute provides otherwise, the scope of review in the district court of an administrative decision is de novo. Zamora misreads **Mata.** Zamora's apparent confusion of our holding in **Mata** stems from the Court's citation to **Keller,** 85 N.M. 134, 509 P.2d 1329, and the cases cited therein. In **Mata** we held that the scope of reviewing administrative decisions was limited to determining whether the administrative decision was arbitrary, capricious, fraudulent, or not supported by substantial evidence, **unless** a statutory provision permits a "wider scope of review at the district court." **Mata,** at 21, 569 P.2d at 947.

{21} The cases cited in **Keller** were provided by this Court in **Mata** simply to support the general rule that when reviewing administrative decisions, the district court acts as an appellate court, not as a fact finder. **Id.** The exception to the general rule, as noted by this Court in **Mata,** is when a statute provides a greater scope of review.

{22} *{*784}* Zamora also cites **Linney v. Board of County Comm'rs of Chaves County,** 106 N.M. 378, 743 P.2d 637 (Ct. App. 1987), as an example of de novo review of an administrative decision by the district court. Zamora misapplies **Linney. Linney** involved the discharge of two jail employees by a county sheriff. Immediately prior to their discharge, the employees had been summoned to the sheriff's office where they were first notified of the complaints against them and were asked only for brief explanations. 106 N.M. at 379, 743 P.2d at 638. On appeal the district court considered only whether the jail employees received the due process standards propounded by **Loudermill** and, contrary to Zamora's assertion, not whether the discharge was a breach of employment contract. 106 N.M. at 379-80, 743 P.2d at 638-39.

{23} Finally, Zamora calls our attention to **Wheatley v. County of Lincoln,** 118 N.M. 745, 887 P.2d 281 (1994). In **Wheatley** the Lincoln County grievance board, after an evidentiary hearing, upheld Wheatley's termination from County employment. Wheatley appealed to the district court where he sought to introduce evidence that had not been before the grievance board. The district court refused to admit the evidence, concluding that the scope of review was not de

novo but was limited to whole record review. 118 N.M. at 747, 887 P.2d at 283. Further, the district court concluded that as long as the procedural due process requirements were met, it could not substitute its judgment for that of the grievance board. The district court reviewed the record and found that the decision to terminate Wheatley's employment was based on bad faith but, nonetheless, upheld the grievance board's decision as being based on substantial evidence. **Id.** The district court was reversed, and Wheatley was granted a full trial on the merits.

{24} In **Wheatley** we expressed our concern that allowing a county personnel board to determine whether a county officer breached an employment contract may be akin to allowing "the wolf to guard the henhouse." **Id.** at 748, 887 P.2d at 248. However, we remain confident that a trial court that properly reviews the whole record for arbitrariness, capriciousness, fraud, or lack of substantial evidence will expose any underlying bad faith and bias in employment termination. This standard operates for such a purpose. "An administrative agency acts arbitrarily or capriciously when its action is unreasonable, irrational, wilful, and does not result from a sifting process." **Oil Transp. Co. v. New Mexico State Corp. Comm'n,** 110 N.M. 568, 572, 798 P.2d 169, 173 (1990). Further, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act is one performed without an adequate determination of principle. **Huey v. Davis,** 556 S.W.2d 860, 865 (Tex. Civ. App. 1977), **rev'd on other grounds,** 571 S.W.2d 859 (1978). Indeed, the district court in **Wheatley,** applying the appropriate standard, found that Wheatley's termination from employment was grounded in bad faith. Yet, the termination was upheld as being supported by substantial evidence. Having found a bad faith employment termination, the district court had sufficient grounds to reverse the personnel board's decision, and any further evidentiary inquiry was unnecessary. "The determination of whether a decision is arbitrary, capricious and unreasonable is not a question separate and apart from whether the decision is supported by substantial evidence." **Board of Educ. v. New Mexico State Bd. of Educ.,** 88 N.M. 10, 12, 536 P.2d 274 (Ct. App. 1975)).

{25} Unless a statute provides otherwise, municipal personnel board decisions are reviewable at the district court only by writ of certiorari and on the whole record for arbitrariness, capriciousness, fraud, or lack of substantial evidence. In **Wheatley** we said that the employee was entitled to a trial de novo on his claim for breach of contract. That decision is inconsistent with our decision today (1) that municipal personnel boards are administrative agencies, the decisions of which may be reviewed on writ of certiorari by the district court, and (2) that the district court reviews such decisions on the whole record for arbitrary or capricious action, fraud, or lack of substantial evidence. To the extent of these inconsistencies, we overrule **Wheatley.**

{26} In **Wheatley** we also said that "unless the legislature has expressly provided a *{*785}* constitutionally-sufficient independent quasi-judicial proceeding for review of termination of a tenured public employee, **see. e.g.,** NMSA 1978, § 22-10-14.1 (Supp. 1994) (providing special appeals process for terminated public school employees), the employee is entitled to a trial de novo in district court." 118 N.M. at 748, 887 P.2d at 284. However, we must acknowledge that **Loudermill** does not require legislative provision of adequate guidelines to satisfy due process. Rather, the county's own personnel manual might have provided satisfactory procedures.

{27} Nevertheless, we emphasize that the limitation on district court review does not

preclude real scrutiny. **See State ex rel. Hughes v. City of Albuquerque,** 113 N.M. 209, 824 P.2d 349 (Ct. App. 1991) (remanding matter to personnel board because conclusions and findings did not support result). As we indicated above, the district court in **Wheatley** had sufficient grounds to reverse the personnel board decision without conducting a de novo trial.

III.

{28} Finally, we address whether Zamora's complaint, filed in district court almost twenty-eight months after the Board's decision, was untimely. We note that there is no statutory time by which to file a petition for a writ of certiorari. This Court has discussed the issue previously, yet some ambiguity remains.

{29} In **Eigner v. Geake,** 52 N.M. 98, 192 P.2d 310 (1948), we established that, absent a statute or court rule providing otherwise, the time limit for filing such a petition is the same as that set for appeals from a final judgment of the district courts, then being three months. We further stated that, unless there is **exceptionally good cause** for delay, there is no reason a party should have more time to ask for a writ of certiorari than he would have to take an appeal or sue out a writ of error in an ordinary case. **Id.** at 99, 192 P.2d at 310-11. "[A] party who delays more than three months in applying for a writ of certiorari is guilty of laches." **Id.**

{30} After **Eigner** was decided, the statutory time limit for appeals from final judgments of the district courts suing out writs of error was shortened from three months to thirty days. In **Board of Education v. Rodriguez,** 77 N.M. 309, 311-12, 422 P.2d 351, 352 (1966), we correspondingly applied the thirty-day time limitation to the filing of writs of certiorari. In **Rodriguez** no question was raised whether there was "exceptionally good cause" to toll the time limitation.

{31} In **Roberson v. Board of Educ.,** we addressed whether a petition for writ of certiorari was barred after fifteen and one-half months. We stated that

> no purely arbitrary time limit should be placed upon our right to issue certiorari; that the question should always be one of laches strictly; that where the lapse of time has not been accompanied by any change in situation, to the prejudice of a party if his victory should be turned into defeat on review, a delay . . . though seriously to be considered, should not necessarily be fatal.

78 N.M. 297, 301, 430 P.2d 868, 872 (1967) (quoting **Gallup Southwestern Coal Co. v. Gallup Am. Coal Co.,** 39 N.M. 94, 40 P.2d 627 (1935)).[4] Thus, lapse of time is but one factor in determining whether certiorari is issued. We then applied laches to determine not only whether there was a lapse of time but also whether the delay prejudiced the defendant. We determined there was no prejudice and, because there was "exceptionally good cause" for delay, appellant was allowed to present her case to the district court under certiorari. Id. 78 N.M. at 302-03, 430 P.2d at 873-74.

{32} We hold that the time limit in which a petition for writ of certiorari must be filed is determined by principles of laches. That is, in the absence of a statute providing otherwise, a petition for a writ of certiorari must be filed within thirty days of an administrative decision. If the petition is filed beyond the thirty-day limit, the district court shall consider the length of time the petition /*786/ was delayed, whether the defendant has been prejudiced by the delay, and whether the petitioner has exceptionally good cause for such a delay. Application of laches is determined on a case-by-case basis. **Hughes,** 114 N.M. at 310, 838 P.2d at 464. The district court in the instant case dismissed Zamora's case without such a determination. Accordingly, we reverse and remand to the district court to determine, by applying the foregoing analysis, whether Zamora perfected a timely appeal.

IV.

{33} In conclusion, we hold that the district court was correct in determining that, absent a specific statutory provision, the procedure to appeal the Village Personnel Board's administrative decision was to petition the district court for a writ of certiorari. Accordingly, the standard of review by the district court of an administrative decision is limited to the whole record for arbitrariness, capriciousness, fraud, or lack of substantial evidence. Finally, we reverse the district court and remand with instructions to determine whether Zamora perfected a timely appeal.

{34} **IT IS SO ORDERED.**

JOSEPH F. BACA, Chief Justice

WE CONCUR:

RICHARD E. RANSOM, Justice

GENE E. FRANCHINI, Justice

STANLEY F. FROST, Justice

PAMELA B. MINZNER, Justice

OPINION FOOTNOTES

1 Section 3-9-27 of the Ordinance states in pertinent part: "Permanent employees may be granted personal leave without pay under certain conditions . . . . The Mayor must approve request for more than five days . . . . An employee may be granted leave without pay for a period not to exceed six (6) months because of illness or disability when certified by a physician . . . ."

2 Section 3-7-7 of the Ordinance states in pertinent part: "Employees who have suffered disability and cannot perform their duties shall be assigned to light duty positions that they are able to perform, if such work is available."

3 This is not to say, however, that the Board's decision was or was not arbitrary, capricious, or fraudulent, or not based on substantial evidence. **See Mata v. Montoya,** 91 N.M. 20, 20-21, 569 P.2d 946, 946-47 (1977). Such a determination was first for the district court if and when Appellant properly and

timely appealed thereto.

4 The Court in **Roberson** cited **Gallup Southwestern** only for its persuasiveness. Only three of the five justices, a bare majority, participated and "found themselves divided in principle and thus unable to dispose of [the case] in a manner to make it a precedent. **Gallup Southwestern,** 78 N.M. at 97, 40 P.2d at 629.

---

120 N.M. 715, 905 P.2d 1119 STATE EX REL. CHILDREN, YOUTH & FAMILIES DEPT. V. CHARLES F. (S. Ct. 1995) 1995 N.M. Lexis 376

STATE OF NEW MEXICO, ex rel., CHILDREN, YOUTH & FAMILIES DEPARTMENT, IN THE MATTER OF CHARLES F., III, KIMBERLY BRIANNA and DAVID F., Children, and CONCERNING DEBBIE and CHARLES F., II, STATE OF NEW MEXICO, ex rel., CHILDREN, YOUTH & FAMILIES, Petitioner-Respondent, and DEBBIE F., Respondent-Petitioner.

NO. 23,206
SUPREME COURT OF NEW MEXICO
120 N.M. 715, 905 P.2d 1119, 1995 N.M. LEXIS 376
October 26, 1995, Decided

OPINION

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number **16220.**

---

120 N.M. 636, 904 P.2d 1061 DOWNS V. SHARTS (S. Ct. 1995) 1995 N.M. Lexis 375

JOHN T. DOWNS, Plaintiff-Petitioner, vs. WALLACE G. SHARTS and SANTIAGO "JAMIE" CHAVEZ, Defendants-Respondents.

NO. 23,211
SUPREME COURT OF NEW MEXICO
120 N.M. 636, 904 P.2d 1061, 1995 N.M. LEXIS 375
October 26, 1995, Decided

OPINION

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number **16599.**

---

120 N.M. 636, 904 P.2d 1061 STATE V. JAMES S. (S. Ct. 1995) 1995 N.M. Lexis 374

STATE OF NEW MEXICO, Plaintiff-Respondent,
vs.
JAMES S., a child, Defendant-Petitioner.

NO. 23,212
SUPREME COURT OF NEW MEXICO
120 N.M. 636, 904 P.2d 1061, 1995 N.M. LEXIS 374
October 26, 1995, Decided

OPINION

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number **16524.**

---

120 N.M. 636, 904 P.2d 1061 STATE V. BARTLETT (S. Ct. 1995) 1995 N.M. Lexis 373

STATE OF NEW MEXICO, Plaintiff-Respondent,
vs.
ROBERT SCOTT BARTLETT, Defendant-Petitioner.

NO. 23,213
SUPREME COURT OF NEW MEXICO
120 N.M. 636, 904 P.2d 1061, 1995 N.M. LEXIS 373
October 26, 1995, Decided

OPINION

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number **16088.**

Pendragon Witnesses - Retired

Alan B. Nichol - RA 1660

Edwards successfully restimulated Chaco Plant No. 5 (1660)

Pendragon ran gamma ray casing collar survey logs - 1661 (Ex N-5) which show that PC well not re-perforated in Coal

high-volume, high-rate, high-pressure frac of Meridex on Gallegos Federal well, escaped coal & broke into PC - 1662

Chaco wells completed in PC only - 1662

Low-volume, low rate frac of Chaco wells remained contained w/in PC - 1662

no perforations in Fruitland coals at all according to gamma ray casing collar surveys - 1666

production curves for Chaco coal wells w/no nearby PC production - the same 1667

if PC producing coal gas should have increased production not decreased because of effects of de-watering 1667

gas composition difficult to identify as PC or Coal - 1672

3rd bench - 1673

3rd bench - higher water production - 1674

Chaco PC wells unlike coal wells, because they flowed w/out artificial lift at immediately, w/out dewatering - production curves differ - 1681

PC not pressure depleted in 95 - 1686

Chaco 15 shut-in pressure was 158 psi before acid job - 1686-87

pressure readings of shut-in wells not indicative of communication w/ Coal - 1687

repressurizing PC w/ Coal to get pressures above 150 psi would require a volume of gas exceeding 1 BCf, in just 2 weeks - 1691

no correlation between PC pressures and distance from coal wells - 1696

Pendragon Witnesses - Cross

Alan B. Nichol 64

Communication exists between Fruitland Coal & the Pictured Cliffs 68

Chaco Plant 5 producing well before coal wells dewatered - 69

pressure before workover 158 psi - 70 no water production very strong, early

after acid work - 180 psi - 70

60% of original PC pressures - 71

after fracs in early 1995 - 170 psi - 71

not coal pressures, which should be around 220 - 71

pressures uniform over a large area - 72

Coal pressures of virgin coal - 250 psi 72-3

Shut-in data establishes no communication - 73

communication seen in Chaco 1, 4 & 5 are caused by fracs out of zone, not wellbore communication - 73

Chris
1-45-96

observation: value of PCs heating is said to decline w/production (Blauer) also but may explain communication w/lower BTU PCs

Paul C. Thompson - 228
Pres. Walsh Engineering

frac jobs on 1, 4, 5 cd 2-R
1, RR designed by PCT - 236
4.5 designed by Paul Blauer

production increased dramatically after fracs - 237

mainly no H_2O before frac - 237

volumes of H_2O increased after frac - 237

"minor amounts" of H_2O - 238

Chaco 2J not fracd - 241

Roland Blauer - 252

qualified? gas analysis? - 262

gas composition of ~~Kutz~~ Chaco wells, but, mid-1995 cd 7-98 closed, mirrored gas composition of Gallego Federal wells - 267

"bubble point" - 270

possibility "phase change" accounting for lowering of BTU content - not consistent w/ observation of gas content at wellhead w/ T/P -274

possibility of deabsorption of gas from H_2O not explored - and discount -276

adsorption commonly recognized in petroleum industry - 276

adsorption into nonorganic rock a possibility but no studied or calculated either - 279

Dr. Lee disputes the above -283

Gas BTU values not a reliable means for determining the source of the gas supply - 293

Michael Conway -305

Al Nicol, Cross

Can't tell PC well from Coal well based on gas analysis - 184

began reparing water from Chaco wells in Feb. 1998 - 185

claims that gas analysis of PC shows higher end components where Coal is Ø - 185, 186

radioactive tracer can detect fractures 12-20 inches from the wellbore 195-96

can't detect fractures like the 750' fracture claimed by Whiting Pendragon's fracture expert Conway - 195

Dome Federal well - 197
3rd bench fracture into - 197

Chaco Plant No. 5

Ex. 33 - "third bench" reserves

Dome Federal 17-27-13 #3

☆ definition of Fruitland Gas Pool
Order 8768

Whitehead

Volcanic ash common in Fruitland Coal 615-16

ash found in coal rather than sandstone because of quiet water environment 629

Cox

3 Chaco wells not showing any evidence of communication: 2-J, 1-J, 2-R (based on shut-in pressures, well-test information, core information from Lansdale Federal, production records) - 651

Chaco 1 - slow pressure drop over 1 year - 651

Chaco 4+5 - responded very quickly each time coal well shut-in, even periods as short as 1-2 days (30 days typical) - 651

pressure information shows that Chaco 4+5 do not "directly" communicate with the Fruitland Coal - instead "indirectly" communicate through the Fruitland coal wells - 652

"[T]he coal wells communicate with the Pictured Cliffs, not the other way around." ?? (652)

Chaco 1 (Cox #3) shows long-term decline in production - 655

Chaco 2-R takes long time to build pressure after shut-in - indicative of "low effective permeability" 657
(Query: low effective permeability support notion of reservoir depletion?)

Clear that formations are communicating - pressure response 658-9

PC formation damaged - 659

One core sample indicated good permeability in the ~~Cod~~ sand - 662

PC not depleted - 663
volumetrics - not all gas produced - 663-64
material balance - pressure still high but no production - 664
shape of decline curves - not suggestive of depletion - 664

permeability good some distance from the wells - 665
demonstrated in communication response
(Query - support notion of depletion?)

BTU data inconclusive - 666
(too many samples from PC and Coal in the
range of 1000 to 1050

Coal wells on compression - 676
(pressure comparison invalid - Gallegos)

(Gallegos - suggests that coal
PC wells during production - gas migrating to
be back to coal when PC wells shut-in - 678)

Whiting well (Gallegos Federal)
~~Chaco 2~~ R not traced
710 feet from Pendragon 1-J 682
no communication
(suggests that fact there was no 682
communication at this well ~~[illegible]~~
→ supports notion that frac's at other wells
did communicate?)

Gallegos Federal No. 1 traced as well
only 180 feet from Chaco 2-J
which was Not traced by Pendragon 684
Chaco
2-R located 768 feet from Gallegos Federal 7 No. 1
which was traced by Whiting 685
Pendragon traced 2-R in January, 1995 685

perforations in Upper Coal in Chaco's
1, 4 and 5 which would have been
fracd as well — 686

explains that the fact that the Gallegos
Federal 7 No. 1 is not in
communication w/ Chaco 2-R is
because 2-R not perforated in
upper PC — but that Gallegos 7 No. 1
could have fracd into ~~the lower~~
the upper PC and would be communicating
with other PC wells via the upper bench-
therefore can't — 688
rule out 7 No. 1 as offending well

Chaco 4: shut-in pressure of 119 lbs.
acid treatment - jumped to 170 lbs. 693
(denies that acid treatment
communicated w/ higher pressure
formation)

Whitley wells fracd in August 1993
Pendragon acid stimulated
January 30, 1995 shut-in pressure of 119 lbs.
1½ mos. since Whitley frac's 693-94
(Gallegos suggests that 119 lbs.
too low)

Cox says distance explains low pressures! 694

pressure response very rapid to changes
in Whiting wells 3714
high permeability

Zamora v. Village of Ruidoso Downs
120 NM 778, 907 P.2d 182 (S.Ct. 1992)

{24} In **Wheatley** we expressed our concern that allowing a county personnel board to determine whether a county officer breached an employment contract may be akin to allowing "the wolf to guard the henhouse." **Id.** at 748, 887 P.2d at 248. However, we remain confident that a trial court that properly reviews the whole record for arbitrariness, capriciousness, fraud, or lack of substantial evidence will expose any underlying bad faith and bias in employment termination. This standard operates for such a purpose. "An administrative agency acts arbitrarily or capriciously when its action is unreasonable, irrational, wilful, and does not result from a sifting process." **Oil Transp. Co. v. New Mexico State Corp. Comm'n,** 110 N.M. 568, 572, 798 P.2d 169, 173 (1990). Further, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act is one performed without an adequate determination of principle. **Huey v. Davis,** 556 S.W.2d 860, 865 (Tex. Civ. App. 1977), **rev'd on other grounds,** 571 S.W.2d 859 (1978). Indeed, the district court in **Wheatley,** applying the appropriate standard, found that Wheatley's termination from employment was grounded in bad faith. Yet, the termination was upheld as being supported by substantial evidence. Having found a bad faith employment termination, the district court had sufficient grounds to reverse the personnel board's decision, and any further evidentiary inquiry was unnecessary. "The determination of whether a decision is arbitrary, capricious and unreasonable is not a question separate and apart from whether the decision is supported by substantial evidence." **Board of Educ. v. New Mexico State Bd. of Educ.,** 88 N.M. 10, 12, 536 P.2d 274 (Ct. App. 1975)).

The Commission's actions in this case did not violate the Commission's rules established by Order No. 8806. While the Director did allow Stevens to make a second attempt to drill a well at an unorthodox location without notice to other lease holders in the Pool, the other lease holders had notice of the subsequent hearing to determine whether this well would be allowed to produce oil. In addition, this action was designed to further the Director's statutory duty to prevent waste by preventing added expense in the development of the field. Moreover, the Director could have approved drilling the second Stevens attempt at the hearing that it held prior to issuing Order No. 8917-A. Thus, the Commission's actions did not violate the rules established by Order No. 8806 and the Commission did not abuse its discretion in this matter.

V

[11] The next issue that we address is whether the Commission's Order No. R-9035 is supported by substantial evidence. Stevens argues that the Commission, in determining correlative rights of Santa Fe, did not refer to the recoverable oil underlying the tract. Stevens claims that this resulted in the Commission apportioning more oil in the Pool to Santa Fe than Santa Fe deserves based on evidence introduced at the hearing. Santa Fe contends that the Commission ignored testimony of its expert witnesses that indicated that a greater portion of the Pool was under its tract. Santa Fe concludes that the Commission underestimated its proportionate share of oil in the Pool and that this estimate is not supported by substantial evidence.

[12-14] Substantial evidence is relevant evidence that a reasonable mind would accept as sufficient to support a conclusion. *Rutter & Wilbanks Corp. v. Oil Conservation Comm'n*, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review, we view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. *National Council*, 107 N.M. at 282, 756 P.2d at 562. The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision. *Id.*

Stevens contends that the Commission did not consider the recoverable reserves underlying the Santa Fe tract, *see* NMSA 1978, Section 70-2-33(H) (correlative right based on recoverable reserves), thereby overestimating the amount of oil under the Santa Fe tract. Stevens also contends that the Commission ignored testimony by Stevens's expert witnesses indicating that more of the Pool was under Stevens's tract than the Commission ultimately concluded. Stevens concludes that the record lacks substantial evidence to uphold the Commission's estimate of Santa Fe's proportionate share of oil in the Pool. Santa Fe contends that the Commission underestimated its proportional share of oil because the Commission failed to accept as conclusive the engineering and geologic evidence presented by Santa Fe of the location and extent of the Pool, which would result in a higher proportion of the oil being allocated to Santa Fe. Santa Fe concludes that the Commission's estimate of Santa Fe's proportionate share of oil in the Pool is not supported by substantial evidence.

In any contested administrative appeal, conflicting evidence will be produced. In the instant case, the resolution and interpretation of such evidence presented requires expertise, technical competence, and specialized knowledge of engineering and geology as possessed by Commission members. *See* NMSA 1978, § 70-2-4 (commissioners to have "expertise in regulation of petroleum production by virtue of education or training"); NMSA 1978 § 70-2-5 (director is "state petroleum engineer" who is "registered by the state board of registration for professional engineers and land surveyors as a petroleum engineer" or "by virtue of education and experience [has] expertise in the field of petroleum engi-

neering"). Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment. *Stokes v. Morgan*, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984); *Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n*, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984). We have reviewed the record and, in light of the standard of review detailed above, find that the decision of the Commission was reasonable and is supported by substantial evidence.

VI

[15] The final issue raised by this appeal is whether the decision of the Commission is arbitrary and capricious.

Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and " 'is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the 'winnowing and sifting' process.' " *Garcia v. New Mexico Human Servs. Dep't*, 94 N.M. 178, 179, 608 P.2d 154, 155 (Ct.App.1979) (quoting *Olson v. Rothwell*, 28 Wis.2d 233, 239, 137 N.W.2d 86, 89 (1965))[, *rev'd*, 94 N.M. 175, 608 P.2d 151 (1980)]. An abuse of discretion is established if the agency or lower court has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. *Le Strange v. City of Berkeley*, 26 Cal.Rptr. 550, 210 Cal.App.2d 313 (1962). An abuse of discretion will also be found when the decision is contrary to logic and reason. *Newsome v. Farer*, 103 N.M. 415, 708 P.2d 327 (1985); *Sowders v. MFG Drilling Co.*, 103 N.M. 267, 705 P.2d 172 (Ct.App.1985).

Perkins v. Department of Human Servs., 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct.App. 1987).

In the instant case, the action of the Commission is not arbitrary and capricious. As discussed in Section IV, *supra*, the Commission did not exceed its statutory authority nor violate its rules when it issued the final order in this case. As discussed in Section III, *supra*, the Commission did not deprive either Santa Fe or Stevens of their due process rights. As demonstrated in Section V, *supra*, the findings of the Commission were supported by substantial evidence. The Commission considered the evidence presented by the parties, and, in light of its statutory duties to protect correlative rights and avoid waste, fashioned a creative solution to resolve this dispute. While the Commission's solution was unique, such a result is not arbitrary or capricious "if exercised honestly and upon due consideration, even though another conclusion might have been reached." *Perkins*, 106 N.M. at 655–56, 748 P.2d at 28–29 (citing *Maricopa County v. Gottsponer*, 150 Ariz. 367, 723 P.2d 716 (App. 1986)). In accordance with the foregoing discussion, we hold that Order No. R–9035 is not arbitrary and capricious.

The judgment of the trial court is AFFIRMED.

IT IS SO ORDERED.

RANSOM, C.J., and HARRIS, District Judge, concur.

835 P.2d 831

JMB RETAIL PROPERTIES COMPANY, f/k/a JMB Property Company, Petitioner,

v.

Hon. Benjamin S. EASTBURN, District Judge, Respondent.

No. 20594.

Supreme Court of New Mexico.

Aug. 3, 1992.

Petitioner sought writ of superintending control, prohibition, or mandamus requiring district judge to recognize petitioner's peremptory challenge of judge. The

tended to punish the wrongdoer and deter others from engaging in similar conduct. 450 N.E.2d at 495. Applying a similar rationale as employed in *Husted*, the Hawaii court in *In re WPMK Corp.* decided that innocent partners are not liable for punitive damages unless it could be shown "that the partnership authorized, ratified, controlled, or participated in the alleged tortious activity." 59 B.R. at 997.

" 'The rule [on derivative liability] is well established in New Mexico that the principal, or master, is liable for punitive or exemplary damages *only* in cases where the principal or master has in some way authorized, participated in or ratified the acts of the agent or servant, which acts were wanton, oppressive, malicious, fraudulent or criminal in nature.' " *Samedan Oil Corp. v. Neeld*, 91 N.M. 599, 601, 577 P.2d 1245, 1247 (1978) (quoting *Couillard v. Bank of N.M.*, 89 N.M. 179, 181, 548 P.2d 459, 461 (Ct.App.1976)). This rule supported the holding in *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 773 P.2d 1231 (1989), a defamation case in which we reversed an employer's liability for punitive damages due to the employee's tort. "[A] master or employer is liable for punitive damages for the tortious act of an employee acting within the scope of his [or her] employment *and* where the employer in some way participated in, authorized or ratified the tortious conduct of the employee." *Id.* at 431, 773 P.2d at 1238 (citing *Samedan Oil Corp.*).

Our law is consistent with the rule set out by the United States Supreme Court in the seminal case of *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101, 107, 13 S.Ct. 261, 262, 37 L.Ed. 97 (1893), that punitive damages can only be awarded against one who has participated in the offense. *Samedan*, 91 N.M. at 601, 577 P.2d at 1247. In other words, "a master or principal is not liable for punitive damages unless it can be shown that in some way he also has been guilty of the wrongful motives upon which such damages are based." *Id.* at 602, 577 P.2d at 1248.

In *Meleski*, unlike the case at bar, the court held there was sufficient evidence for the jury to have found that the partners ratified or authorized the fraudulent acts. Here the court specifically found that the copartners, Mrs. Glenn and the Popes, "committed no fraudulent acts." Accordingly, absent a finding of ratification, authorization, or participation in the fraudulent conduct, punitive damages may not be recovered from copartners for one partner's fraudulent conduct.[1] Glenn, his wife, and Mr. and Mrs. Pope, as partners in P & G Investments are liable to plaintiff jointly and severally for the award of compensatory damages, attorney fees, and costs; however, only Glenn is liable to plaintiff for the award of punitive damages.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

835 P.2d 819

SANTA FE EXPLORATION COMPANY, Petitioner–Appellant,

v.

OIL CONSERVATION COMMISSION OF the STATE OF NEW MEXICO, Respondent–Appellee,

and

STEVENS OPERATING CORPORATION, Petitioner–Cross–Appellant,

v.

OIL CONSERVATION COMMISSION OF the STATE OF NEW MEXICO, Respondent–Cross–Appellee.

No. 19707.

Supreme Court of New Mexico.

July 27, 1992.

Appeal was taken from order of the District Court, Chaves County, W.J. Schne-

1. In *Gallegos* this court prescribed that the determination as to the liability for punitive damages must be made separately when two or more defendants are involved. 108 N.M. at 728, 779 P.2d at 105.

dar, D.J., approving final order of the Oil Conservation Commission governing production of oil from pool. The Supreme Court, Baca, J., held that: (1) Commission member's ex parte contact with interest owner did not create appearance of impropriety; (2) interest owner's protected property right in producing oil underlying its tract was not implicated by virtue of another interest owner's drilling of well; (3) Commission did not exceed its authority under Oil and Gas Act when approved; and (4) Statutory Unitization Act does not preclude unitization of field in primary production.

Affirmed.

1. Administrative Law and Procedure ⇐682

Mines and Minerals ⇐92.21

Oil Conservation Commission's failure to provide proper citation to record in its answer brief did not require Supreme Court to disregard Commission's arguments or to accord Commission's arguments less weight on appeal; rather, counsel for Commission would be advised to read and follow appellate rules to avoid future violations. SCRA 1986, Rule 12–213, subds. A(3), B.

2. Administrative Law and Procedure ⇐314

Constitutional Law ⇐296(1)

Ex parte contact by member of Oil Conservation Commission with owner of interest in oil pool prior to owner's second directional drilling attempt, member's conditional approval of the drilling, and subsequent participation in affirmance of decision by Commission, did not create appearance of impropriety, in violation of due process; bias issue was not raised at Commission hearing, and member did not express opinion regarding outcome of case prior to hearing. NMSA 1978, §§ 70–2–2 to 70–2–4, 70–2–11; U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐255(1), 278(1.1)

At a minimum, procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of possible deprivation and an opportunity to defend; in addition, the trier of fact must be unbiased and may not have predisposition regarding outcome of case. U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇐296(1)

Interest owner in oil pool was not denied due process on appeal from Oil Conservation Commission when district court dismissed with prejudice its claim of bias on part of Commission member; court allowed briefing on question of whether to vacate claim of bias and whether dismissal of bias claim should be with or without prejudice. U.S.C.A. Const.Amend. 14.

5. Constitutional Law ⇐277(1)

Interest owner's protected property right in producing oil underlying its tract in oil pool was not implicated by virtue of another interest owner's drilling of the well, for purposes of due process notice and hearing requirements. U.S.C.A. Const. Amend. 14.

6. Administrative Law and Procedure ⇐475

Constitutional Law ⇐296(1)

Mines and Minerals ⇐92.17

Oil Conservation Commission did not violate interest owner's due process rights in proceeding to determine whether to approve unorthodox well in oil pool and impose production penalty when it considered issues concerning allocation of production from pool, protection of correlative rights of pool members, and prevention of waste; parties had general notice of issues to be determined, and other evidence was presented at hearing before Commission made its final decision. U.S.C.A. Const. Amend. 14.

7. Constitutional Law ⇐296(1)

Mines and Minerals ⇐92.78

Oil Conservation Commission did not violate interest owner's substantive due process rights when it set low allowable production from unorthodox well in oil pool: Commission did not act in arbitrary or capricious manner, and Commission's actions were consistent with its statutory duties to prevent waste and protect correla-

tive rights of other producers in the pool. U.S.C.A. Const.Amend. 14.

8. **Mines and Minerals** ⇐92.78

Oil Conservation Commission did not exceed its authority under Oil and Gas Act when it approved unorthodox well in oil pool, placed restriction on production from that well, and limited oil production from entire pool; well was located so that it could produce oil from top portion of pool, thereby avoiding waste, but was also located so that it could effectively drain pool, supporting production penalty. NMSA 1978, §§ 70-2-11, 70-2-12, subd. B(7).

9. **Mines and Minerals** ⇐92.78

Statutory Unitization Act does not preclude unitization of oil field in primary production. NMSA 1978, §§ 70-2-11, subd. A, 70-7-1.

10. **Mines and Minerals** ⇐92.78

Oil Conservation Commission did not violate its rules set out in order establishing oil pool when it allowed interest owner to drill well at nonstandard location without prior notice and hearing to other lease holders in pool, where other lease holders had notice of subsequent hearing to determine whether well would be allowed to produce oil.

11. **Mines and Minerals** ⇐92.79

Substantial evidence supported decision Oil Conversation Commission approving well in unorthodox location in oil pool, placing restriction on production from that well, and limiting production from entire pool. NMSA 1978, §§ 70-2-4, 70-2-5, 70-2-33, subd. H.

12. **Administrative Law and Procedure** ⇐791

"Substantial evidence" necessary to support agency decision is relevant evidence reasonable mind would accept as sufficient to support conclusion.

See publication Words and Phrases for other judicial constructions and definitions.

13. **Administrative Law and Procedure** ⇐791

In determining whether there is substantial evidence to support administrative agency decision, Supreme Court reviews whole record; in such review, Court reviews evidence in light most favorable to upholding agency determination, but does not completely disregard conflicting evidence.

14. **Administrative Law and Procedure** ⇐788

Agency decision will be upheld if the Supreme Court is satisfied that evidence in record demonstrates reasonableness of its decision.

15. **Mines and Minerals** ⇐92.78

Oil Conservation Commission's decision to approve unorthodox well drilled in oil pool, place restrictions on production from that well, and limit production from entire pool, was not arbitrary and capricious; Commission considered evidence presented by parties, and in light of its statutory duties to protect correlative rights and avoid waste, fashioned creative solution to resolve dispute. NMSA 1978, § 70-2-13.

Padilla & Snyder, Ernest L. Padilla, Santa Fe, Brown, Maroney & Oaks Hartline, K. Douglas Perrin, Dallas, Tex., for appellant.

Robert G. Stovall, Santa Fe, for Oil Conservation Com'n.

Campbell, Carr, Berge & Sheridan, William F. Carr, Santa Fe, for Stevens Operating Corp.

OPINION

BACA, Justice.

This appeal involves a series of orders issued by the New Mexico Oil Conservation Commission (the "Commission") and the New Mexico Oil Conservation Division (the "Division"). These orders established and govern the production of oil from the North King Camp Devonian Pool (the "Pool") in which appellant, Santa Fe Exploration Company ("Santa Fe"), and cross-appellant, Stevens Operating Corporation ("Stevens"), owned interests. After the Division approved Stevens's request to drill a

well at an unorthodox location and limited production from the well, both Santa Fe and Stevens petitioned the Commission for a de novo review. After consolidation of the petitions, the Commission, in its final order, approved the Stevens well, placed restrictions on Stevens's production from this well, and limited oil production from the entire Pool. Pursuant to NMSA 1978, Section 70–2–25 (Repl.Pamp.1987), both Santa Fe and Stevens appealed the final order of the Commission to the district court, which affirmed. Both parties appeal the decision of the district court. We note jurisdiction under Section 70–2–25 and affirm.

I

In December 1988, at the request of Santa Fe, the Division issued Order No. R–8806, which established the Pool and the rules and regulations governing operation of the Pool. These rules established standard well spacings and a standard unit size of 160 acres; regulated the distances that wells could be placed from other wells, the Pool boundary, other standard units, and quarter-section lines; set production limits for wells in the Pool; and outlined procedures for obtaining exceptions to the rules. The order also approved Santa Fe's Holstrom Federal Well No. 1 (the "Holstrom well") for production, which Santa Fe began producing at the rate of 200 barrels per day.

In April 1989, Curry and Thornton ("Curry"), predecessors in interest to Stevens, applied to the Division to drill a well in the Pool and for an exception to the standard spacing and well location rules. Curry requested the non-standard spacing because it claimed that geologic conditions would not allow for production of oil from their lease from an orthodox well location. Santa Fe [1] opposed the application, claiming that the well would impair its correlative rights to oil in the Pool. In its Order No. R–8917, the Division approved Curry's application to drill the well at the unorthodox location but imposed a production penalty limiting the amount of oil that Curry could produce from the well to protect correlative rights of other lease holders in the Pool.

In May, Stevens, which had replaced Curry as an operator in the Pool, applied to the Division for an amendment to Order No. R–8917. Stevens requested that, instead of drilling the well authorized by Order No. R–8917, it be allowed to enter an existing abandoned well and drill directionally to a different location. The requested well, if approved and drilled, would also be at an unorthodox location. Santa Fe opposed the amendment and objected to the original production penalty, which it contended should have allowed less production from the Stevens well. The Division approved Stevens's application and issued Order No. R–8917–A amending Order No. R–8917. The amended order, while allowing directional drilling to an unorthodox location, required Stevens to otherwise meet the requirements of the original order, including the original production penalty.

Stevens proceeded to drill the well authorized by the amended order. When the well failed to produce oil, Stevens contacted the Division Director and requested approval to re-drill the well to a different location and depth. The Director permitted Stevens to continue drilling at its own risk and subject to subsequent orders to be entered after notice to all affected parties and a hearing. Stevens drilled and completed this well (the "Deemar well") and filed an application for a de novo hearing by the Commission to approve production from the well and to consider the production penalty. *See* NMSA 1978, § 70–2–13 (Repl.Pamp.1987) (decisions by the Director may be heard de novo by the Commission). Santa Fe also filed an application for a de novo hearing opposing Stevens's application or, in the alternative, urging that a production penalty be assessed against the Stevens well.

The Commission consolidated the petitions and, after notice to the parties and a

1. Santa Fe and Exxon USA were co-owners of both the lease and the production from the Holstrom well. While both Santa Fe and Exxon USA contested the application, for the sake of simplicity we will refer to them collectively as "Santa Fe."

hearing, entered Order No. R-9035. This order estimated the total amount of oil in the Pool and the amount of oil under each of the three tracts in the Pool.[2] The order set the total allowable production from the Pool at the existing production rate of 235 barrels per day,[3] and allocated production to the two wells in accordance with the relative percentages of oil underlying each of the three tracts. Under this formula, Stevens was allowed to produce 49 barrels per day from its Deemar well, Santa Fe was allowed to produce 125 barrels per day from its Holstrom well, and the undeveloped tract left in the Pool would be allowed to produce 61 barrels per day, if developed. The order also allowed the production to be increased to 1030 barrels per day if all operators voluntarily agreed to unitized operation of the Pool.

Pursuant to NMSA 1978, Section 70-2-25(A), both Santa Fe and Stevens applied to the Commission for a rehearing. Santa Fe contended that the second attempt at directional drilling was unlawful; that it was denied due process and equal protection by the ex parte contact between Stevens and the Division Director; that the findings of the Commission apportioning production were not supported by the evidence; that the reduction of production was not supported by the evidence and was erroneous, capricious, and contrary to law; and that the unitization was illegal and confiscatory to Santa Fe. Stevens argued that the order was contrary to law because it would result in the drilling of an unnecessary well on the undeveloped tract, which would result in waste; that the order was arbitrary, capricious, unreasonable, and contrary to law because it exceeded the Commission's statutory authority; that the order violated its due process rights; and that the findings regarding recoverable reserves were contrary to the evidence and arbitrary and capricious. When the Commission took no action on the applications for rehearing, the petition was presumed to be denied and each party appealed to the district court, which consolidated the appeals. *See* NMSA 1978, § 70-2-25.

On appeal to the district court, Santa Fe contended that Order No. R-9035 was arbitrary and capricious, that it was not supported by substantial evidence, that the Commission exceeded its statutory authority, and that the Commission Chairman's bias against Santa Fe denied it due process. Stevens contended that the order was arbitrary, capricious, and unreasonable; that it was contrary to law; and that it denied Stevens's rights to due process. The trial court, after a review of the evidence presented at the Commission's hearings, affirmed the Commission's order. The trial court also dismissed, with prejudice, Santa Fe's contention of bias.

Pursuant to Section 70-2-25, both Santa Fe and Stevens appeal the district court decision to this Court. Santa Fe contends (1) that it was denied procedural due process because the Commission was biased; (2) that the district court erred when it failed to consider the question of bias; (3) that the Division violated its own regulations and procedures; (4) that the Commission abused its discretion when it lowered allowable production from the Pool; and (5) that the Commission decision was not supported by the evidence and was arbitrary and capricious. Stevens contends (1) that the Commission exceeded its authority when it reduced allowable production in an attempt to unitize operation of the Pool; (2) that the order violated the Commission's statutory duty to prevent waste; (3) that the order was not supported by substantial evidence; and (4) that its rights to due process were violated. Because of a substantial overlap of issues

2. The order estimated oil productive rock volume in the Pool to be 10,714 acre-feet and allocated the oil as follows: 21% to the tract on which Stevens held the lease and where the unorthodox well was located (E/2 W/2 of section 9); 53% to the tract on which Santa Fe held the lease and where the Holstrom well was located (SE/4 of section 9); 26% to the tract on which Santa Fe held the lease and where no producing well was located (NE/4 of section 9).

3. At the time, Santa Fe was producing 200 barrels per day of oil from its Holstrom well. Under the production penalty formula imposed by the prior Division order, Stevens would have been allowed to produce 35 barrels per day from its Deemars well.

raised by Santa Fe and Stevens, we consolidate these issues and address the following: (1) whether the Commission's actions violated due process rights of either Santa Fe or Stevens; (2) whether by issuing Order No. R-9035 the Commission exceeded its statutory authority or violated any of its own rules; (3) whether the Commission's order was supported by substantial evidence; and (4) whether the Commission's order was arbitrary and capricious.

II

[1] Before addressing the substance of this appeal, we first must address an issue of appellate procedure. Santa Fe contends that the Commission, in its answer brief, has disregarded SCRA 1986, 12-213 (Cum. Supp.1991), by failing to provide proper citation to the record proper, transcript of proceedings, and exhibits on which it relied. In light of this failure, Santa Fe urges us to disregard the Commission's arguments or, in the alternative, to accord the Commission's arguments less weight.

We agree with Santa Fe that the Commission failed to provide proper citations in its answer brief. Rule 12-213(B) requires an answer brief to meet the same requirements as the brief in chief, which include "citations to authorities and parts of the record proper, transcript of proceedings or exhibits relied on." Rule 12-213(A)(3). The Commission's answer brief contains numerous factual statements without a single citation to the record below, except for a passing reference to several findings made by the Commission (but without citation to where such findings appear in the Record Proper) and one citation to the record in which the Commission's brief quoted Santa Fe's brief in chief and citation. The Court of Appeals, in addressing a similar violation, stated:

> [W]e caution [appellant's] counsel regarding violations of our appellate rules. [Appellant] provided no citations to the parts of the record and transcript he relied on, a violation of SCRA 1986, 12-213(A)(1)(c) and (A)(2). Technically, we have no duty to entertain any of [appellant's] contentions on appeal due to this procedural violation. *See Bilbao v. Bilbao*, 102 N.M. 406, 696 P.2d 494 (Ct.App. 1985). [Appellant's] counsel also failed to provide case authority for several of his issues, a violation of Rule 12-213(A)(3). We remind counsel that we are not required to do his research. *In re Adoption of Doe* [, 100 N.M. 764, 676 P.2d 1329 (1984)]. We will not review issues raised in appellate briefs and unsupported by cited authority. *Id.*

Fenner v. Fenner, 106 N.M. 36, 41-42, 738 P.2d 908, 913-14 (Ct.App.), *cert. denied*, 106 N.M. 7, 738 P.2d 125 (1987). As the Court of Appeals advised appellant's counsel in *Fenner*, we advise counsel for the Commission "to read and follow the appellate rules to avoid future violations." *Id.* 106 N.M. at 42, 738 P.2d at 914.

III

We turn now to the due process claims of Santa Fe and Stevens. Santa Fe claims that it was denied procedural due process for three separate reasons: (1) the Commission was biased by the ex parte communication between the Division Director and Stevens thereby tainting its decision; (2) the Division Director's approval of the second directional drilling attempt was given prior to notice and a hearing; and (3) the Commission failed to give notice that it was going to consider limiting allowable production from the Pool. Stevens, while contesting Santa Fe's charge of bias, contends that its procedural due process rights were violated because the Commission failed to give adequate notice of its intent to limit production from the entire field. Stevens also claims that its substantive due process rights were violated by the Commission's allegedly erroneous determination of the recoverable reserves underlying the Pool. We address each contention below.

A

[2] Santa Fe argues that its procedural due process rights were denied because the Division Director had ex parte contact with Stevens prior to Stevens's second directional drilling attempt, conditionally approved the drilling, and then participated in the

affirmance of this decision as a member of the Commission. This action, Santa Fe contends, gives the appearance of impropriety and irrevocably taints the Commission's decision, and, as such, renders the decision voidable. *See, e.g., Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.*, 685 F.2d 547, 564 (D.C.Cir.1982). Santa Fe also contends that the district court erred when it dismissed its claim of bias with prejudice. Santa Fe argues that the court should have allowed its discovery motion on the issue of bias rather than dismissing with prejudice. These actions, Santa Fe concludes, violated its rights to procedural due process.

[3] At a minimum, procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of the possible deprivation and an opportunity to defend. *Reid v. New Mexico Bd. of Examiners in Optometry*, 92 N.M. 414, 415–16, 589 P.2d 198, 199–200 (1979). In addition, the trier of fact must be unbiased and may not have a predisposition regarding the outcome of the case. *Id.* at 416, 589 P.2d at 200. Our cases also require the appearance of fairness to be present. *Id.*

> The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

Id. The above principles are applicable to administrative proceedings, such as the instant case, where the administrative agency adjudicates or makes binding rules that affect the legal rights of individuals or entities. *Id.* Due process safeguards are particularly important in administrative agency proceedings because "many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed." *Id.*

In *Reid*, the Board of Examiners in Optometry initiated disciplinary proceedings against Dr. Reid for alleged misconduct. Prior to the hearing and pursuant to a statute, Reid disqualified two of the five Board members. At the hearing, Reid moved to disqualify one of the remaining Board members, Dr. Zimmerman, on the basis of bias. Reid based his motion on Zimmerman's prior statements that Reid would lose his license after the hearing. After Zimmerman testified that he could render a fair and impartial decision, the Board denied Reid's request to disqualify Zimmerman. The Board revoked Reid's license to practice and he appealed to the district court, which affirmed. *Id.* at 415, 589 P.2d at 199. On appeal to this Court, Reid claimed that Zimmerman's testimony indicated prejudgment and that the failure to disqualify Zimmerman deprived him of his right to due process. We agreed and held that the Board's failure to disqualify Zimmerman violated Reid's due process rights because Zimmerman's prior statements indicated bias against Reid. *Id.* at 416, 589 P.2d at 200.

The instant case is distinguishable from the *Reid* case. Unlike the appellant in *Reid*, Santa Fe failed to raise the issue of the Division Director's bias at the Commission hearing, even though it was aware of the prior ex parte contact. Unlike the Board member in *Reid*, the Director in the instant case did not express an opinion regarding the outcome of the case prior to the hearing. The Director merely permitted Stevens to drill a second exploratory well at its own risk and conditioned approval of production from the well on further Commission action. He made no comment on the probability of Commission approval or on the possible production penalties that could be assessed. Additionally, at the original hearing, the Director could have approved Stevens's request to drill the well to a different depth. Moreover, by statute, the Director is a member of the Commission, NMSA 1978, Section 70–2–4 (Repl. Pamp.1987), and has a duty to prevent waste, NMSA 1978, Sections 70–2–2, –3 (Repl.Pamp.1987) (defining and prohibiting waste); NMSA 1978, Section 70–2–11 (Repl.Pamp.1987) (setting out duties). Here, the Director avoided waste by allowing the second well to be drilled, which

eliminated the expense of removing the drilling rig from the drilling site and moving the rig back after approval was obtained. As *Reid* is distinguishable, we hold that the Commission did not violate Santa Fe's procedural due process rights by virtue of bias.

[4] In addition, Santa Fe was not denied due process when the district court dismissed its claim of bias with prejudice. The court allowed briefing on the question of whether to vacate the claim of bias and whether dismissal of the bias claim should be with or without prejudice. More is not required. *See Lowery v. Atterbury*, 113 N.M. 71, 73, 823 P.2d 313, 315 (1992). *See also, Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir.1984) (procedural due process not violated where petitioner given opportunity to address issue by memorandum).

B

We next address other claims by the parties that their respective rights to procedural due process were denied. Santa Fe contends that the Commission's actions impaired its constitutionally protected property rights with neither adequate notice nor an opportunity to be heard regarding two separate issues: (1) whether the Commission should grant permission for Stevens's second directional drilling attempt; and (2) whether the Commission should reduce the Pool wide allowable production. Stevens also contends that it was denied procedural due process when the Commission failed to provide notice prior to the hearing that Pool wide allowables might be reduced as a consequence of the hearing.

1

[5] Santa Fe's first argument is that, by allowing Stevens to drill the second well without notice or a prior hearing, the Commission denied Santa Fe due process. Before due process is implicated, the party claiming a violation must show a deprivation of life, liberty, or property. *Reid*, 92 N.M. at 415–16, 589 P.2d at 199–200. In the instant case, the property right implicated is Santa Fe's right to produce the oil underlying its tract in the Pool. This right was not implicated by virtue of Stevens drilling a well, but rather would be implicated by Stevens being allowed to produce oil from the well. Santa Fe had notice and an opportunity to be heard before the Commission granted Stevens permission to produce oil from the Deemar well. Because no due process right was implicated, we find no violation of due process.

2

[6] Citing *Jones* and *McCoy v. New Mexico Real Estate Comm'n*, 94 N.M. 602, 614 P.2d 14 (1980), both Santa Fe and Stevens claim that the Commission deprived them of procedural due process. They argue that the Commission failed to give adequate notice that it would consider limiting production from the Pool. Both claim that the only issues before the Commission were whether the Deemar well should be approved and what production penalty should be imposed. Because the Commission went beyond these issues and decided an issue of which the parties neither had notice nor an opportunity to be heard, both parties conclude that the Commission violated their due process rights.

Curiously, none of the parties cited *National Council on Compensation Insurance v. New Mexico State Corporation Commission*, 107 N.M. 278, 756 P.2d 558 (1988), which we find controlling. In *National Council*, the National Council on Compensation Insurance ("NCCI") filed a premium rate increase for all worker's compensation carriers operating in New Mexico with the State Insurance Board. Prior to a hearing considering the rate increase, the Insurance Board, by letter and a subsequent mailed notice, informed NCCI that a hearing had been scheduled to allow public written and oral comments regarding the proposed rate increases and to allow NCCI to present its filing. The notice provided that the hearing would consider whether the proposed rate increase was excessive, inadequate, or unfairly discriminatory. After the hearing, the Insurance Board denied NCCI's rate increase request, and NCCI appealed. *Id.* at 280–82, 756

P.2d at 560–62. On appeal, NCCI contended that its procedural due process rights were denied because the notice provided was not sufficiently specific to allow NCCI to prepare for issues to be addressed at the hearing. *Id.* at 283, 756 P.2d at 563. We disagreed and held that the notice provided comported with due process requirements because "[t]he notice provided NCCI an opportunity to be heard by reasonably informing NCCI of the matters to be addressed at the hearing so that it was able to meet the issues involved." *Id.* at 284, 756 P.2d at 564. In other words, general notice of issues to be presented at the hearing was sufficient to comport with due process requirements.

Like the notice given to NCCI in *National Council*, both Santa Fe and Stevens were reasonably informed as to the issues that the Commission would address at its hearing on the consolidated petitions. The parties themselves had each requested a de novo review by the Commission of Stevens's application for a non-standard well location. Santa Fe requested that the Commission deny the application or, in the alternative, impose a production penalty to protect its correlative rights. Stevens requested approval of its Deemar well for production and asked the Commission to reconsider the production penalty. At the hearing, the parties presented the evidence and requested that the Commission provide them the relief that each sought: the right to produce its proportionate share of the oil from the Pool. The parties knew, prior to the hearing, that the Commission would be considering production rates from the various wells and the correlative rights of all parties concerned.

The cases relied upon by the parties are either distinguishable or support the result we reach today. In *McCoy*, we considered whether a realtor's right to procedural due process was violated when her license was revoked by the Real Estate Commission. In that case, the district court based its decision on an issue raised by the Real Estate Commission for the first time on appeal. Because the realtor was denied notice and any opportunity to prepare her case and be heard on that issue in the district court, we held that the district court's decision violated due process. *McCoy*, 94 N.M. at 603–04, 614 P.2d at 15–16. In *Jones*, the appellant claimed that he was denied due process when the trial court did not allow him to present testimony at a hearing to determine whether a settlement agreement should be approved. The Tenth Circuit disagreed, and, held that, because the appellant was given notice and had the opportunity to be heard by submitting a lengthy memorandum, he was not denied due process. *Jones*, 741 F.2d at 325.

Unlike the appellant in *McCoy*, the parties in the instant case had adequate notice of the issues that were going to be addressed to allow them to prepare their cases. In fact, the evidence presented by the parties at the Commission's hearing shows that they had notice of the very issues that the Commission eventually considered: allocation of production from the Pool, protection of the correlative rights of Pool members, and prevention of waste in the Pool. The parties presented evidence of the size, shape, location, and structure of the reservoir. The parties presented evidence that the Stevens well was located so that it could effectively drain the entire reservoir and destroy correlative rights of the other parties unless a production penalty was assessed. The parties presented evidence of the efficient production rate of the Santa Fe well. Expert testimony presented at the hearing demonstrated that the oil in the Pool could be produced more efficiently under unitized operation. While the Commission crafted a unique solution to the problem presented to it, the *process* by which the Commission reached this solution was not unique. The parties had general notice of the issues to be determined, and evidence was presented at a hearing before the Commission made its final decision. Under these circumstances, we hold that Stevens and Santa Fe had adequate notice so as to be reasonably informed of the issues to be decided by the Commission. Thus, we find no violation of procedural due process here.

C

[7] The final due process argument that we discuss is whether Stevens's substantive due process rights were violated by the Commission's determination of the recoverable reserves underlying the Pool. Stevens argues that the setting of low allowable production from the well was an arbitrary decision that will deprive it of a valuable property right. Stevens, citing *Schware v. Board of Bar Examiners*, 60 N.M. 304, 291 P.2d 607 (1955), *rev'd*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), claims that this is a violation of substantive due process. We disagree. As discussed in Section VI, *infra*, the Commission did not act in an arbitrary or capricious manner. Moreover, as demonstrated in Section IV, *infra*, the Commission's actions were consistent with its statutory duties to prevent waste and protect the correlative rights of other producers in the Pool.

IV

The next issue that we address is whether the Commission exceeded its statutory authority or violated its rules when it issued Order No. R-9035. Both Santa Fe and Stevens contend that Order No. R-9035, while not requiring unitization, effectively unitizes operation of the Pool. They argue that the Commission does not have the statutory authority to require unitization of the Pool because, under the Statutory Unitization Act, NMSA 1978, Sections 70-7-1 to -21 (Repl.Pamp.1987), unitization is available only in fields that are in the secondary or tertiary recovery phase. They assert that, because the Commission order effectively unitizes the Pool, a field in the primary development phase, the Commission exceeded its statutory authority. In addition, Santa Fe contends that the Commission violated its own rules when it allowed Stevens's second directional drilling attempt and that Order No. 9035 is void. The Commission argues that its actions were proper under the Oil and Gas Act, NMSA 1978, Sections 70-2-1 to -38 (Repl.Pamp.1987 & Cum.Supp.1991), and argues that the Statutory Unitization Act is inapplicable to the instant case.

A

[8] "The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it." *Continental Oil Co. v. Oil Conservation Comm'n*, 70 N.M. 310, 318, 373 P.2d 809, 814 (1962). The Oil and Gas Act gives the Commission and the Division the two major duties: the prevention of waste and the protection of correlative rights. NMSA 1978, § 70-2-11(A); *Continental Oil Co.*, 70 N.M. at 323, 373 P.2d at 817. Correlative rights are defined as

> the opportunity afforded * * * to the owner of each property in a pool to produce without waste his just and equitable share of the oil * * * in the pool, being an amount, so far as can be practicably determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil * * * under the property bears to the total recoverable oil * * * in the pool and, for such purpose, to use his just and equitable share of the reservoir energy.

NMSA 1978, § 70-2-33(H). In addition to its ordinary meaning, waste is defined to include "the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil * * * ultimately recovered from any pool." NMSA 1978, § 70-2-3(A).

The broad grant of power given to the Commission to protect correlative rights and prevent waste allows the Commission "to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties." NMSA 1978, § 70-2-12(B)(7). In addition, the Division and the Commission are "empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." NMSA 1978, § 70-2-11.

In the instant case, evidence presented to the Commission indicated that the Pool was located under three separate tracts of land.

The Commission was called upon to determine the total amount of oil in the Pool and the proportionate share underlying each tract. Stevens's Deemar well was located so that it could produce oil from the top portion of the Pool, thereby avoiding waste that would have occurred unless the well was allowed. However, the well was located so that it could effectively drain the entire Pool. The Commission, charged with the protection of correlative rights of the other lease owners in the Pool, placed a production penalty on the well to protect these rights. Thus, the Commission attempted to avoid waste while protecting correlative rights. We hold that, under the facts of this case, the Commission did not exceed the broad statutory authority granted by the Oil and Gas Act.

[9] Moreover, we are unpersuaded by the argument of both Stevens and Santa Fe that the Statutory Unitization Act prohibits the Commission's actions. They argue that, by enacting the Statutory Unitization Act, the legislature intended to limit the availability of forced unitization to secondary and tertiary recovery only. Both Santa Fe and Stevens quote the following language from the Statutory Unitization Act to support their argument:

> It is the intention of the legislature that the Statutory Unitization Act apply to any type of operation that will substantially increase the recovery of oil above the amount that would be recovered by *primary recovery alone* and not to what the industry understands as exploratory units.

Section 70–7–1 (emphasis added by Stevens and Santa Fe). They assert that this section precludes unitization of a field in primary production such as the Pool. We disagree.

We read the above quoted language from Section 70–7–1 merely to say that the Statutory Unitization Act is not applicable to fields in their primary production phase, such as the Pool in the instant case. Nothing contained in the Statutory Unitization Act, including the above quoted section, however, limits the authority of the Commission to regulate oil production from a pool under the Oil and Gas Act. The Commission still must protect correlative rights of lease holders in the Pool while preventing waste. The Commission still has broad authority "to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." NMSA 1978, § 70–2–11(A). As discussed above, in the instant case the Commission's actions were within its statutory authority. We hold that the circumstances of this case do not implicate the Statutory Unitization Act and that the Commission's actions in effectively unitizing operation of the Pool were an appropriate exercise of its statutory authority under the Oil and Gas Act.

B

[10] Santa Fe contends that, by issuing Order No. R–9035, the Commission abused its discretion by failing to follow the rules and regulations established by Order No. R–8806. That order established the Pool and set out special rules and regulations designed to prevent waste and protect correlative rights.[4] The order also established notice and hearing requirements before the Commission could allow a non-standard well to be drilled in the Pool. Santa Fe contends that, by allowing Stevens to drill a well at a non-standard location, *i.e.*, to within 70 feet of Santa Fe's lease line, without prior notice and a hearing, the Commission violated its own rules. Santa Fe also contends that lowering the allowable production from the Holstrom well to 125 barrels of oil per day without adequate notice is a violation of these rules. Santa Fe concludes that, because Order No. 9035 was issued in a manner inconsistent with these rules, the order is void and Order Nos. 8917 and 8917–A should be reinstated. We disagree.

4. These rules provided that the standard size for proration unit was to be 160 acres, that a well could not be located closer than 660 feet from the outer boundary of a proration unit nor nearer than 1320 feet from the nearest well in the Pool, and that the maximum production allowed from a standard production unit would be 515 barrels per day.

110 N.M. 568, 798 P.2d 169 OIL TRANSP. CO. V. NEW MEXICO SCC (S. Ct. 1990)
1990 N.M. Lexis 265

OIL TRANSPORT COMPANY, Plaintiff-Appellant,
vs.
NEW MEXICO STATE CORPORATION COMMISSION, ERIC P. SERNA, JOHN H. ELLIOTT and JEROME D. BLOCK, Defendants-Appellees, and GROENDYKE TRANSPORT, INC., ALFRED HITE and SHELBY HITE, d/b/a ASH, INC., and STEERE TANK LINES, INC., Intervenors-Appellees

No. 18212
SUPREME COURT OF NEW MEXICO
110 N.M. 568, 798 P.2d 169, 1990 N.M. LEXIS 265
July 17, 1990, Filed

Appeal from the District Court of Santa Fe County; Roger L. Copple, District Judge.

COUNSEL

Jones, Snead, Wertheim, Rodriguez & Wentworth, James G. Whitley, Elizabeth Woldman, Santa Fe, New Mexico, For Appellant.

Hal Stratton, Attorney General, Joseph Van R. Clarke, Assistant Attorney General, Santa Fe, New Mexico, For Appellees Corporation Commission.

Raymond G. Sanchez, F. M. Mowrer, Albuquerque, New Mexico, For Intervenor Ash, Inc.

Civerolo, Hansen & Wolf, Wayne C. Wolf, Bruce T. Thompson, Albuquerque, New Mexico, For Intervenor Groendyke.

Jack A. Smith, Albuquerque, New Mexico, For Intervenor Steere Tank Lines, Inc.

JUDGES

Kenneth B. Wilson, Justice. Richard E. Ransom, Justice, Steve Herrera, District Judge, (sitting by designation), concur. Dan Sosa, Jr., Chief Justice, Joseph F. Baca, Justice, Seth D. Montgomery, Justice, not participating.

AUTHOR: WILSON

OPINION

*{*569}* WILSON, Justice.

This matter coming on for consideration by the court on motion for rehearing and the court having considered said motion and being sufficiently advised, now, therefore, the opinion handed down on April 24, 1990 is hereby withdrawn and the opinion filed this date is substituted therefor.

Oil Transport Company (OTC) appeals a district court judgment affirming New Mexico State Corporation Commission's (Commission) orders denying OTC's application for a certificate of public convenience and necessity and granting Ash, Inc.'s (Ash) application. We reverse in part,

affirm in part, and remand with instructions.

FACTS

In December 1986 Ash applied to the Commission for a certificate of public convenience and necessity to transport petroleum products statewide. **See** NMSA 1978, §§ 65-2-80 to -127 (Repl. Pamp. 1981). OTC filed a similar application in February 1987. The Commission heard Ash's application on March 25 and 26, 1987, and heard consolidated applications of OTC and Mission Petroleum Carriers, Inc. (Mission) on May 6, 7, and 8, 1987. OTC and Steere Tank Lines, Inc. (Steere) intervened to protest Ash's application. Ash, Steere, and Groendyke Transport, Inc. (Groendyke) intervened to protest the OTC and Mission applications. Prior to Ash's application hearing, and again on April 13, 1987, OTC moved to consolidate the Ash and OTC application hearings for comparative review. The motions were denied by operation of law when the Commission failed to act on them prior to entering final orders on each application. The Commission granted Ash's application on October 19, 1987, and denied the OTC and Mission applications on October 29, 1987.

On January 7, 1988, OTC separately appealed both Commission orders to the district court claiming they were arbitrary, biased, and unsupported by substantial evidence. OTC also claimed the Commission's failure to consolidate the Ash and OTC applications denied OTC due process and equal protection. OTC consolidated its appeals on March 7, 1988. On February 3, 1988, the Commission filed its answer, in which it denied its orders were improper and claimed OTC lacked standing to appeal the grant of Ash's application since OTC was merely an intervenor in that proceeding. *{*570}* On April 18, 1988, OTC amended its appellate complaints to include claims that the Commission discriminated against OTC, a Nevada corporation owned by a Lebanese national, in violation of 42 U.S.C. Sections 1981 and 1983 (1982) and erred in assessing record preparation costs against OTC. OTC also sought attorney fees under 42 U.S.C. Section 1988 (1982). The Commission denied these claims. The district court granted Ash, Groendyke, and Steere the right to intervene in these proceedings pursuant to Section 65-2-120(C).

On August 11, 1988, the district court vacated the Commission's orders and remanded for **comparative review** of the Ash and OTC applications and a resolution of conflicts in the Commission's findings of fact and conclusions of law. The court declined to review OTC's discrimination claims and claims for attorney fees and costs, since they were not raised before the Commission. The court concluded the Commission's grant of Ash's application was supported by substantial evidence and ordered the Commission to correct a clerical error in Ash's certificate if, **after comparative review,** Ash qualified for a certificate.

On August 30, 1988, OTC moved the court to reconsider its conclusion that substantial evidence supported the Commission's grant of Ash's application, as it conflicted with the court's vacation and remand of the Commission orders. The court denied this motion on September 2, 1988, stating there was no conflict since the two applications were **not mutually exclusive as an economic fact.** The court retained jurisdiction to review the Commission's orders entered upon remand.

On remand, the Commission affirmed its orders on grounds that Ash presented substantial evidence the public needed **its** services and OTC did not. The Commission also found OTC's intervenors showed substantial evidence that granting OTC's application would contravene public convenience and necessity. The Commission again concluded that the applications were **not mutually exclusive** as an economic fact, but did not make a comparison of Ash and OTC's qualifications as carriers.

On October 12, 1988, OTC moved the district court for relief from the Commission's orders on the above grounds. On December 13, 1988, the court denied this motion, finding that the Commission complied with the remand instructions and that the orders were supported by substantial evidence. OTC appeals the district court's judgment.

ISSUES

On appeal OTC asserts: (1) the Commission's denial of its application was not supported by substantial evidence; (2) the Commission's orders were arbitrary; (3) the Commission's orders were domestically biased against OTC, in violation of 42 U.S.C. Sections 1981 and 1983 (1982); and (4) the Commission erred in assessing record preparation costs against OTC. No appeal was taken from the district court's order directing the Commission to comparatively review the Ash and OTC applications. In view of this fact, the issue before us is not whether a comparative review was required, but rather, whether the Commission complied with the district court's order and comparatively reviewed the applications.

On review we must determine whether the Commission's orders were: (1) within the scope of its authority; (2) supported by substantial evidence; (3) arbitrary, capricious, or fraudulent; or (4) the result of bias or an abuse of discretion. NMSA 1978, § 12-8-22(A) (Repl. Pamp. 1988); **Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n,** 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984). In making this determination, we independently review the whole record for district court error. **National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,** 107 N.M. 278, 282, 756 P.2d 558, 562 (1988). On appeal we may correct an administrative agency's misapplication of the law. **Conwell v. City of Albuquerque,** 97 N.M. 136, 138, 637 P.2d 567, 569 (1981); **Ortiz v. New Mexico Employment Sec. Dep't,** 105 N.M. 313, 315, 731 P.2d 1357, 1359 (Ct. App. 1986).

*{*571}* OTC does not dispute the Commission's authority to decide common carrier applications. The Commission has constitutional authority to determine matters of public convenience and necessity relating to common carriers. N.M. Const. art. XI, § 7. The Commission also has statutory authority to establish reasonable license requirements to perform its functions. NMSA 1978, § 65-2-83 (C) and (D) (Cum. Supp. 1989). We discuss OTC's issues in this context.

(I) SUBSTANTIAL EVIDENCE

OTC argues substantial evidence does not support the Commission's denial of OTC's application due to its failure to consider Ash's evidence of public need for a statewide petroleum

carrier in evaluating OTC's application. Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. **National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,** 107 N.M. 278, 282, 756 P.2d 558, 562 (1988); **Viking Petroleum, Inc. v. Oil Conservation Comm'n,** 100 N.M. 451, 453, 672 P.2d 280, 282 (1983).

(a) Certificate Requirements

Except as provided in NMSA 1978, Section 65-2-84 (Repl. Pamp. 1981), the Commission shall issue a certificate of public convenience and necessity authorizing the applicant to provide transportation as a common carrier under the Motor Carrier Act if it finds:

(1) that the person is fit, willing and able to provide the transportation to be authorized by the certificate and to comply with the Motor Carrier Act and regulations of the commission; and

(2) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need.

NMSA 1978, § 65-2-84(D) (Repl. Pamp. 1981). **See also Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n,** 101 N.M. 470, 473, 684 P.2d 1135, 1138 (1984). Notwithstanding an applicant's prima facie showing pursuant to Section 65-2-84(D), the Commission must deny an application if it finds, based on intervenor and protestant evidence, that a grant would be inconsistent with public convenience and necessity. **Id.** at 473-74, 684 P.2d at 1138-39; **see also** §§ 65-2-84(E), (F).

(b) Public Need

The Commission denied OTC's application in part for failure to show, in its hearing, a public need for its services. The Commission's order was based on a strict interpretation of NMSA 1978, Section 65-2-84(D) (Repl. Pamp. 1981), which requires **"persons supporting the issuance of the certificate..."** to present evidence the public needs their services. (emphasis added). We disagree with this interpretation of the statute.

Prima facie evidence of public need is established by identifying: (1) commodities to be shipped; (2) points to and from which traffic moves; (3) the volume of freight to be tendered to the applicant; and (4) why present freight transportation services fall to meet present demands. **See Refrigerated Transp. Co. v. Interstate Commerce Comm'n,** 616 F.2d 748, 751 (5th Cir. 1980); **Novak Contract Carrier Application,** 103 M.C.C. 555, 557 (1967). "[P]ublic need is a fact and is not the exclusive property of any party or supporting witness, and that having been proven by any one of several applicants for the same authority, or by all of them collectively, the public interest must control as to which shall receive the operating rights." **Contractors Transport Corp. Extension-Iron and Steel Articles,** 126 M.C.C. 637, 641 (1977). This court has held that the statutory terms "convenience" and "necessity" refer to a definite need by the general public, rather than individuals. **Transcontinental Bus Sys., Inc. v. State Corp. Comm'n,** 61 N.M. 369, 372, 300 P.2d 948, 951 (1956); **Ferguson-Steere Motor Co. v. State**

Corp. Comm'n, 63 N.M. 137, 146, 314 P.2d 894, 903 (1957). "Once it has been determined that consolidation of several proceedings is appropriate, it is axiomatic that the evidence adduced in one of the *{*572}* proceedings becomes a part of the entire consolidated record and is to be considered in making decisions on the merits of each of the other embraced proceedings." **Contractors Transport Corp. Extension-Iron and Steel Articles,** 126 M.C.C. at 640-41.

In this case, the Commission twice determined that the Ash and OTC applications were not mutually exclusive. Nevertheless, the district court ordered a comparative review of the Ash and OTC applications on remand and that order has not been appealed. Thus, under the above law, Ash and OTC's evidence of "public need" was also consolidated.

Both Ash and OTC presented evidence of commodities to be shipped, points of transportation, and prospective freight volume. Ash presented evidence that, in many areas of New Mexico, only one carrier was available to transport petroleum products. Its witnesses stated they needed more than one carrier to meet their demands and to encourage competition among carriers. Ash also presented evidence that the New Mexico economy could support more carriers and present demands exceeded available services. In addition, Ash presented evidence that its customers were pleased with its performance and would use it, as well as other certified carriers, to transport statewide. Intervenors in Ash's case objected to the wording of its application and generally stated that present carrier services met state demands.

OTC presented evidence that only one statewide carrier was presently certified. Its witnesses stated they needed more statewide carriers to increase competition in the industry, to ensure product transportation, and to allow business expansion. Some of OTC's witnesses stated they would need less carrier service, as New Mexico business was declining. OTC's intervenors presented evidence that New Mexico business was declining and OTC's certification would harm present carriers.

After hearing this evidence, the Commission determined that Ash presented sufficient evidence of "public need" and OTC did not. This finding is contrary to the law stated above. We conclude that the Commission should have considered Ash's evidence of "public need" in evaluating OTC's application and its failure to do so deprived OTC of the substantial evidence necessary to support its application.

(II) ARBITRARY, CAPRICIOUS OR FRAUDULENT

OTC next claims the Commission's disparate treatment of Ash and OTC was arbitrary. An administrative agency acts arbitrarily or capriciously when its action is unreasonable, irrational, wilful, and does not result from a sifting process. **Perkins v. Department of Human Servs.,** 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987); **Garcia v. New Mexico Human Servs. Dep't,** 94 N.M. 178, 179, 608 P.2d 154, 155 (Ct. App.) (quoting **Olson v. Rothwell,** 28 Wis.2d 233, 239, 137 N.W.2d 86, 89 (1965), **reversed on other grounds,** 94 N.M. 175, 608 P.2d 151 (1980).

The Commission separately evaluated the "public need" evidence presented by Ash and OTC, contrary to the law stated above. The Commission then found "public need" supported only Ash's application. Once a "public need" was shown, the Commission had no rational basis for denying

OTC's application for failure to show "public need" for **its** services.

It appears that once the determination of no mutual exclusivity was made, the Commission did not thereafter consider the consolidated record in denying OTC's application in finding nos. 5, 6, 9 and 10. However, in finding no. 12, the Commission found, based on the record **of the Ash application,** that OTC's application was not consistent with "public convenience and necessity." If the Commission refused to look at the consolidated record on "public need" when it would help OTC while looking at the consolidated record on "public convenience and necessity" when it would hurt OTC, such decision making is clearly arbitrary. We conclude the Commission's decision was arbitrary.

(III) BIAS OR ABUSE OF DISCRETION

(a) Bias

OTC next argues the Commission unconstitutionally applied NMSA 1978, Section 65-2-84(D) (Repl. Pamp. 1981) *{*573}* to deny OTC's application. Specifically, OTC alleges the Commission's orders were domestically biased against OTC, in violation of 42 U.S.C. Sections 1981 and 1983 (1982), and it seeks attorney fees under 42 U.S.C. Section 1988 (1982). In support, OTC cites Commission findings that: (1) OTC was a Nevada corporation owned by a Lebanese national; and (2) Ash, a New Mexico corporation, provided twenty-two jobs for New Mexicans.

As stated, the district court declined to hear these issues, first raised on appeal. "[I]ssues not raised in administrative proceedings will not be considered for the first time on appeal." **Wolfley v. Real Estate Comm'n,** 100 N.M. 187, 189, 668 P.2d 303, 305 (1983). **See also Kaiser Steel Corp. v. Revenue Div.,** 96 N.M. 117, 120, 628 P.2d 687, 690 (Ct. App.), **cert. denied,** 96 N.M. 116, 628 P.2d 686 (1981). The district court may remand original issues to the Commission, if it is necessary to dispose of the case. NMSA 1978, § 12-8-22(B) (Repl. Pamp. 1988). The district court determined that these issues were not dispositive of the case and did not remand them. We find the Commission's failure to jointly consider the applicants' "public need" evidence dispositive of this case and affirm the district court's refusal to consider these claims.

(b) Abuse of Discretion

OTC next claims that the Commission abused its discretion by originally failing to consolidate the Ash and OTC applications. **See Ashbacker Radio Corp. v. Federal Comm. Comm'n,** 326 U.S. 327 (1945). An agency abuses its discretion when its decision is not in accord with legal procedure or supported by its findings, or when the evidence does not support its findings. **Perkins v. Department of Human Servs.,** 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987). An agency also abuses its discretion when its decision is contrary to logic and reason. **Id.** The Commission has discretion to consolidate hearings. N.M. State Corp. Comm'n R.P. 44 (Nov. 14, 1985). The Commission may prescribe its own procedural rules within constitutional limits. N.M. Const. art. XI, § 4; **In re Atchison, T. & S.F. Ry.,** 37 N.M. 194, 20 P.2d 918 (1933).

Even were we to assume the Commission had discretion not to consolidate the applications originally, the Commission had no discretion to ignore the district court's order requiring a comparative review. As stated, the Commission twice determined that the applications were not mutually exclusive. However, since the district court ordered a comparative review of both applications, including "public need" evidence, we conclude the Commission abused its discretion by falling to consolidate the evidence of public need when considering OTC's application.

(IV) COMPARATIVE REVIEW OF OTC AND ASH AS CARRIERS

The Commission failed to make findings or conclusions regarding the comparative merits of OTC and Ash, despite the district court's instructions that the Commission should make a comparative review of the Ash and OTC applications to determine whether either or both should be awarded permits. The record supports the Commission's finding that there is a public need and necessity for the services to be rendered by Ash and OTC. It is therefore necessary that the Commission make a comparative review of the whole record. After reviewing both the Ash and OTC application proceedings and all of the evidence presented, it should make a determination of whether the grant of a certificate to OTC would be "inconsistent with the public convenience and necessity" and whether OTC is "fit, willing and able to provide transportation to be authorized by the certificate and to comply with the Motor Carrier Act and the regulations of the commission." NMSA 1978, § 65-2-84(D)(1) (Repl. Pamp. 1981).

The Commission should make additional findings of fact as may be necessary to support its decision.

(V) RECORD PREPARATION COSTS

Last, OTC argues it should not be assessed preparation costs for a record *{*574}* that the Commission is required to keep in triplicate. The Commission is statutorily required to keep three copies of all **witness testimony** at its hearings. NMSA 1978, § 63-7-13 (Repl. Pamp. 1989). The Commission is not required to keep three copies of the entire record, as OTC suggests. Commission Rule 64 requires the appellant to pay appellate record preparation costs. N.M. State Corp. Comm'n R.P. 64 (Nov. 14, 1985). As stated, the Commission may prescribe such rules. N.M. Const. art. XI, § 4; **In re Atchison, T. & S.F. Ry.,** 37 N.M. 194, 20 P.2d 918 (1933). Thus, the Commission's assessment of record preparation costs against OTC was proper.

We reverse and remand to the Commission with instructions that, having determined a lack of mutual exclusivity, it enter additional findings of fact and conclusions of law, based upon the entire consolidated record, as to whether the grant of a certificate to OTC would be, "inconsistent with the public convenience and necessity" and whether OTC is, "fit, willing and able to provide the transportation to be authorized by the certificate and to comply with the Motor Carrier Act and regulations of the commission." NMSA 1978, § 65-2-84(D)(1) (Repl. Pamp. 1981).

IT IS SO ORDERED.

Standard of appellate review for administrative agencies

ADVANCE OPINIONS

FROM THE NEW MEXICO SUPREME COURT & COURT OF APPEALS

TOPIC INDEX

Administrative Law
Administrative Appeal; Generally; Arbitrary and Capricious Actions; Evidence; Judicial Review; Legislative Intent; Scope of Review; and Standard of Review

Appeal and Error
Appellate Jurisdiction; Appellate Review; Judicial Review; and Standard of Review

Constitutional Law
Independence of University Regents

Employment Law
Collective Bargaining; Duties of Employee and Employer; Employee Grievances; Employer-Employee Relationship; Employment Contact; Labor Unions; Tenure; and Union Organizing

Statutes
Interpretation; Legislative Intent; Rules of Construction; and Legislative History

FROM THE NEW MEXICO SUPREME COURT

Opinion Number: 1998-NMSC-020

THE REGENTS OF THE UNIVERSITY OF NEW MEXICO,
Plaintiff-Appellant,

versus

NEW MEXICO FEDERATION OF TEACHERS and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, GALLUP CAMPUS,
Defendants-Appellees.

No. 24,716 (filed June 23, 1998)

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS

PETRA JIMENEZ MAES, District Judge

JOHN F. KENNEDY
SIMONS, CUDDY & FRIEDMAN, L.L.P.
Santa Fe, New Mexico

CHARLES N. ESTES, JR.
Albuquerque, New Mexico
for Plaintiff-Appellant

K. LEE PEIFER
Albuquerque, New Mexico

MORTON S. SIMON
LINDA M. VANZI
SIMON & OPPENHEIMER
Santa Fe, New Mexico
for Defendants-Appellees

OPINION

GENE E. FRANCHINI, Chief Justice

{1} The Board of Regents of the University of New Mexico (UNM) appeals a determination by the Public Employee Labor Relations Board (PELRB) that invalidated portions of the university's labor-management relations policy. The PELRB held that the Public Employee Bargaining Act, NMSA 1978, §§ 10-7D-1 to -26 (1992, prior to 1997 amendment, effective Apr. 1, 1993) [hereinafter PEBA], requires all public employers, like UNM, to open the collective-bargaining process to all public employees except management employees, supervisors, and confidential employees. The PELRB held UNM's labor policy invalid because it excludes many categories of employees that PEBA includes. The PELRB's determination was affirmed by the district court. On appeal, UNM raises two arguments: (1) that its labor policy is exempt from PEBA under the Act's "grandfather clause," under which public employers whose labor policies were established prior to October 1, 1991 are released from the requirements of the Act; and (2) that PEBA conflicts with the Regents' constitutionally mandated autonomy in its governance of the university. We conclude that those portions of UNM's labor relations policy that exclude categories of employees in violation of PEBA are not grandfathered, and that PEBA does not conflict with the New Mexico Constitution. We affirm.

I. FACTS AND PROCEEDINGS

{2} The University of New Mexico is a state institution whose management and control are placed by the New Mexico Constitution into the hands of a seven-member Board of Regents. *See* N.M. Const. art. XII, § 13 (as amended 1994). In May 1970, the UNM Board of Regents adopted a labor-management relations policy which authorized collective bargaining for several categories of UNM employees. *See* University of New Mexico, *Labor-Management Relations* (as revised April 16, 1979) [hereinafter *Policy*]. This *Policy* was revised in April 1979 and again in 1980. (The record in this case included only the text of the 1979 version of the *Policy*; there is no suggestion that pertinent sections of the1980 version were materially differ-

ent.) The *Policy* expressly excluded certain categories of employees from the bargaining process including "administrative, faculty and supervisory personnel" and "professional and technical personnel." UNM, *Policy* ¶ B, at 3-4. By the time of the first hearing in this matter, UNM had recognized and negotiated collective-bargaining agreements with four bargaining units representing approximately 1800 employees.

{3} Twenty-two years after UNM first adopted its collective-bargaining *Policy*, the New Mexico Legislature enacted the Public Employee Bargaining Act. *See* §§ 10-7D-1 to -26 (enacted by 1992 N.M. Laws, ch. 9). PEBA for the first time guaranteed to public employees the right under the law "to organize and bargain collectively with their employers." Section 10-7D-2. PEBA excluded "management employees, supervisors and confidential employees" from the collective-bargaining process. Section 10-7D-5. However, it opened the process to several categories of public employees that were explicitly excluded by the UNM *Policy*. *See* § 10-7D-4(P) (defining "public employee"); UNM, *Policy* ¶ B, at 3-4.

{4} One of the provisions of PEBA created the PELRB, whose function is the administration of PEBA. Section 10-7D-8 (creating the Board). The powers and duties of the PELRB included promulgating rules and regulations, § 10-7D-9(A), overseeing collective bargaining between public employees and their employers, § 10-7D-9(A)(1), (2), and enforcing the provisions of PEBA "through the imposition of appropriate administrative remedies," § 10-7D-9(F). *See generally* § 10-7D-9 (delineating powers and duties of the PELRB). PEBA forbade public employers, public employees, and labor organizations from engaging in a number of specific "prohibited practices" in conducting labor-management relations. Section 10-7D-19 (practices prohibited to public employers); § 10-7D-20 (practices prohibited to public employees); § 10-7D-21 (practices prohibited to labor organizations). The PELRB was responsible for hearing and determining "complaints of prohibited practices" under the Act. Section 10-7D-9(A)(3).

{5} On March 10, 1995, the New Mexico Federation of Teachers (NMFT) filed a prohibited practices complaint with the PELRB, alleging violations of PEBA by UNM. *See* PELRB Case No. PPC 14-95(0) (March 10, 1995); *see also* Commencement of Case, Public Employee Labor Relations Board, 11 NMAC 21.3.8 (March 18, 1993) (procedures for filing prohibited practices complaint). The NMFT claimed that UNM's *Policy* barred the right of bargaining collectively to certain occupational categories whose inclusion PEBA required. The NMFT sought to represent non-faculty professional and technical employees.

{6} On the same day, the American Association of University Professors–Gallup Branch (AAUP) submitted a petition to UNM requesting recognition as the bargaining representative for teaching faculty, librarians, and academic counselors at UNM's campus in Gallup, New Mexico. On March 23, 1995, the Regents declined to accept this petition. The AAUP responded with a prohibited practices complaint, filed with the PELRB on April 26, 1995. *See* PELRB Case No. PPC 17-95(O); *see also* 11 NMAC 21.3.8 (procedures for filing prohibited practices complaint).

{7} Later the same year, three formal hearings were held before a PELRB hearing officer, on October 10, and November 12 and 13. *See* Prohibited Practices Hearings, Public Employee Labor Relations Board, 11 NMAC 21.3.16 (March 18, 1993) (mandating formal hearing in the absence of a settlement agreement). The complaints by the NMFT and the AAUP–who, in this opinion, we shall occasionally characterize as "the Unions"–were consolidated at these hearings. The hearing officer issued a decision and recommended order on March 6, 1996. *See* Decision and Order of the Hearing Officer, PELRB Case No. PPC 14-95(0) (NMFT complaint), PELRB Case No. PPC 17-95(O) (AAUP complaint) (Mar. 6, 1966) [hereinafter First Decision and Order]; *see also* Hearing Officer Reports, Public Employee Labor Relations Board, 11 NMAC 21.3.18 (March 18, 1993) (requirements for report by hearing officer).

{8} PEBA included a special provision for those public employers that, prior to October 1, 1991, had already voluntarily adopted a collective-bargaining system and had successfully negotiated collective-bargaining agreements with their employees. *See* § 10-7D-26(A) & (B). This grandfather clause permitted those public employers to continue to operate under their pre-existing provisions and procedures. UNM argued that, under this grandfather clause, it was exempted from recognizing the Unions. The hearing officer disagreed, concluding that, "The UNM labor policy at issue is invalid insofar [as] it denies the rights to UNM faculty, professional and technical employees under PEBA to join, assist or refuse same with respect to any labor organization." First Decision and Order, at 12.

{9} UNM also argued that the interpretation of PEBA urged by the Unions conflicted with its Regents' constitutional authority to control and manage the university, and that, in such circumstances, the New Mexico Constitution must prevail. The hearing officer disagreed, concluding that "UNM's constitutional status does not prohibit the application of PEBA to it. PEBA has no direct impact on [the] duty of the Board of Regents of UNM to manage or control the [university]." *Id.*

{10} Further, the hearing officer held that UNM had committed a prohibited practice by its refusal to accept the AAUP's petition that it be recognized as the bargaining agent on behalf of the faculty, counselors, and librarians at UNM's Gallup Branch. *Id.* There was no similar holding with respect to the NMFT's complaint.

{11} The hearing officer recommended that the PELRB enter an order requiring "UNM [to] conduct an election to determine whether the AAUP shall be the exclusive certified bargaining unit representative of any eligible employees listed in the AAUP's petition who work at Gallup/UNM." *Id.* at 13. Finally, he recommended that the PELRB "issue [an] order invalidating that portion of UNM's existing Policy on Labor-Management Relations having to do with denying faculty, professional and technical employees the rights guaranteed under PEBA to join [or] assist labor organizations for the purpose of bar-

gaining collectively over working conditions or refusal of same." *Id.*

{12} As permitted by PELRB regulations, UNM filed a notice of appeal, on March 22, 1996, seeking PELRB review of the hearing officer's recommendation. *See* Appeal to Board of Hearing Officer's Recommendation, Public Employee Labor Relations Board, 11 NMAC 21.3.19.1 (March 18, 1993) (procedure for applying for Board review). Two months later, the PELRB issued its determination. *See* Decision and Order, 1 PELRB No. 18 (June 25, 1996). The Board adopted the hearing officer's conclusions of law on two issues:

> 1. That portion of the UNM labor policy at issue is invalid because it denies the right to form, join or assist a labor organization to the faculty, professional, and technical occupational groups and also denies the right for such occupational groups to refuse to engage in such organizing activities.
>
> 2. The constitutional argument does not foreclose the application of PEBA to UNM. The Act does not infringe on the regents' constitutional responsibility to manage or control the university.

Id. at 7-8. However, the PELRB concluded that the AAUP's petition to be recognized as the representative of the employees at UNM's Gallup Branch did not conform to the requirements of PEBA. *Id.* at 9-10 ("[T]he petition as presented to the regents appears to contemplate recognition of the AAUP as the exclusive representative for these positions without an election."). The Board therefore disagreed with the hearing officer and concluded that UNM had not committed a prohibited practice by refusing to accept the AAUP's petition to negotiate on behalf of the Gallup employees.

{13} As permitted by PEBA, UNM, on July 25, 1996, filed in district court an appeal of the PELRB's Decision and Order. *See* § 10-7D-23(B) ("Any person or party, including any labor organization affected by a final regulation, order or decision of the board or local board, may appeal to the district court for further relief."); Rule 1-074 NMRA 1998. Oral arguments were held in February 1997, and, on April 1, 1997, the district court entered a Decision and Order affirming all the conclusions of the PELRB. *See Regents of the Univ. of N.M. v. New Mexico Fed'n of Teachers*, No. SF 96-2069(C) (N.M. Dist. Ct. April 1, 1997).

{14} UNM appealed to the New Mexico Court of Appeals on April 28, 1997. We received this case by certification from the Court of Appeals as provided by NMSA 1978, § 34-5-14(C)(2) (1972), which permits the Court of Appeals to certify to the Supreme Court matters that involve "an issue of substantial public interest that should be determined by the supreme court." The Court of Appeals concluded that this case raised "issues of substantial public interest concerning public employee bargaining and the constitutional authority of the Board of Regents in relation thereto." *Regents of the Univ. of N.M. v. New Mexico Fed'n of Teachers*, No. 18,443 (N.M. Ct. App. Oct. 2, 1997) (Order of Certification to the New Mexico Supreme Court).

{15} We address two issues: Whether UNM, because it is accorded grandfather status by PEBA, can be compelled to recognize categories of employees that are excluded by its *Policy*, and whether PEBA conflicts with the Regents' constitutionally mandated authority to govern and control the university. We answer the first question in the affirmative and the second in the negative, and therefore, affirm.

II. STANDARD OF JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS

{16} The parties disagree about the standard of review that applies when appellate courts examine the determinations of administrative agencies. The Unions argue that this Court should not reweigh the evidence in the record and that we should accord great deference to an agency's legal determinations. *See Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 332, 940 P.2d 177, 180 [hereinafter *Fire Fighters I*]. UNM, on the other hand, contends that we are not rigidly bound by an agency's factual or legal conclusions, even when those conclusions concern an agency's area of expertise. UNM's interpretation is more in accordance with our recent statements on this matter. PEBA does set forth a common formulation:

> Actions taken by the board or local board shall be affirmed unless the court concludes that the action is:
>
> (1) arbitrary, capricious or an abuse of discretion;
>
> (2) not supported by substantial evidence on the record taken as a whole; or
>
> (3) otherwise not in accordance with law.

Section 10-7D-23(B). Very similar language appears in a recently enacted law whose purpose is to promote "uniformity with respect to judicial review of final decisions by agencies." *See* 1998 N.M. Laws, ch. 55, § 1(D), (E) (enacting NMSA 1978, § 12-8A-1 (1998)). Our cases have elaborated upon this formulation.

{17} On numerous occasions we have set forth standards of appellate review that, unless the Legislature determines otherwise, apply to all administrative agencies in New Mexico. It should not be necessary for us to repeat these standards for each individual agency as their determinations come before us for review. A recent description of the relevant general principles as they applied to a determination by the New Mexico Department of Labor, is, absent a statute to the contrary, applicable to all other agencies:

> "When reviewing administrative agency decisions courts will begin by looking at two interconnected factors: whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency's specialized field of expertise." *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, [1995-NMSC-071,] 120 N.M. 579, 582, 904 P.2d 28, 31 (1995).
>
> If an agency decision is based upon the interpretation of a

particular statute, the court will accord some deference to the agency's interpretation, especially if the legal question implicates agency expertise. However, the court may always substitute its interpretation of the law for that of the agency's "because it is the function of the courts to interpret the law." *Id.* at 583, 904 P.2d at 32. If the court is addressing a question of fact, the court will accord greater deference to the agency's determination, "especially if the factual issues concern matters in which the agency has specialized expertise." *Id.*

When reviewing findings of fact made by an administrative agency we apply a whole record standard of review. *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). This means that we look not only at the evidence that is favorable, but also evidence that is unfavorable to the agency's determination. *Trujillo v. Employment Sec. Dep't*, 105 N.M. 467, 470, 734 P.2d 245, 248 (Ct. App. 1987). We may not exclusively rely upon a selected portion of the evidence, and disregard other convincing evidence, if it would be unreasonable to do so. *National Council on Compensation Ins. v. New Mexico State Corp. Comm'n*, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988).

The decision of the agency will be affirmed if it is supported by the applicable law and by substantial evidence in the record as a whole. *Kramer v. New Mexico Employment Sec. Div.*, [1992-NMSC-069] 114 N.M. 714, 716, 845 P.2d 808, 810 (1992). "Substantial evidence" is evidence that a reasonable mind would regard as adequate to support a conclusion. *Wolfley v. Real Estate Comm'n*, 100 N.M. 187, 189, 668 P.2d 303, 305 (1983). If the agency's factual findings are not supported by substantial evidence, the court may adopt its own findings and conclusions based upon the information in the agency's record. *Sanchez v. New Mexico Dep't of Labor*, 109 N.M. 447, 449, 786 P.2d 674, 676 (1990).

> The party challenging an agency decision bears the burden on appeal of showing "that agency action falls within one of the oft-mentioned grounds for reversal including whether the decision is arbitrary and capricious; whether it is supported by substantial evidence; and whether it represents an abuse of the agency's discretion by being outside the scope of the agency's authority, clear error, or violative of due process." *Morningstar*, [1995-NMSC-071,] 120 N.M. at 582, 904 P.2d at 31.

Fitzhugh v. New Mexico Dep't of Labor, 1996-NMSC-044, ¶¶ 21-25, 122 N.M. 173, 180, 922 P.2d 555, 562.

{18} To these principles we would add the observation PEBA was enacted so recently that it has generated very little jurisprudence in New Mexico. The Act has been addressed by only three other New Mexico appellate opinions: *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, 123 N.M. 239, 938 P.2d 1384 [hereinafter *Fire Fighters II*]; *Fire Fighters I*, 1997-NMCA-044, 123 N.M. 329, 940 P.2d 177; and *City of Las Cruces v. Public Employee Labor Relations Bd.*, 1996-NMSC-024, 121 N.M. 688, 917 P.2d 451. For this reason, our Court of Appeals has suggested that federal labor law provides a useful point of reference in developing the emerging law under PEBA. *Fire Fighters II*, 1997-NMCA-031, ¶ 15, 123 N.M. at 243, 938 P.2d at 1388. This is because much of the language in PEBA was derived from the National Labor Relations Act, 29 U.S.C. §§ 151 to 169 (1994) [hereinafter NLRA]. *Id.* Though we did not find it necessary in this opinion to refer to the NLRA, we agree with the Court of Appeals' conclusion that, "[a]bsent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted." *Id.*

III. THE GRANDFATHER CLAUSE

A. Statutes in Question

{19} Three categories of employees are excluded by PEBA from the right to bargain collectively:

> Public employees, *other than management employees, supervisors and confidential employees*, may form, join or assist any labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse any or all such activities.

Section 10-7D-5 (emphasis added). The Act defines "public employee" as "a regular, nonprobationary employee of a public employer; provided that in the public schools, 'public employee' shall also include any regular probationary employee." Section 10-7D-4(P).

{20} The UNM *Policy*, in contrast, excludes many more categories of employees:

> B. *MEMBERSHIP AND REPRESENTATION*
>
> (1) Any permanent, full-time or part-time, staff employee of the University is free to join and assist any labor organization of his own choosing or to participate in the formation of a new labor organization, or to refrain from any such activities, *except however, administrative, faculty and supervisory personnel, professional and technical personnel, security officers and guards, confidential employees and employees engaged in personnel work, temporary part-time employees and temporary full-time employees* shall not be represented by any labor organization for the purposes of bargaining collectively with the University on wages, hours, or other working conditions.
>
> (2) The Rights described in Section B(1) do not extend to

> participation in or the management of a labor organization, or acting as a representative of any such organization, *where such participation, management or activity would be incompatible with the official university duties of an employee.*

UNM, *Policy* ¶ B, at 3-4 (emphasis added). This is the only portion of the UNM *Policy* that was expressly invalidated by the PELRB.

{21} PEBA contains a grandfather clause which exempts from some of the requirements of the Act those institutions that adopted labor-management policies before October 1, 1991. UNM argues that, because it instituted its *Policy* in 1970, it qualifies as a grandfathered institution. For this reason, UNM claims to be exempt from those portions of the Act that would otherwise require it to recognize the employee categories represented by the NMFT and the AAUP. PEBA's grandfather provisions are set forth in the first two subsections of Section 10-7D-26:

> A. Any public employer *other than the state* that prior to October 1, 1991, adopted by ordinance, resolution or charter amendment a system of provisions and procedures permitting *employees* to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives may continue to operate under those provisions and procedures.
>
> B. Only a public employer other than the state or a municipality whose ordinance, resolution or charter amendment has resulted in the designation of *appropriate bargaining units*, the certification of exclusive bargaining agents and the negotiation of existing collective bargaining agreements may avail itself of the provisions set forth in Subsection A of this section. (Emphasis added.)

The third subsection of Section 10-7D-26, delineates the requirements for a public employer whose policy is not grandfathered:

> C. Any public employer other than the state that subsequent to October 1, 1991, adopts by ordinance, resolution or charter amendment a system of provisions and procedures permitting *employees* to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives freely chosen by its *employees* may operate under those provisions and procedures rather than those set forth in the Public Employee Bargaining Act [10-7D-1 to 10-7D-26 NMSA 1978]; provided that the employer shall comply with the provisions of Sections 8, 9, 10, 11 and 12 [10-7D-8 to 10-7D-12 NMSA 1978] of that act and provided the following provisions and procedures are included in each ordinance, resolution or charter amendment:
>
> (1) the right of *public employees* to form, join or assist employee organizations for the purpose of achieving collective bargaining;
>
> . . . .
>
> (4) the right of an exclusive representative to negotiate all wages, hours and other terms and conditions of employment for *public employees* in the appropriate bargaining unit;
>
> . . . .
>
> (9) prohibited practices for the public employer, *public employees* and labor organizations that promote the principles established in Sections 19, 20 and 21 [10-7D-19 to 10-7D-21 NMSA 1978] of the Public Employee Bargaining Act.

Section 10-7D-26 (emphasis added).

{22} Though it was an issue when this case was initiated, there is, at this point, no dispute that UNM qualifies as a "public employer other than the state" under Section 10-7D-26(A). The Legislature clarified this question with a recent amendment declaring that "[s]tate educational institutions, as provided in Article 12, Section 11 of the constitution of New Mexico, shall be considered public employers other than the state for collective bargaining purposes only." Section 10-7D-4(Q) (enacted by 1997 N.M. Laws, ch. 212, § 1).

B. Grandfather Clauses Generally

{23} Statutory limitations, like the one at issue in this case, under which UNM hopes to be absolved from recognizing the Unions, are variously termed "grandfather clauses," "saving clauses," "exemptions," and "provisos." Attempts have been made to draw fine distinctions among these expressions. However, courts and legislators seldom rigorously differentiate these terms. *See* 1A Norman J. Singer, *Statutes and Statutory Construction* § 20.22 (5th ed. 1993) (stating that neither courts nor statutory drafters make consistent distinctions in defining these words).

{24} These types of statutory provisions delineate a special exception from the general requirements of a statute. *See State ex rel. Crow v. City of St. Louis*, 73 S.W. 623, 629 (Mo. 1903) ("A saving clause is an exception of a special thing out of general things mentioned in the statute."). The effect of these provisions is to narrow, qualify, or otherwise restrain the scope of the statute. *Stafford v. Wessel*, 52 N.E.2d 605, 606 (Ill. App. Ct. 1943) (stating that the function of a saving clause or proviso "is to except some particular case or situation from a general principle or enactment"). They remove from the statute's reach a class that would otherwise be encompassed by its language. We shall refer to the limitation at issue in this case as a "grandfather clause."

{25} The intent of grandfather clauses is to save something that would otherwise be lost. *Bass v. Albright*, 59 S.W.2d 891, 894 (Tex. Civ. App. 1933, no writ). These laws do not usually create rights or requirements, but rather prevent an entity from being altered or imposed upon by a new statute. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 162 (1920) (stating that "[t]he usual function of a saving clause is to preserve something from immediate interference–not to create"). A grandfather clause preserves something old, while the remainder of the law of which it is a part institutes

something new. A grandfather clause may have the effect of relieving an entity from submitting to new restrictions, or the clause may have the reverse effect of permitting the entity to avoid broadening the scope of its activities. The grandfather clause may extend prerogatives to those already receiving them, while denying those same prerogatives or imposing additional obligations upon the remainder of the class. *O.C. Taxpayers for Equal Rights, Inc. v. Mayor of Ocean City*, 375 A.2d 541, 547 (Md. 1977).

{26} Grandfather clauses are deemed necessary because they prevent harm. *See Commonwealth Air Transp., Inc. v. Stuart*, 196 S.W.2d 866, 869 (Ky. 1946). New statutory restrictions or requirements can, in many circumstances, impose hardships upon enterprises whose activities were well established prior to the law's enactment. By including grandfather provisions into a new law, the Legislature recognizes that there are classes of entities who could be damaged by the blanket and unrestricted application of new rules. *Cf. id.* (stating that grandfather clause prevents harm to established enterprises).

C. Judicial Construction of Grandfather Clauses

{27} Generally, in resolving statutory ambiguities, courts will favor a general provision over an exception. *See State v. Christensen*, 137 P.2d 512, 518 (Wash. 1943). This is especially true when a statute promotes the public welfare. *Wheeler v. Wheeler*, 25 N.E. 588, 590 (Ill. 1890) ("It is familiar that if the words employed are susceptible of two meanings, that will be adopted which comports with the general public policy of the state, as manifested by its legislation, rather than that which runs counter to such policy."). Because of this judicial predilection, strict or narrow construction is usually applied to exceptions to the general operation of a law. *State ex rel. Murtagh v. Department of City Civil Serv.*, 42 So. 2d 65, 73-74 (La. 1949). For this reason, a grandfather clause will be construed to include no case not clearly within the purpose, letter, or express terms, of the clause. *See United States v. McElvain*, 272 U.S. 633, 639 (1926) (A proviso "is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose."); *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 165 (1841) (Those who claim their case falls within the exceptions created by a statutory proviso "must establish it as being within the words as well as within the reasons thereof."). "In interpreting the exceptions to the generality of the grant, courts include only those circumstances which are within the words and reason of the exception." *Dalehite v. United States*, 346 U.S. 15, 31 (1953). When the scope of a grandfather clause is ambiguous, the court will construe it strictly against the party who seeks to come within its exception. *Teague v. Campbell County*, 920 S.W.2d 219, 221 (Tenn. Ct. App. 1995).

{28} In establishing whether a party falls within the scope of a grandfather clause, courts will apply the rules of statutory construction that are appropriate in the interpretation of any statute. The principal objective in the judicial construction of statutes "is to determine and give effect to the intent of the legislature." *State ex rel. Klineline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). We will construe the entire statute as a whole so that all the provisions will be considered in relation to one another. *New Mexico Pharm. Ass'n v. State*, 106 N.M. 73, 74, 738 P.2d 1318, 1320 (1987). "Statutes must be construed so that no part of the statute is rendered surplusage or superfluous." *Western Investors Life Ins. Co. v. New Mexico Life Ins. Guar. Ass'n (In re Rehabilitation of W. Investors Life Ins. Co.)*, 100 N.M. 370, 373, 671 P.2d 31, 34 (1983). The complement of the preceding rule is that we "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." *Burroughs v. Board of County Comm'rs*, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975). We will not depart from the plain wording of a statute, unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions. *State ex rel. Helman v. Gallegos*, 1994-NMSC-022, 117 N.M. 346, 351-52, 871 P.2d 1352, 1357-58.

D. Legislative History

{29} In attempting to validate its interpretation of the grandfather clauses, UNM introduced evidence regarding PEBA's legislative history. UNM offered testimony from various members of the Governor's Task Force on Public Employee Collective Bargaining, a group of citizens that had engaged in the early drafting of PEBA. It also introduced the statements of an NMFT representative who purported to articulate what employee organizations expected during the drafting of PEBA. UNM even discussed early proposed versions of PEBA that were never enacted. None of this evidence is material, competent, or relevant.

{30} It is the policy of New Mexico courts to determine legislative intent primarily from the legislation itself. *United States Brewers Ass'n, Inc. v. Director of the N.M. Dep't of Alcoholic Beverage Control*, 100 N.M. 216, 219, 668 P.2d 1093, 1096 (1983). Unlike some states, we have no state-sponsored system of recording the legislative history of particular enactments. We do not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation. If the intentions of the Legislature cannot be determined from the actual language of a statute, then we resort to rules of statutory construction, not legislative history.

{31} It is true that, at least on one rare occasion, we looked to "contemporaneous documents submitted to and considered by the legislature at the time of enactment of the legislation." *Helman*, 1994-NMSC-022, 117 N.M. at 350 n.4, 355-56, 871 P.2d at 1356 n.4, 1361-62. However, even this tangible evidence can be of questionable probity in intuiting the Legislature's thought processes. The connection between a particular document and the final wording of a statute may be very tenuous.

{32} The statements of legislators, especially after the passage of legislation, cannot be considered competent evidence in establishing what the Legislature intended in enacting a measure. *United States Brewers Ass'n*, 100 N.M. at 218-19, 668 P.2d at 1095-96 (quoting *Haynes v. Caporal*, 571 P.2d 430, 434

(Okla. 1977)). If the testimony of actual legislators is not recognized as competent, then statements from citizens who drafted early versions of legislation are even less competent. The same can be said of descriptions by labor representatives of what their constituents desired from a particular piece of legislation. Further, we can see no point in attempting to construct the language of statutory provisions that were never enacted. The exclusion of such provisions from the final statute tells us nothing dispositive about the Legislature's intentions; such exclusions are not even necessarily indicative of what the Legislature did *not* intend.

{33} will therefore not consider any of the evidence presented by UNM regarding the "legislative history" of PEBA.

E. PEBA's Grandfather Clauses

{34} PEBA sets forth two requirements a public employer must satisfy in order to obtain grandfather status. First, it must already have in place "a system of provisions and procedures permitting *employees* to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives." Section 10-7D-26(A) (emphasis added). PEBA makes it clear that this system must be productive, actually resulting "in the designation of appropriate bargaining units, the certification of exclusive bargaining agents and the negotiation of existing collective bargaining agreements." Section 10-7D-26(B). Second, in order to be grandfathered, this system must be in effect "prior to October 1, 1991." Section 10-7D-26(A).

{35} We will construe this two-part test narrowly, holding that it applies to specific provisions of a public employer's policy rather than the policy as a whole. In other words, portions of an employer's collective-bargaining system may fail this two-part test while the remainder may qualify for grandfather status. We will address only those portions of UNM's *Policy* that are raised by the issues in this case; we express no opinion about the grandfather status of the remainder of the *Policy*.

{36} Public employers whose system, at least partially, meets these two requirements "may continue to operate under" the valid pre-existing "provisions and procedures." Section 10-7D-26(A). If a public employer does not fulfill these two requirements, it must conform to all the general provisions of PEBA. UNM's *Policy* was instituted in 1970 and easily satisfies the second requirement. The resolution of this issue turns on whether UNM's *Policy* fulfills the first requirement.

{37} There is no dispute that UNM has, since 1970, permitted some employees to "form, join or assist any labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion." Section 10-7D-5. Further, with at least four groups of employees, UNM has negotiated successful collective-bargaining agreements. These accomplishments do not, however, settle the question of UNM's grandfather status.

1. "Public employees" versus "employees"

{38} In an effort to distinguish itself from public employers who do not merit grandfather status, UNM focuses attention on subsection (C) of Section 10-7D-26 which sets forth requirements for collective-bargaining systems established after October 1, 1991. UNM attempts to make much of the observation that this particular subsection–quoted above in paragraph 21–uses the term "public employees" in specifying who should be allowed to bargain with a non-grandfathered public employer. In contrast, UNM argues, the grandfather clause, Section 10-7D-26(A), uses only the general term "employees." Thus, UNM claims, employment policies established after October 1, 1991, cannot enlarge upon the three categories of "public employees" that PEBA expressly excludes from the bargaining process, those being "management employees, supervisors and confidential employees." Section 10-7D-5. However, UNM asserts that the use of the general term "employees" in the grandfather clauses means that UNM is not required to open the bargaining process to all "public employees" as they are defined under the Act. UNM seems to be saying that, even though it did not recognize all eligible "public employees" as mandated by PEBA, it has earned grandfather status by recognizing at least a few categories of "employees."

{39} Here, UNM is arguing that "public employee," a term that is specifically defined by PEBA, is distinct from "employees," a term which PEBA uses but does not specifically define. UNM has raised a legitimate ambiguity in the grandfather clauses. Under our standards of statutory review, this ambiguity will be construed strictly against UNM, the party that seeks to come within the grandfather exception. *See Teague*, 920 S.W.2d at 221.

{40} UNM's argument violates the statutory rule of construction that prohibits reading any language into a statute that is not clearly implicated by the actual words of the statute. *See Burroughs*, 88 N.M. at 306, 540 P.2d at 236. Under this rule of construction, it is more logical to conclude that, when a term, comprised of more than one word, is expressly defined by a statute, and a shortened form of this term appears elsewhere in the statute in context similar to the use of the long form, and further, when the statute includes no separate definition for this shortened form, the court should presume that the two terms have one-and-the-same definition. Certainly, under such circumstances, the burden of proof rests upon the party that claims the two terms have different meanings. This proof may be established by employing the usual methods of statutory construction such as looking to the intent of the Legislature and interpreting the words in the context of the statute as a whole. *Cf. Klineline*, 106 N.M. at 735, 749 P.2d at 1114 (legislative intent); *New Mexico Pharm. Ass'n*, 106 N.M. at 74, 738 P.2d at 1320 (whole statute).

{41} UNM has failed to demonstrate that PEBA intends to distinguish between "public employees" and "employees." UNM offers no rationale for its peculiar implicit assertion that an act called the "Public Employee Bargaining Act" would regulate any employees other than "public employees." All the language of PEBA, taken as a whole, indicates that when the Legislature used the

term "employees," it intended to refer only to "public employees" as they are defined and regulated under the Act. *See New Mexico Pharmaceutical Ass'n*, 106 N.M. at 74, 738 P.2d at 1320 (construe the statute as a whole).

{42} In fact, subsection C of Section 10-7D-26 actually uses both terms, contrary to UNM's claim that it discusses only "public employees." Furthermore, it uses both terms to set forth the requirements for a single class of public employers: those who are not grandfathered. Looking at the language of Section 10-7D-26(C), it is difficult to imagine how the statute could make any sense at all if the Legislature intended to distinguish between "employees" and the "public employees." For example, it would be senseless for this single statutory subsection to distinguish between these two terms when, on the one hand, it permits any public employer, after October 1, 1991, to adopt "a system of provisions and procedures permitting *employees* to form, join or assist any labor organization for the purpose of bargaining collectively through exclusive representatives freely chosen by its *employees*," § 10-7D-26(C) (emphasis added), and then, on the other hand, requires, in almost identical language, that this system include "the right of *public employees* to form, join or assist employee organizations for the purpose of achieving collective bargaining," § 10-7D-26(C)(1) (emphasis added). In this case, ambiguity and absurdity would be the consequence of departing from the apparent intention of the Legislature to use two slightly different terms to express a single idea. *Helman*, 1994-NMSC-022, 117 N.M. at 351-52, 871 P.2d at 1357-58 (indicating we will not depart from the language of a statute unless it is necessary to resolve an ambiguity or absurdity).

{43} When PEBA describes those who may collectively bargain as "employees," it refers to all public employees, except confidential, managerial, and supervisory employees, who work for a public employer other than the state. *See* § 10-7D-5; § 10-7D-26. Furthermore, this is the meaning that the Legislature intended when it used the word "employees" in the grandfather clause, Section 10-7D-26(A). Paragraph B of UNM's *Policy*, quoted in full above in paragraph 20, does not qualify for grandfather status under PEBA because it does not extend the right to bargain collectively to all employees who have been afforded this right under PEBA. Thus, this portion of UNM's *Policy* fails to meet the first requirement, mentioned above, that a public employer must satisfy in order to obtain grandfather status.

2. "Appropriate bargaining units"

{44} This conclusion is bolstered by other language from the grandfather clauses that recognizes only those policies that result in actual productive collective-bargaining agreements. Subsection B of Section 10-7D-26. requires that such policies result "in the designation of *appropriate bargaining units*, the certification of exclusive bargaining agents and the negotiation of existing collective bargaining agreements." (Emphasis added.) PEBA defines "appropriate bargaining unit" as "a group of *public employees* designated by the board or local board for the purpose of collective bargaining." Section 10-7D-4(A) (emphasis added).

{45} UNM's *Policy* includes a definition of "appropriate bargaining unit" which is in direct conflict with PEBA's definition:

> D. *DETERMINATION OF APPROPRIATE BARGAINING UNIT*
>
> The University will be solely responsible for determining . . . whether a unit is appropriate for purposes of exclusive recognition.

UNM, *Policy* ¶ D, at 6-7. UNM's definition is superceded by PEBA. Because UNM's grandfather status depends in part on whether it has designated "appropriate bargaining units," it would not be sensible to allow UNM's self-serving definition of this term to settle the grandfathering question.

{46} Thus, under PEBA, a grandfathered collective-bargaining policy must include "appropriate bargaining units." Section 10-7D-26(B). Reading this grandfather provision in the context of PEBA as a whole, a bargaining unit is "appropriate" only as defined by PEBA. Under PEBA's definition, these units must be comprised of "public employees." All classes of "public employees" as defined by PEBA must have the right to form bargaining units or the units will not conform to PEBA's definition of "appropriate bargaining unit." As discussed above, UNM's *Policy* does not recognize all classes of "public employees" as the term is defined in Section 10-7D-5 and Section 10-7D-4(P). Thus, UNM's *Policy* does not provide for "the designation of appropriate bargaining units." Section 10-7D-26(B). This failure on the part of UNM's *Policy* leads to the conclusion that Paragraph D of UNM's *Policy*, in which UNM defines "appropriate bargaining unit," is invalid and must also be denied grandfather status.

3. Public policy and the purpose of PEBA

{47} We noted above that grandfather clauses function to prevent harm. *See Commonwealth Air Transp.*, 196 S.W.2d at 869. Such clauses serve to mitigate hardship and injustice upon those who have engaged without statutory regulation in an activity before the statute was initiated. As we shall demonstrate in the second part of this opinion, UNM has offered no convincing evidence of any hardship or injustice it will suffer from opening the collective-bargaining process to an expanded number of employees. Lacking this evidence, it cannot claim it will suffer from the hardship that the grandfather clause was created to prevent.

{48} Finally, it is our intention in this analysis to determine and give effect to the intentions of the Legislature. *Klineline*, 106 N.M. at 735, 749 P.2d at 1114. In this case, it is important that any public employer's collective-bargaining policy conform to the purpose for which the Legislature created PEBA:

> The purpose of the Public Employee Bargaining Act [10-7D-1 to 10-7D-26 NMSA 1978] is to guarantee *public employees* the right to organize and bargain collectively with their employers, to promote harmonious and

> cooperative relationships between public employers and *public employees* and to protect the public interest by assuring, at all times, the orderly operation and functioning of the state and its political subdivisions.

Section 10-7D-2 (emphasis added). Once again the Act makes clear that its very function is to extend the right to organize and bargain collectively to all "public employees" as they are defined by PEBA. It is entirely within the constitutional police power of the Legislature to require a public employer–even one that has a long-standing well-established employment policy– to expand the scope of employees to whom it must extend the right to bargain collectively. *Cf. State v. Spears*, 57 N.M. 400, 408, 259 P.2d 356, 361 (1953) (discussing the Legislature's "power to discriminate between persons already lawfully pursuing an occupation subject to the police power and persons who may thereafter seek to engage in the same business."). UNM cannot rationally argue that it should be immunized from the core purpose of the Act by denying the statutory collective-bargaining rights to all but a few of the thousands of its public employees.

{49} We conclude that, regarding UNM's grandfather status, the decision of the PELRB was neither arbitrary nor capricious, nor did the Board abuse its discretion in any way. *See Fitzhugh*, 1996-NMSC-044, ¶¶ 21-25, 122 N.M. at 180, 922 P.2d at 562; *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-071, 120 N.M. 579, 582, 904 P.2d 28, 31; *see also* § 10-7D-23(B) (standards of judicial review); § 12-8A-1 (same).

IV. PEBA AND THE CONSTITUTIONAL AUTHORITY OF THE BOARD OF REGENTS

{50} The UNM Board of Regents exists because the New Mexico Constitution mandates that "[t]he legislature shall provide for the control and management of the university of New Mexico by a board of regents consisting of seven members." N.M. Const. art. XII, § 13. The Board of Regents is an independent governing body which has a very real, though somewhat ill-defined, independence from outside control. The Legislature has specified some of the Regents's powers:

> The board of regents shall have power and it shall be its duty to enact laws, rules and regulations for the government of the university of New Mexico. The board of regents may hire a president for the university of New Mexico as its chief executive officer and shall determine the scope of the president's duties and authority.

NMSA 1978, § 21-7-7 (1995). The reason for the Regents' autonomy is to assure that the educational process is free of interference from the capricious whims of the political process.

{51} This is not to suggest that the Board of Regents is exempt from the laws of New Mexico. *See Regents of the Univ. of Mich. v. Michigan Employment Relations Comm'n*, 204 N.W.2d 218, 223 (Mich. 1973). As the Unions point out, the Board of Regents is subject to the Legislature's exercise of its police power. "The Legislature is the proper branch of government to determine what should be proscribed under the police power; a statute is sustainable as a proper exercise of that power if the enactment is reasonably necessary to prevent manifest evil or reasonably necessary to preserve the public safety, or general welfare." *Alber v. Nolle*, 98 N.M. 100, 105, 645 P.2d 456, 461 (Ct. App. 1982). The Board of Regents is not immune from statutes that further the public welfare and that are of statewide concern and general applicability such as the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to -7, 28-1-9 to -14 (1969, as amended through 1995), and the New Mexico Unemployment Compensation Law, NMSA 1978, §§ 51-1-1 to -58 (1936, as amended through 1997).

{52} However, legislation that intrudes upon the authority of boards of regents to determine educational policy will be struck down as unconstitutional. *Cf. Board of Regents v. Judge*, 543 P.2d 1323, 1331-35 (Mont. 1975) (striking down, as unconstitutional violation of regents' authority, legislative attempts to intrude into budgetary decisions of university); *Board of Regents v. Baker*, 638 P.2d 464, 469 (Okla. 1981) (striking down a statute that raised faculty salaries because it interfered with regents' constitutionally mandated independence and power to govern university). Similarly, the Legislature will appropriate funds for the university, but it is forbidden from taking direct control over those funds it has appropriated. *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 370, 524 P.2d 975, 986 (1974); *State v. Hearne*, 112 N.M. 208, 211-12, 813 P.2d 485, 488-89 (Ct. App. 1991).

{53} UNM argues that its constitutional autonomy is violated by the PELRB's command that it open the bargaining process to all its employees except those excluded under PEBA. UNM is correct in pointing out that, when a legislative measure directly impairs the Regents's power to make decisions about the educational character of the university, the State Constitution becomes a restriction upon the measure's applicability. *See National Labor Relations Bd. v. Yeshiva Univ.*, 444 U.S. 672, 688 (1980) ("The 'business' of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions"). UNM contends that the PELRB misinterpreted the Act so as to supercede the Board of Regents' constitutional power over educational matters. UNM argues that decisions about which categories of employees should be permitted to collectively bargain are central to the "control and management" of the university under Article XII, Section 13 of the New Mexico Constitution; as such, these decisions have a potentially profound impact on the educational mission of the university. The decisive issue before us is whether the enforcement of PEBA's collective-bargaining requirements upon UNM would violate Article XII, Section 13 of the New Mexico Constitution by infringing upon the autonomy of the Board of Regents in its "control and management" of the university.

{54} UNM describes a number of dilemmas that it fears will be raised by the enforcement of the PELRB's decision.

UNM claims that it follows the practice of many universities of dividing the governance of the institution "between a central administration and one or more collegial bodies." *Yeshiva Univ.*, 444 U.S. at 680. In the case of UNM, the collegial body is the Faculty Senate. UNM asserts that, because virtually all decisions relating to the educational mission of the university are decided with significant input from the Faculty Senate, the introduction of collective bargaining among faculty members will have a significant negative impact. *Cf. id.* at 686 (discussing the absolute authority faculty members of Yeshiva University hold over academic matters). This is because, according to UNM, the collective-bargaining process is adversarial in nature, while the relationship between the university administration and the Faculty Senate is collegial, being based upon common interests and goals.

{55} Collective bargaining would also, according to UNM, undermine the role of faculty members in faculty personnel decisions. UNM postulates that, in questions of tenure or promotion, faculty members must evaluate one another independently and critically in contrast to unionized employees who tend to unite against management in support of one another. *Cf. id.* at 687 (discussing the conflict resulting when employees "divide their loyalty between employer and union"). In the same vein, UNM asserts that unionized employees seek "across-the-board" pay increases that directly conflict with the development of individual employment packages to attract "faculty superstars" who are important to the university's reputation.

{56} UNM claims that for all these reasons, collective bargaining would interfere with the influence faculty members assert over the university's educational mission. UNM seems to be suggesting that, because union activities would require faculty members to distance themselves from educational decisions, the role of the Faculty Senate would be correspondingly reduced.

{57} UNM's concerns are without merit. All of UNM's objections are speculations about what might occur. There is no concrete evidence to prove that the undermining of the collegial system of university governance is in any way inevitable. Moreover, in arguing that the collective-bargaining process is inherently adversarial, UNM expresses generalizations and stereotypes that have no basis in the specific facts of this case. Depicting these evils as if they were necessary results of PEBA is in direct contradiction to the Act's self-described purpose of promoting "harmonious and cooperative relationships between public employers and public employees" and protecting "the public interest by assuring, at all times, the orderly operation and functioning of the state and its political subdivisions." Section 10-7D-2. We find no necessary link between the requirement to bargain in good faith and the usurpation of the Regent's constitutional powers.

{58} UNM cannot demonstrate a logical connection between PEBA and the loss of its autonomy because it is not required under PEBA to accept any specific proposal. It always has control over the final outcome of any agreement. UNM need not fear that its financial autonomy will be undermined because PEBA only requires the university to "bargain in good faith." Section 10-7D-17(A)(1). There is no requirement about which terms it must accept in an agreement; the university always has final say over the financial consequences of any negotiated settlement. *Cf. Hearne*, 112 N.M. at 211-12, 813 P.2d at 488-89 (discussing financial autonomy).

{59} Similarly, UNM need not yield to any employee proposal that legitimately interferes with the educational mission of the university. PEBA specifically guarantees that "neither the public employer nor the [labor organization] shall be required to agree to a proposal or to make a concession." Section 10-7D-17(A)(1). PEBA also explicitly states that it is setting no standards for a public employer's personnel decisions:

> Unless limited by the provisions of a collective bargaining agreement or by other statutory provision, a public employer may:
>
> A. direct the work of, hire, promote, assign, transfer, demote, suspend, discharge or terminate public employees;
>
> B. determine qualifications for employment and the nature and content of personnel examinations; . . . .

Section 10-7D-6. PEBA simply requires that UNM "bargain in good faith." with its employees about the terms and conditions of employment and makes no specific requirements as to the outcome of any negotiations. *See* § 10-7D-17(A)(1).

{60} Undoubtedly, there will be circumstances in which a union might wish to bargain over a matter that UNM believes will implicate its constitutional power to set educational policy. In addressing similar issues, the Michigan Supreme Court explained that the question as to whether an employee's proposal will implicate the university's educational mission is dependent upon the specific facts of the situation:

> Because of the unique nature of the University of Michigan [because of its constitutional autonomy] . . . the scope of bargaining by the [employees'] Association may be limited if the subject matter falls clearly within the educational sphere. Some conditions of employment may not be subject to collective bargaining because those particular facets of employment would interfere with the autonomy of the Regents. For example, the Association clearly can bargain with the Regents on the salary that their members receive since it is not within the educational sphere. While normally employees can bargain to discontinue a certain aspect of a particular job, the Association does not have the same latitude as other public employees. For example, interns could not negotiate working in the pathology department because they found such work distasteful. If the administrators of medical schools felt that a certain number of hours devoted to pathology was necessary to the education of the intern, our Court would not interfere since this does fall within the autonomy of the

> Regents under Article VIII, section 5. Numerous other issues may arise which fall between these two extremes and they will have to be decided on a case by case basis.

Regents of the Univ. of Mich., 204 N.W.2d at 224. Any potential intrusions into UNM's educational or academic policies can be addressed by the PELRB as they arise. PEBA specifically empowers the PELRB to "hold hearings for the purposes of . . . adjudicating disputes and enforcing the provisions of the Public Employee Bargaining Act." Section 10-7D-12(A)(3). In this way, PEBA functions to protect, rather than undermine, the constitutional autonomy of UNM's Board of Regents.

V. CONCLUSION

{61} For the foregoing reasons, we affirm the district court's affirmance of the Decision and Order of the PELRB. UNM's *Policy* is invalidated insofar as it denies collective-bargaining rights to all public employees as they are defined by PEBA.

{62} IT IS SO ORDERED.

GENE E. FRANCHINI,
Chief Justice

WE CONCUR:
JOSEPH F. BACA, Justice
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
DAN A. MCKINNON, III, Justice

CLASSIFIEDS

POSITIONS

ASSOCIATE ATTORNEY

Santa Fe commercial law firm is seeking an associate with 4 to 5 years of litigation experience. Applicants should possess excellent research and writing skills. Good benefits and growth potential. Please submit resume, writing sample and cover letter to: Box W, P.O. Box 25883, Albuquerque, NM 87125.

ATTORNEYS

New Mexico Public Defender Department is recruiting applicants for four (4) Public Defender 1 vacancies and one (1) Public Defender 3 vacancy in Albuquerque, New Mexico. Incumbents will provide professional legal services within the Metropolitan Division for indigent clients facing criminal charges. The Public Defender 1 is an entry-level Public Defender Attorney. Qualifications: Current license as an attorney issued by the Supreme Court of NM. Some law practice is preferable. Opened through Aug. 7, 1998. Please contact Cristina Jaramillo, Public Defender 5, at (505) 841-5186 for more information. DOL Job Order #: NM0624967. The Public Defender 3 is the full-performance, staff-level Public Defender Attorney. Qualifications: Current license as an attorney issued by the Supreme Court of NM. Experience in the general practice of law or as an attorney for a public or private employer totaling two (2) years. Please contact Cristina Jaramillo, Public Defender 5, at above number. DOL Job Order #: NM0624980.

ATTORNEY

The New Mexico Public Defender Department is recruiting for a Public Defender 3 position, which will be located in either Santa Fe or Albuquerque, NM. The incumbent will provide habeas corpus representation for indigent petitioners. The Public Defender 3 is a full-performance, staff-level Public Defender Attorney. Qualifications: Current license as an attorney issued by the Supreme Court of NM. Training and/or experience in the practice of criminal law at the trial and/or appellate level totaling a minimum of three (3) years. Please contact Lisa Wisdom, Assistant Chief Public Defender, at (505) 827-3931 for more information. Applicants for this position must register with NM Department of Labor (DOL). Please contact John Stapleton, HR Manager, at (505) 827-3931, Ext. 102, for the DOL job order number. This position is being advertised pending funding approval. The position is a term position for FY99 running from Aug. 1, 1998 - June 30, 1999. The State of New Mexico is an equal opportunity employer.

ASSISTANT DISTRICT ATTORNEY II

The Ninth Judicial District Attorney's Office has an opening for an Assistant District Attorney II. Applicants should be licensed New Mexico attorneys. The position allows successful applicant the opportunity to handle juvenile, misdemeanor and felony criminal prosecutions through all stages of the criminal justice system. The opening is for the Portales, New Mexico District Attorney's Office and is available at present. Salary based upon experience and motivation. Send resume to: Randall M. Harris, District Attorney, 700 N. Main, Suite #16, Curry County Courthouse, Clovis, NM 88101.

STAFF ATTORNEY
PUEBLO OF POJOAQUE
LEGAL DEPARTMENT

Resumes are being accepted for a staff attorney. The applicant shall represent the Pojoaque Pueblo Gaming Commission, Pueblo members, and shall be responsible for various civil and criminal legal assignments. The applicant should have an understanding of jurisdictional issues. Two years of legal experience is preferred, but all applicants shall be considered. Native American attorneys are urged to apply. Please include salary requirements. The job will be under a two-year contract and shall begin no later than Oct. 1, 1998. Resumes can be mailed or faxed to: Pueblo of Pojoaque, Legal Department, Rt. 11, Box 21-B, Santa Fe, NM 87501, fax (505) 455-3363.

SANTA FE COUNTY
ASSISTANT COUNTY ATTORNEY

Santa Fe County is seeking an attorney with 0-2 years experience for fast-paced and diverse legal work, including litigation, land use and water issues, personnel matters, contract review and negotiation and law-enforcement matters. Position requires court appearances, public presentations before various commissions and committees and a great deal of personal contact with county commissioners, other county officials, county employees and the public. Salary starts at $37,000 per year, but will commensurate with experience. Please send resume to: Santa Fe County Attorney's Office, P.O. Box 276, Santa Fe, NM 87504-0276 or 102 Grant Avenue. Deadline to submit resume is Aug. 17, 1998. Santa Fe County is an EEO/AA Employer.

ASSOCIATE

Small creditor law firm has an opening for an associate attorney position with 1-3 years of experience in the practice of law preferred. Good benefit package and salary commensurate with experience. Send resume to: Box B, P.O. Box 25883, Albuquerque, NM 87125.

ASSOCIATE ATTORNEYS

Martin E. Threet & Associates, a law firm primarily engaged in civil practice, is seeking two associates, one with 3-5 years experience in the general practice of law, and for the second associate, minimal experience acceptable. All inquiries kept confidential. Submit resume, writing sample and cover letter to: L.A. Elliott, 6400 Uptown Blvd. NE, Albuquerque, NM 87110.

ASSOCIATE ATTORNEY

Busy commercial law firm seeks associate with approximately three to four years of experience. Excellent writing and legal analysis skills required. The ideal candidate would have experience in bankruptcy, commercial litigation, commercial law and business transactions. Submit resume, writing sample and cover letter to: Office Manager, Jacobvitz, Thuma & Matthews, 500 Marquette Ave. NW, Ste. 650, Albuquerque, NM 87102.

SENIOR TRIAL PROSECUTOR

Eighth Judicial District Attorney John Paternoster is seeking applications to immediately fill a position of Senior Trial Prosector in the Taos Office. The position requires prosecution or criminal law trial experience. Salary for this position is $44,685 depending on experience. Please send resume to: Geri V. Montoya, Fiscal Officer, P.O. Drawer E, Taos, New Mexico 87571. Deadline for applications is Aug. 15, 1998.

ASSISTANT DISTRICT ATTORNEY

Assistant District Attorney position available with the Sixth Judicial District Attorney's Office in Silver City. Criminal law experience required. Position primarily involves prosecution of DWI cases and some misdemeanors. Salary commensurate with experience. Please send resume to: Jim Foy, Sixth District Attorney, P.O. Box 1025, Silver City, NM 88062 or fax to 505-388-5184. Application deadline is 5 p.m., Aug. 7, 1998.

All advertisements must be submitted in writing, either typed or clearly printed. *Advertisement deadline is Thursday, 5:00 p.m. for the issue of the following week.* Display and classified advertising will be accepted for publication in the *Bar Bulletin*, in accordance with standards and ad rates set by the Editor and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication requests. The Editor reserves the right to review and edit classified ads, to request that an ad be revised prior to publication, or to reject ads. Advertising space for educational seminars will be provided at one-half the regular advertising rates. Rate sheets available upon request. Call (505) 797-6029 for advertising information.

Fasken v. OCC 87 NM 292 532 P.2d 588 (1975)

In their argument in this court, each party attempts to explain precisely what is transpiring 5700 feet below the surface of Eddy County. Certainly we do not want for theories. We suffer from a plethora of theories. The theories of each party sound equally logical and reasonable and each is diametrically opposed to those of the other party. The difficulty with them is that they emanate from the lips and pens of counsel and are not bolstered by the expertise of the Commission to which we give special weight and credence (Grace v. Oil Conservation Com'n, 87 N.M. 205, 531 P.2d 939 [decided January 31, 1975]); (Rutter & Wilbanks Corporation v. Oil Conservation Com'n, 87 N.M. 286, 532 P.2d 582 [decided February 21, 1975]), nor included in its findings.

Fasken

All of the issues of this case may be resolved by simple rules, clearly stated by this court on several occasions. In cases where the sufficiency of the Commission's findings is in issue or their substantial support is questioned, after the dust of the Commission hearing has settled, the following must appear:

A. Findings of ultimate facts which are material to the issues. Such findings were characterized as "foundationary matters", "basic conclusions of fact" and "basic findings" in Continental Oil Co. v. Oil Conservation Com'n, 70 N.M. 310, 373 P.2d 809 (1962). These findings have to do with such ultimate factors as whether a common source of supply exists, the prevention of waste, the protection of correlative rights and matters relative to net drainage. Whether the ultimate findings in this case are sufficient we do not decide. Their sufficiency is not disputed by Fasken in this appeal.

B. Sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings. In Continental, it was said that although elaborate findings are not necessary, nevertheless:

"* * * Administrative findings by an expert administrative commission should be sufficiently extensive to show * * * the basis of the commission's order." Id. at 321, 373 P.2d at 816.

Such findings are utterly lacking here and reversal is thereby required. We do not have the vaguest notion of how the Commission reasoned its way to its ultimate findings. We have only the theories stated in argument of counsel which we are ill-equipped to gauge.

C. The findings must have substantial support in the record. This requirement was recently discussed and redefined in Grace, but we do not reach this question owing to the deficiencies in the findings themselves.

The summary judgments are reversed. The orders of the Commission are set aside. The cases are remanded to the Commission for the making of additional findings of fact based upon the record as it presently exists, and the entry of new orders.

Fugere v. State, 120 N.M. 29, 897 P.2d 216 (Ct. App. 1995)

The standard of review for an appeal from an administrative agency is whether there is substantial evidence in the record as a whole to support the agency's decision. **Romero** , 106 N.M. at 659, 748 P.2d at 32. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. **Rutter & Wilbanks Corp. v. Oil Conservation Comm'n** , 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). The determination of whether Fugere refused "to submit to a breath test is a question of fact, not of law." **Romero** , 106 N.M. at 659, 748 P.2d at 32. Since this is a factual question, the hearing officer's determination that Fugere's acts constituted a refusal may only be overturned if not supported by the record as a whole. **Id.** at 660, 748 P.2d at 33.

Morningstar Water Users Ass'n v. State Pub. Util., 120 N.M. 579, 904 P.2d 28 (1995)

The party challenging a Commission decision bears the burden on appeal of showing that the decision "is unreasonable, or unlawful." Section 62-11-4. More specifically, the party must show that agency action falls within one of the oft-mentioned grounds for reversal including whether the decision is arbitrary and capricious; whether it is supported by substantial evidence; and whether it represents an abuse of the agency's discretion by being outside the scope of the agency's authority, clear error, or violative of due process. **See El Vadito de los Cerrillos Water Ass'n v. New Mexico Pub. Serv. Comm'n,** 115 N.M. 784, 787, 858 P.2d 1263, 1266 (1993); 2 Am. Jur. 2d **Administrative Law** § 522 (1994).

When reviewing administrative agency decisions courts will begin by looking at two interconnected factors: whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency's specialized field of expertise. **Cf. El Vadito,** *{*583}* 115 N.M. at 792, 858 P.2d at 1271 (Ransom, C.J., dissenting).

When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation. **Public Serv. Co. v. New Mexico Pub. Serv. Comm'n,** 106 N.M. 622, 625, 747 P.2d 917, 920 (1987). The court will confer a heightened degree of deference to legal questions that "implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." **Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.,** 746 P.2d 896, 903 (Alaska 1987); **see also Stokes v. Morgan,** 101 N.M. 195, 202, 680 P.2d 335, 342 (1984) ("The special knowledge and experience of state agencies should be accorded deference."). However, the court is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law. **See Thomas v. Missouri Dep't of Social Servs.,** 805 S.W.2d 286, 288 (Mo. Ct. App. 1991). The court should reverse if the agency's interpretation of a law is unreasonable or unlawful. **See Maestas v. New Mexico Pub. Serv. Comm'n,** 85 N.M. 571, 574, 514 P.2d 847, 850 (1973).

When the matter before the court is a question of fact, the court will generally defer to the decision of the agency, especially if the factual issues concern matters in which the agency has specialized expertise. **See Attorney Gen. v. New Mexico Pub. Serv. Comm'n.** 111 N.M. 636, 642, 808 P.2d 606, 612 (1991). The court will review the evidence in the light most favorable to the agency decision but it is not limited by the old standard of ignoring evidence unfavorable to the agency decision. Rather, the court can employ a whole record review to determine if the agency's factual determination is supported by substantial evidence. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.,** 101 N.M. 291, 294, 681 P.2d 717, 720 (1984).

The determination of whether an administrative agency has jurisdiction over the parties or subject matter in a given case is a question of law. **El Vadito,** 115 N.M. at 787, 858 P.2d at 1266. As an administrative body created by statute, the agency's authority and jurisdiction are defined by statute. **New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n,** 81 N.M. 683, 684-85, 472 P.2d 648, 649-50 (1970) [hereinafter **Electric v. Commission].** New Mexico courts will accord "little deference" to the agency's own interpretation of its jurisdiction. **El Vadito,** 115 N.M. at 787, 858 P.2d at 1266.

111 N.M. 636, 808 P.2d 606 ATTORNEY GEN. V. NEW MEXICO PUB. SERV. COMM'N (S. Ct. 1991) 1991 N.M. Lexis 125

IN THE MATTER OF THE PRUDENCE OF COSTS INCURRED BY PUBLIC SERVICE COMPANY OF NEW MEXICO IN CONSTRUCTION OF PALO VERDE NUCLEAR GENERATING STATION, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO,

Appellant,

vs.

NEW MEXICO PUBLIC SERVICE COMMISSION and PUBLIC SERVICE COMPANY OF NEW MEXICO, Appellees

No. 19046
SUPREME COURT OF NEW MEXICO
111 N.M. 636, 808 P.2d 606, 1991 N.M. LEXIS 125
March 21, 1991, Filed. As Amended

Appeal From Order of the Public Service Commission.

COUNSEL

Honorable Tom Udall, Attorney General, Randall Childress, Deputy Attorney General, Nann Houliston, Assistant Attorney General, Santa Fe, New Mexico, for Appellant.

Lee W. Huffman, James C. Martin, Commission Counsel, Santa Fe, New Mexico, for Appellee New Mexico.

Keleher & McLeod, Richard B. Cole, Robert H. Clark, Albuquerque, New Mexico, O'Melveny & Myers, Carl R. Schenker, Jr., Phillip R. Kaplan, Robert M. Schwartz, Brian C. Anderson, Kathleen D. Strong, Washington, D. C., for Appellee Public Service Company of New Mexico.

JUDGES

Dan Sosa, Jr., Chief Justice. Seth D. Montgomery, Justice, Gene E. Franchini, Justice, concur.
AUTHOR: SOSA

OPINION

Sosa, Chief Justice.

*{*637}* In this "prudence case" we consider the second phase of a unified three-part process by which the New Mexico Public Service Commission (PSC or the Commission) considered the rate treatment of Public Service Company of New Mexico's (PNM's) 10.2% ownership interest in the Palo Verde Nuclear Generating Station (Palo Verde).

In the preceding excess capacity case,[1] we held that:

(1) PSC had jurisdiction to issue its final order both with respect to determination of alternatives to the inventory ratemaking methodology and to problems relating to phasing in of PNM's excess generating capacity;

(2) PSC's regulatory decision-making process was not pre-empted by federal law;

{*638} (3) PSC's exclusion of the M-S-R contract did not violate the Commerce Clause;

(4) PSC's consideration of the effects of various fuel mixes was not error;

(5) Various PSC findings on the merits affecting ultimate rates were not ripe for review;

(6) PSC acted reasonably in breaking the case into three parts and delaying any decisions on prudence until a decision on excess capacity was rendered;

(7) PSC's decision allowing inclusion of Palo Verde Units 1 and 2 but excluding Unit 3 and some 235 megawatts of coal-fired generating capacity from rate base (thereby excluding some $384 million of capital costs from PNM's rate base) was affirmed.

Having thus decided phase one of this tripartite case, we now consider phase two, the prudence case. The Attorney General (AG) appeals PSC's prudence order, 110 P.U.R. 4th 69 (NMPSC 1990), arguing that PSC wrongly terminated a hearing on the merits of the prudence case by considering and then approving a stipulation entered into between PSC staff (Staff) and PNM. This procedural argument is bolstered by the AG's contention that the prudence order is not based on substantial evidence. On appeal, we affirm PSC's prudence order in its entirety.

We consider first the AG's procedural objections to the order. Contrary to the AG's contentions, our reading of the record convinces us that when settlement negotiations began, and while they continued, the AG was given ample opportunity to participate but declined to do so. Even had he been excluded from settlement negotiations, however, the AG nonetheless was given opportunity to participate and did fully participate in the five weeks of hearings which PSC held on the issue of the stipulation's fairness to ratepayers and investors. **See generally Re Nine Mile Point 2 Nuclear Generating Facility,** 78 P.U.R 4th 23, 46 (NYPSC 1986) (exclusion from "confidential" settlement negotiations does not invalidate final order where the hearing process on the contested settlement afforded all parties due process).

The AG was afforded reasonable notice, an opportunity to be heard and to present his claims or defenses. More was not required. **See Jones v. New Mexico State Racing Commission,** 100 N.M. 434, 671 P.2d 1145 (1983). Here the AG had some four months to prepare for the hearing and filed numerous interrogatories along with testimony and exhibits of four witnesses. **Cf. New Mexico Industrial Energy Commission v. New Mexico Public Service Commission,** 104 N.M. 565, 568, 725 P.2d 244, 247 (1986) (no due process violation where NMIEC had less than one month to prepare for hearing on contested stipulation).

The core of the AG's due process attack is that Staff and PNM on their own improperly negotiated the settlement, thereby excluding the AG as a representative of residential ratepayers and depriving the AG and the ratepayers of due process. We disagree with the AG's argument that Staff may not enter into settlement negotiations with one or more utilities. The AG challenges Staff's capacity to negotiate as a "party." Yet, there is no dispute that Staff is not a party. The real question is whether Staff, under relevant statutes and PSC rules, has the capacity, however Staff is designated, to conduct settlement negotiations. We find that Staff does possess this capacity. This has been conceded even by one of the AG's own witnesses, who testified,

"Staff obviously had the capacity in this case to enter into agreement with [PNM]...."

NMSA 1978, Section 62-6-4(A) (Repl. Pamp. 1984) gives PSC power "to do all things necessary and convenient in the exercise of its power and jurisdiction... to regulate or supervise the rates or service of any utility...." This broad authority includes the power to publish rules, NMSA 1978, 62-6-1, and to employ staff. 62-5-8. Under its rules, PSC has established that "parties to a proceeding and Staff may reach compromises and settle some or all issues." NMPSC Rule 110.83(a). Further, stipulated settlements may *{*639}* be formulated for the Commission's approval in which Staff plays an active role. NMPSC Rule 110.85(a).

PSC's rules and policies in this regard do not differ from the standard practice throughout the nation. **See e.g., City of Akron v. Public Utilities Commission,** 55 Ohio St. 2d 155, 157-58, 378 N.E.2d 480, 483 (1978) (approving stipulation executed by Staff and one utility); **Re Nine Mile Point 2 Nuclear Generating Facility,** 78 P.U.R.4th at 25 (prudence review resolved by stipulation between utility owners and Staff); **National Fuel Gas Supply Corp. v. F.E.R.C.,** 811 F.2d 1563, 1571-72 n. 5 (D.C. Cir. 1987), **cert. denied,** 484 U.S. 869 (1987) (even if Staff is considered a "party" to settlement negotiations, the Commission itself does not thereby become improperly involved in negotiations). **See also Southern Union Gas Company v. New Mexico Public Service Commission,** 84 N.M. 330, 331, 503 P.2d 310, 311 (1972) (PSC given great flexibility by legislature to achieve its goals); **cf. Mountain States Telephone & Telegraph Company v. New Mexico State Corporation Commission,** 90 N.M. 325, 331, 563 P.2d 588, 594 (1977) (corporation commission "a prime mover" to see that public interest protected); **Halsted v. Dials,** 391 S.E.2d 385 (W.Va. 1990) (if agency determines agreement is just and reasonable it may confirm the settlement without authorization of dissenting party).

The AG strenuously argues that this case is controlled by the holding in **Business and Professional People for the Public Interest (BPI) et. al. v. The Illinois Commerce Commission et. al.** 136 Ill.2d 192, N.E.2d (1990). We disagree. The distinguishing feature of that case is that the Illinois Supreme Court found the Illinois Commerce Commission did not have statutory authority to enter two of the provisions of its Sixth Order. The court opined:

Absent statutory law to the contrary, we have no quarrel with the Commission's ability to **consider** a settlement proposal not agreed to by all of the parties and the intervenors as a decision on the merits, as long as the provisions of such a proposal are within the commission's power to impose, the provisions do not violate the [Illinois Public Utilities Act] and the provisions are independently supported by substantial evidence in the whole record. Such was not the situation in the case at bar.

Id. at 345, 555 N.E.2d at 704.

One of the glaring errors in the Illinois Commission's order was its fixing of a five-year rate. The court held, "We need not decide here whether or under what circumstances the Commission could set long-term rates because circumstances justifying the establishment of rates over a five-year period clearly do not exist in the case at bar." **Id.** at ; N.E.2d at . In the present case, there is no contention raised that PSC lacked statutory authority to resolve the issues before

it; the only issue asserted in this aspect of the appeal is the capacity of Staff to enter into settlement negotiations. Hence, the Illinois case is not supportive of the AG's argument. Further, as we will discuss below, in the case before us, we find that there **is** substantial evidence in the whole record to support PSC's prudence order.

Although Staff is technically not a party to settlement negotiations, we would completely blind ourselves to reality if we did not recognize that Staff functions in very much the same way as a bona fide party in almost all respects. This includes the hiring of witnesses and presentation of evidence, cross-examining witnesses for other parties, making arguments on both the law and the facts, and otherwise behaving in the same way that a party does. Yet, in none of its activities is Staff subject to direction by the commission; Staff is instead an autonomous participant making presentations to the Commission and eliciting rulings from it. We see no reason to treat a stipulation between Staff and PNM (or any other party) on the outcome of the case any differently than a stipulation as to any other matter in the course of the proceedings, or any differently than a stipulation between two ordinary parties.

*{*640}* In many cases, the only party before the Commission is the applicant, or, if the Commission has initiated the proceeding, the respondent. To say that Staff cannot enter into a stipulation with the party is to rule out stipulations in all such single party cases. Consider what would happen in cases where the Commission initiated the proceeding: Staff, which would act as the prosecutor or initiator of the case, would have no ability to stipulate with the respondent, and the case would have to proceed through a hearing, even though there might not be any contested issues. We cannot imagine that the legislature would have intended such a costly, time-consuming result.

Be that as it may, this case is in essence controlled by our holding in **New Mexico Industrial Energy Commission v. New Mexico Public Service Commission,** 104 N.M. 565, 725 P.2d 244 (1986) (Commission adopted a contested stipulation) wherein we recognized that a cooperative approach in reconciling the interests of the parties was consistent with the public policy favoring settlement of disputes. That policy is especially pertinent here, where the Commission in effect initiated the proceeding (inquiring into the prudence of PNM's Palo Verde expenditures) and its "prosecutorial arm," Staff, entered into a stipulation with the target of the inquiry, PNM, by making a stipulation to the outcome.

We note that both the AG and PSC rely on **Mobile Oil Corporation v. Federal Power Commission,** 417 U.S. 283, 312-14 (1974), for support. In that case, the Court in reviewing the Federal Power Commission's adoption of a contested stipulation made it clear that a stipulation which is not joined by all parties is not binding as to a non-settling party, that is, the non-settling party must still be afforded the opportunity to present its views on the merits to the Commission. However, "even if there is a lack of unanimity [in the stipulation], it may be adopted as a resolution **on the merits,** if [the Commission] makes an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will" resolve the subject of the proceeding in a way that is just and reasonable. **Id.** at 314 (quoting **Placid Oil Co. v. FPC,** 483 F.2d 880, 893 (5th Cir. 1973) (emphasis in original).

By the holding in **Mobile Oil,** PSC can adopt a contested stipulation by, first, affording any non-stipulating party an opportunity to be heard on the merits of the stipulation (i.e., whether it is a fair and reasonable resolution of the controversy before the Commission) and second, making an independent finding, supported by substantial evidence in the record, that the stipulation does indeed resolve the matters in dispute in a way that is fair, just and reasonable and in the public interest.

In the present case, PSC satisfied both of these requirements. First, it afforded the AG ample opportunity to present his views on the merits of the stipulation and on the merits of the underlying controversy. The AG himself, prior to the hearing, took the position that the issues to be decided in the hearing were whether adoption of the stipulation would be a fair, just and reasonable resolution of the prudence issues surrounding Palo Verde and would be consistent with the public interest, and whether Staff and PNM as proponents of the stipulation had met their burden of proof on these issues.

PSC's final order summarizes the voluminous discovery that preceded the hearing and the enormity of the hearing process itself, including the length of time, large number of witnesses, etc. During oral argument, it was pointed out that the AG's position had been that his four volumes of testimony on the issue of approval of the stipulation were the same as what his testimony would have been on the underlying issue of PNM's prudence in investing in Palo Verde. Therefore, we conclude that the AG, as a nonstipulating party, had precisely the same opportunity to present his position on the "merits" of the controversy -- PNM's prudence in investing in Palo Verde -- by attacking the stipulation as he would have had if no stipulation had ever been entered into between PNM and Staff.

*{*641}* On the second requirement imposed by **Mobile Oil,** PSC's final order speaks for itself; it **does** contain the requisite "independent finding" that the stipulation is a fair, just and reasonable resolution of the prudence issues relating to PNM's investment in Palo Verde and is consistent with the public interest. This finding is supported by the substantial evidence of the witnesses who testified on behalf of PNM and Staff, and the Commission's finding that PNM and Staff met their burden of proof appears to be well supported and within the bounds of universally accepted standards defining "substantial evidence on the whole record."

We note that the AG does not ask us to find or conclude that PNM was imprudent, but merely to find that the evidence warrants setting aside the stipulation and holding public hearings on the prudence issues. From the discussion above, it is obvious that we disagree with the AG's assertions as to the lack of evidence and his call for public hearings. It is equally obvious from the above discussion why we need not reach the AG's collateral argument to the effect that he has standing to represent residential ratepayers but was denied such standing by the stipulated settlement process and entry of final order.

Whether the AG does or does not have standing to represent residential ratepayers makes no difference, because we have concluded that he received all the process to which he was due in advancing his case before the commission and failed to win his case. Had he stood before the Commission as representative of ratepayers rather than as representative of the State of New

Mexico, the result would be the same.

Nonetheless, because of the magnitude of this case and its enormous impact on the lives of the citizens of this state, we would feel remiss if we did not add a few words on why we agree that PSC's final order does in fact promote and serve the public good and why in fact PSC did arrive at this final order properly, openly and fairly.

This prudence case must be understood in the context of the unified relationship which exists between our holding in the excess capacity case and PSC's unappealed decision in the rate case (NMPSC Case No. 2262). Although the three cases have been segmented for more judicious handling, in reality the three aspects of the case -- excess capacity, prudence, rate-setting -- lie on a continuum of similarity that binds the disparate elements together into a whole. When looking at the parts in the context of the whole, the following picture emerges.

The overall case involves a determination of rate treatment for PNM's 390 megawatt interest in Palo Verde, consisting of 130 megawatts each in three separate nuclear power generating units. In PSC's excess capacity order, which we have now affirmed,[2] PSC included Units 1 and 2 in PNM's next rate case (2262), but excluded from future rates Unit 3 and 235 megawatts of coal-fired generating capacity. This decision excluded $384 million from PNM's rate base. In its prudence decision (the case at bar), PSC further disallowed $90 million from PNM's rate base and imposed stringent performance standards on Palo Verde operations. After reviewing all of the work, evidence, testimony and thinking that had gone into the excess capacity case and the prudence case, PSC in Case 2262 came to the conclusion that PNM's rates should be **decreased** by $2.9 million. Neither the AG, nor anyone else, appealed this ratepayer-favorable decision.

We have no difficulty in taking judicial notice of the unappealed decision in Case 2262. **See Illinois Bell Telephone Company v. Illinois Commerce Commission,** 55 Ill.2d 461, 468, 303 N.E. 2d 364, 368 (1973) (court may take judicial notice of commission actions subsequent to one under review); **Holquin v. Elephant Butte Irrigation District,** 91 N.M. 398, 402, 575 P.2d 88, 92 (1977) (judicial notice of agency rules and regulations); **Miller v. Smith,** 59 N.M. 235, 239-40, 282 P.2d 715, 718-19 (1955) (judicial notice of "closely interwoven" causes).

*{*642}* In the case at bar, PSC was charged with the responsibility of excluding imprudent expenditures from PNM's rate base. We find that PSC succeeded. Even if this were not the case, however, our duty on review of a commission order is not dependent on whether PSC succeeded in excluding imprudent expenditures, but on whether PSC acted capriciously, whether its decision was supported by substantial evidence and whether its determination was within the scope of its authority. **Attorney General v. New Mexico Public Service Commission,** 101 N.M. 549, 553, 685 P.2d 957, 961 (1984). We must view PSC's decision in the light most favorable to upholding that decision, **New Mexico Human Services Department v. Garcia,** 94 N.M. 175, 608 P.2d 151 (1980), and we must take into account the considerable discretion with which PSC is endowed in determining the justness and reasonableness of utility rates. **Hobbs Gas Company v. New Mexico Public Service Commission,** 94 N.M. 731, 616 P.2d 1116 (1980). Finally, we must give PSC's decision great deference, owing to the Commission's expertise in this highly technical area. **See Viking Petroleum, Inc. v. Oil Conservation**

Commission, 100 N.M. 451, 453, 672 P.2d 280, 282.

Taking the above into account, one cannot remain unimpressed with the "end result" of PSC's determination in this tripartite case, or remain unconvinced that the public interest has indeed been served and the needs of both investors and ratepayers have indeed been dutifully promoted by PSC. **See Federal Power Commission v. Hope Natural Gas Company,** 320 U.S. 591, 602 (1944) ("total effect of the rate order" being not unreasonable, judicial inquiry ends and method employed to reach rates unimportant); **Duquesne Light Company v. Barasch,** 488 U.S. 299 (1989) (challenge to successive phases of rate-setting process failed to show how ultimate rates were unjust). Not only has the AG not contested the ultimate rate set in this tripartite case, he has failed even in the prudence case to challenge the $90 million disallowance or the performance standards imposed by PSC. This tacit concession on the AG's part that the end result is just and fair illustrates, we think, the virtue and worth of the PSC final order on prudence.

Accordingly, we hold that the AG's challenge to the Commission's final order fails both in its procedural and in its substantive aspects.

For the foregoing reasons the final order of the Public Service Commission is affirmed.

OPINION FOOTNOTES

1 **In the Matter of the Adjudication of Alternatives to the Inventorying Ratemaking Methodology, and/or Plans for the Phasing in of Public Service Company of New Mexico's Excess Generating Capacity: Public Service Company of New Mexico and New Mexico Industrial Energy Consumers v. New Mexico public Service Commission, and Public Service Company of New Mexico** (No. 18,381) and **In the Matter of the Adjudication of Alternatives to the Inventorying Ratemaking Methodology, and/or Plans for the Phasing in of Public Service Company of New Mexico's Excess Generating Capacity: Attorney General of the State of New Mexico v. New Mexico Public Service Commission Public Service Company of New Mexico and Southwestern Public Service Company** (No. 18,415).

2 See **supra** p.1 n.1.

106 N.M. 622, 747 P.2d 917 PUBLIC SERV. CO. V. NEW MEXICO PUB. SERV. COMM'N (S. Ct. 1987)

Public Service Company of New Mexico, Appellant,
vs.
New Mexico Public Service Commission, Appellee, and New Mexico Industrial Energy Consumers and The Attorney General of the State of New Mexico, Intervenors-Appellees

No. 16608
SUPREME COURT OF NEW MEXICO
106 N.M. 622, 747 P.2d 917
December 28, 1987, Filed
APPEAL FROM PUBLIC SERVICE COMMISSION

COUNSEL

Keleher & McLeod Robert H. Clark, Richard B. Cole, Albuquerque, for Appellant.
Steven F. Asher, Charles F. Noble, Santa Fe, for Appellee.
Hal Stratton, Attorney General, Gary Epler, Assistant Attorney General, for Intervenor-appellee Attorney General.
Campbell, Pica & Olson, Lewis O. Campbell, Wayne Shirley, for Intervenor NM Industrial Energy Consumers.
AUTHOR: RANSOM

OPINION

*{*623}* RANSOM, Justice.

In February, 1986, Public Service Company of New Mexico (PNM) filed an application with the New Mexico Public Service Commission (Commission) which, along with other requests, sought Commission approval of a general diversification plan to restructure PNM into a public utility holding company. In the summer of 1986, the Commission conducted hearings and issued a final order disapproving the restructuring plan. PNM has appealed to this Court for a review of that final order.

At issue is whether the Commission had the statutory authority to disapprove a restructuring prior to its completion and, if it did, whether the Commission abided by its regulations in making its decision. Also at issue is whether there was substantial evidence to support the Commission's order.

We interpret NMSA 1978, Section 62-2-19 (Repl. Pamp.1984) to allow the Commission to disapprove a public utility holding company restructuring prior to its completion. Further, we find that the Commission complied with its applicable regulations and that there was substantial evidence to support the Commission's order of disapproval. We affirm.

PNM contends that Section 62-6-19 should be construed to grant the Commission only the

power to issue remedial orders to rectify the adverse effects of a completed holding company restructuring. PNM reads Section 62-6-19 to preclude the Commission from investigating the formation *{*624}* of the holding company until it is a completed event.

PNM bases its interpretation on the verb tense employed by the legislature in drafting Subsections 62-6-19(B) and (C) relating to Class II transactions, defined as including "the formation * * * of a * * * public utility holding company by a public utility or its affiliated interest * * *." NMSA 1978, 62-3-3(K) (Repl. Pamp.1984). PNM maintains that if the legislature intended the Commission to have the power of prior approval over holding company restructurings, then Subsections 62-6-19(B) and (C) would have been written in the future tense. Subsection 62-6-19(B) provides that:

In order to assure reasonable and proper utility service at fair, just and reasonable rates, the commission may investigate:

* * * * * *

(2) Class II transactions or the resulting effect of such Class II transactions on the financial performance of the public utility to determine whether such transactions or such performance **have** an adverse and material effect on such service and rates.

(Emphasis added.)

Similarly, Subsection (C) requires a public utility company engaging in a Class II transaction to demonstrate that such transaction **has not** materially and adversely affected the utility's ability to provide service at reasonable rates.

PNM claims that use of the present tense indicates that the Class II transaction must already have taken place before the Commission may investigate. According to PNM, if the legislature had contemplated prior approval of holding company restructurings, it would have used words such as " **will** have an adverse and material effect" and " **will** not affect."

"Unless a contrary intent is clear, courts will read and give effect to statutes as written, attributing to the words their plain meaning." **Waksman v. City of Albuquerque**, 102 N.M. 41, 43, 690 P.2d 1035, 1037 (1984). Subsection 62-6-19(B) authorizes the Commission to investigate Class II transactions such as the **formation** of a holding company. "Formation" entails the act of giving form or shape to something or of taking form. **Webster's Third New International Dictionary** 893 (1971). Clearly, PNM was engaged in the formation of its holding company structure when the Commission investigated to determine any adverse and material effect on service and rates. The formation of PNM's holding company involved several steps, one of which was to seek Commission approval. Additionally, PNM had to obtain approval from the Securities and Exchange Commission (SEC) and from PNM's shareholders. Prior to the Commission hearing, PNM had filed its SEC registration statement and had presented its corporate reorganization proposal to its stockholders.

Use of the present tense within Section 62-6-19 does not establish that the legislature only intended the Commission to investigate completed Class II transactions. On the contrary, the

statute grants the Commission the authority to investigate the act of giving form or shape to a public utility holding company to determine the formation's adverse and material effect on service and rates.

Further, Section 62-6-19 speaks of Class II transactions **or** their resulting effect. The word "or" is given a disjunctive meaning unless the context of the statute demands otherwise. **First Nat'l Bank v. Bernalillo County Valuation Protest Bd.,** 90 N.M. 110, 112, 560 P.2d 174, 176 (Ct. App.1977). By using the disjunctive, the legislature intended the Commission to investigate either the formation itself or the resulting effect. Consequently, Subsection (B) allows the Commission to either investigate the act of giving form or shape to the holding company or its resulting effect.

Finally, Subsection (E) of Section 62-6-19 contains a legislative mandate that the Commission "promulgate rules * * * to implement the provisions of Subsections B, C and D of this section, including the manner of conducting such investigations and making such determinations * * * as may be reasonably necessary and as are consistent with the provisions of this 1982 act." *{*625}* In response, the Commission issued General Order 39 (Rules regarding Class I and Class II utilities transactions) in November 1982. General Order 39, Section 3.1(A) states that "No public utility may engage in a Class II transaction * * * without first obtaining written approval of a general diversification plan from the Commission."

Both parties have structured arguments based upon the events which have transpired since the promulgation of General Order 39. The Commission points to the failure of the legislature to express dissatisfaction with General Order 39 as indicative of legislative endorsement. PNM counters that unsuccessful amendments to Section 62-6-19, which would expressly authorize prior Commission approval of Class II transactions, demonstrates that the legislature does not interpret the statute to give the Commission the right of prior approval and that, therefore, General Order 39 is void because it is outside the scope of the statutory authority granted the Commission by Section 62-6-19. **See Rivas v. Board of Cosmetologists,** 101 N.M. 592, 594, 686 P.2d 934, 936 (1984).

In this instance, we construe no intent from legislative inaction. However, it is well settled that courts should accord deference to the interpretation given to a statute by the agency to which it is addressed. **Borrego v. United States**, 577 F. Supp. 408, 412 (D.N.M.1983). **See also Groendyke Transport, Inc. v. New Mexico State Corp. Comm'n**, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984).

Furthermore, PNM's interpretation of Section 62-6-19 would strip the Commission of its ability to protect ratepayers from the adverse effects of the holding company restructuring until the impact has occurred. This Court must interpret statutes in a way which will not render their application unreasonable nor defeat the intended objective of the legislature. **State v. Garcia**, 93 N.M. 51, 53, 596 P.2d 264, 266 (1979). To ascertain the legislative intent we read the entire act as a whole, each part construed in connection with every other part. **General Motors Acceptance Corp. v. Anaya**, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985).

Read in light of the Public Utility Act's statutory framework, Section 62-6-19 gives the Commission the authority to promulgate General Order 39. The legislature gave the Commission the right to formulate the means reasonably necessary to investigate any Class II transaction. **See** § 62-6-19(E). Further, with certain exceptions not applicable here, Section 62-6-4(A) grants the Commission the exclusive power to supervise every public utility in respect to its rates and service regulations and to do all things **necessary and convenient** in the exercise of its power. In conformity with this legislative mandate, the Commission decided to require prior approval of any holding company restructuring. We find General Order 39 to be neither plainly erroneous nor inconsistent with the Act, **see Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n**, 93 N.M. 546, 555, 603 P.2d 285, 294 (1979), and we defer to the Commission's determination that prior approval of Class II transactions is necessary to perform the Commission's investigatory task under Section 62-6-19. **See Groendyke Transport, Inc.,** 101 N.M. at 477, 684 P.2d at 1142.

Even if the Commission has the power of prior approval, PNM maintains that the Commission failed to follow General Order 39 and, consequently, PNM was denied due process. PNM argues that the Commission had no basis to disapprove the restructuring because PNM fully complied with the regulation. Further, PNM contends that the Commission based its disapproval on regulatory concerns not addressed in General Order 39.

Upon examination of the regulation, we cannot agree with PNM's allegations. Section 3.1(C) of General Order 39 provides in part: "The Commission shall approve the general diversification plan * * * if the Commission finds that such approval is in the public interest. Approval is in the public interest if the Commission finds * * * that it appears that the utility's ability to provide reasonable and proper utility service at fair, just and reasonable rates will *{*626}* not be adversely affected by [the Class II transaction] * * *."

The Commission's disapproval of PNM's holding company was primarily based on its determination that the holding company structure would impair the Commission's ability to supervise PNM to ensure reasonable rates and services. Specifically, the holding company structure proposed by PNM would preclude the Commission's access to records of companies within the holding company with whom PNM would engage in business transactions.

Section 62-6-17 grants the Commission access to the books and records of an "affiliated interest" of a utility. An "affiliated interest" as defined by statute includes, among other entities, a subsidiary of a utility. § 62-3-3(A). As long as PNM's diversified activities would continue to be performed by entities that are subsidiaries of PNM, the Commission would continue to have access to information needed to ensure that no cross-subsidies are occurring between PNM and an affiliate. The danger of cross-subsidization has been given extensive analysis by this Court in **Gas Co. v. New Mexico Public Service Commission**, 100 N.M. 740, 676 P.2d 817 (1984).

PNM's restructuring would change the corporate relationship of the diversified entities to PNM. The restructuring would change the status of certain subsidiaries of PNM to a status which can be called "sisters" of PNM. A "sister" of a utility is a subsidiary of a holding company of

which the utility also is a co-equal subsidiary. Under Section 62-3-3(A) the definition of an "affiliated interest" excludes a company which is in a "sister" relationship to the utility in the holding company structure. Therefore, the holding company structure proposed by PNM would prevent the Commission's access to the books and records of the "sister" necessary to ensure the reasonableness of transactions between that "sister" and PNM. Consequently, the Commission was unable to find that PNM's ability to provide reasonable and proper utility service at fair, just and reasonable rates would not be adversely and materially affected by the proposed restructuring.

This Court's role in reviewing orders of an administrative agency is to ensure that the order is neither arbitrary nor capricious, that the order is supported by substantial evidence, and that the order is within the agency's scope of authority. **See Elliott v. New Mexico Real Estate Comm'n**, 103 N.M. 273, 275, 705 P.2d 679, 681 (1985). Examination of both the applicable statutes and regulations, together with the record, reveals that the final order disapproving the restructuring fell within the scope of Section 62-6-19, followed the dictates of General Order 39, and was supported by substantial evidence. We affirm.

IT IS SO ORDERED.

WE CONCUR: Dan Sosa, Jr., Senior Justice, Harry E. Stowers, Jr., Justice.

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
Jennifer A. Salisbury
Cabinet Secretary

Lori Wrotenbery
Director
Oil Conservation Division

July 12, 2000

Chesapeake Operating, Inc.
c/o W. Thomas Kellahin
P. O. Box 2265
Santa Fe, New Mexico 87504-2265

Telefax No. (505) 982-2047

Manzano Oil Corporation
P. O. Box 2107
Roswell, New Mexico 88202-2107

Telefax No. (505) 625-2620

Attention: Kenneth Barbe, Jr.

Steve / fyi amusement / Classic Mike / toss or shred when read / Lyn

Re: ***Administrative application of Chesapeake Operating, Inc. for a non-standard subsurface oil producing area/bottomhole oil well location, as defined by Rule 4 of the "Special Rules and Regulations Northeast Lovington-Pennsylvanian Pool," as promulgated by Division Order No. R-3816, as amended, and Division Rule 111.A (7), within a project area [see Division Rule 111.A (9)] comprising the S/2 NE/4 of Section 10, Township 16 South, Range 36 East, NMPM, Lea County, New Mexico, being a standard 80-acre oil spacing and proration unit for the Northeast Lovington-Pennsylvanian Pool for its proposed Warehouse "10" Well No. 2 to be directionally drilled from a surface location 1196 feet from the North line and 2463 feet from the East line (Unit B) of Section 10 to a targeted bottomhole location at a depth of 11,900 feet (TVD), or 12,033 feet (MD), to be within 100 feet of a point 1842 feet from the North line and 2213 feet from the East line (Unit G) of Section 10.***

Dear Messrs. Kellahin and Barbe:

The Division is in receipt of an objection telefaxed by Manzano Oil Corporation ("Manzano") today (July 12, 2000), see copy attached, on the grounds of: **(i)** various problems concerning this location; and **(ii)** absence of notice. Insufficient notice to all "***affected persons***," pursuant to Division Rules 104.F (3), 104.F (4), and 1207.A (2), by an applicant is considered to be a very serious violation of the *New Mexico Oil and Gas Act*, Chapter 70, Article 2 NMSA 1978. Likewise however, the filing of a frivolous objection in order to slow the processing of an appropriate and legitimate application for Division consideration is considered to be equally offensive and can quit possibly be seen as an obstruction of this agency's duties in carrying out its statutory mandates.

As not to clutter the Division's hearing docket with applications that can be processed administratively, I need to verify the validity of Manzano's objections by: **(i)** requesting from Manzano a detailed description of the various problems mentioned in Mr. Barbe's letter of objection and to identify its mineral interest and/or operations on a land plat; and **(ii)** having Chesapeake respond to Manzano charges in such a manner appropriate to its own findings.

Oil Conservation Division * 2040 South Pacheco Street * Santa Fe, New Mexico 87505
Phone: (505) 827-7131 * Fax (505) 827-8177 * http://www.emnrd.state.nm.us

In order for the Division to act on this matter in a timely fashion, responses must be in my possession by 5:00 p.m. MDST on Wednesday, July 26, 2000. In the mean time I strongly urge both parties to seek an equitable solution on their own.

Please submit your responses to me in Santa Fe at 2040 South Pacheco Street; Santa Fe, New Mexico 87505, and/or via telefax at (505) 827-1389. Thank you.

Sincerely,

Michael E. Stogner
Chief Hearing Officer/Engineer

cc: New Mexico Oil Conservation Division - Hobbs
Ms. Lori Wrotenbery, Director - NMOCD, Santa Fe
Ms. Lyn Hebert, Legal Counsel - NMOCD, Santa Fe