

ATTORNEY GENERAL

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Date: April 15, 1959

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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2 STATE OF NEW MEXICO EX REL OIL CONSERVA-
3 TION COMMISSION, EDWIN L. MECHEM, MURRAY E.
4 MORGAN, A. L. PORTER, JR., Members of said
5 Commission, TEXAS PACIFIC COAL AND OIL COM-
6 PANY, EL PASO NATURAL GAS COMPANY and PERMIAN
7 BASIN PIPELINE COMPANY,

8 Relators,

9 vs.

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Respondent.

ORIGINAL PROCEEDING

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O P I N I O N

1 **CANDY, Justice.**

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3 This is a proceeding invoking our original jurisdiction by
4 way of a writ of prohibition. The case was instituted in the
5 name of the State of New Mexico on the relation of the Oil Conser-
6 vation Commission and its members, and certain companies interested
7 in sustaining an order of the commission. The respondent is The
8 Honorable John R. Brand, District Judge of the Fifth Judicial Dis-
9 trict, and the proceeding seeks to prohibit him from receiving any
10 evidence in a case involving an appeal from the Oil Conservation
11 Commission other than the record as heard before the commission.

12 The Oil Conservation Commission held certain hearings in-
13 volving the question of proration of gas production from the
14 Jalmat Gas Pool in southern Lea County, New Mexico, and following
15 the promulgation of the commission's final order with respect to
16 proration, petitions for review were filed in the Lea County
17 district court under the provisions of § 65-3-22(b), N.M.S.A.
18 1953, by various operators who objected to the commission's order.
19 These petitions for review, eight in all, named the commission
20 and certain other operators as respondents. The cases were con-
21 solidated under one docket number in Lea County, and thereafter
22 a pretrial conference was held. At the time of the original pre-
23 trial conference, the applicants for the review advised the court
24 that they intended to offer evidence in addition to the record
25 made before the commission. The respondent advised these parties
26 that they should notify their adversaries of the "gist of the
27 testimony" and that the court on a second pretrial conference
28 would advise counsel whether or not the evidence would be con-
29 sidered.

30 Prior to the second pretrial conference held on September
31 23, 1958, the applicants for review submitted what was termed an
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1 "offer of proof" and an amendment to the offer. This was con-
2 sidered by the trial court and, after hearing arguments from
3 both sides, the court stated that the petitioners seeking the
4 review would be permitted to offer proof which was not available
5 to the commission, in order that he might determine whether or
6 not the order of the commission was proper and reasonable and
7 whether or not, in view of later developments after the order,
8 a determination could be made affecting the invalidity, unreason-
9 ableness or capriciousness of the order in not protecting the
10 correlative rights in the property. Following this announcement
11 by the respondent, the relators, after proper petition to this
12 court, obtained an alternative writ of prohibition.

13 The case has been extensively briefed by attorneys for the
14 relators and respondent, and is before us for determination on
15 two questions, first, whether the writ of prohibition should be
16 made absolute on the ground that the respondent is about to
17 exceed his jurisdiction, and, second, that if the respondent is
18 held to be within his jurisdiction, whether we should not prohibit,
19 in the exercise of our superintending control over district courts,
20 to prevent error reasonably calculated to work irreparable
21 mischief, great, extraordinary and exceptional hardship, costly
22 delays, and highly unusual burdens of expense. The relief sought
23 will be taken up and considered in the above order.

24 With respect to relators' right to prohibit, it appears
25 without question that the trial court has jurisdiction of both
26 the parties and subject matter. This is admitted by relators.
27 However, they seriously contend that if respondent allows the
28 admission of the evidence, that it will represent the exercise
29 of an excess of jurisdiction. We feel that this contention is
30 directly answered in State v. Carnody, 1949, 53 N.M. 367, 208
31 P. 2d 1073, and in various other cases, including but not limited
32 to State v. District Court of Eighth Judicial District, 1934,

6 District, supra, but making very slight changes in order to
7 fit the particulars of this case, we will paraphrase a part of
8 former Chief Justice Watson's opinion, as follows:

9 The fact that the district court may be about
10 to decide matters wrongly is of no concern of ours
11 when merely investigating the jurisdiction, nor
12 is it material that we might on review be compelled
13 to reverse the case.

14 It might be convenient, in this case as in many
15 others, to stop proceedings as soon as it appears
16 that there is a substantial error about to be
17 committed. Such is not the policy of our law.
18 Such a system might develop delays and other incon-
19 veniences offsetting entirely the advantages often
20 suggested for it.

21 Therefore, we do not believe that the present case is one
22 calling for our writ of prohibition for want of jurisdiction in
23 the respondent to follow the course of action which he has
24 announced.

25 This leaves for decision whether or not we should issue
26 the writ in the exercise of our superintending control reposed
27 in us by N.M. Const. art. 6, § 3.

28 Without setting forth the same at length, the statute,
29 § 65-3-22(b), provides that the trial upon the appeal from the
30 commission "shall be de novo" with the transcript of the hearings
31 before the commission being made admissible in whole or in part
32 subject to legal objections, and further that the evidence "may
include evidence in addition to the transcript of proceedings."
By the same section, the district court is directed to determine
the issues of law and fact upon a preponderance of the evidence
and to enter its order either affirming, modifying or vacating
the order of the commission.

1 We thus have a controversy relating specifically to the
2 powers and duties of courts when considering appeals from adminis-
3 trative tribunals. The relators contend that the de novo and addi-
4 tional evidence provisions are an unlawful delegation of power and
5 violate the basic theory of separation of powers between the
6 legislative, executive and judicial branches of government; that
7 the courts cannot constitutionally be required to review de novo
8 any administrative action that is deemed nonjudicial, such as in
9 this case, proration of gas. On the contrary, the respondent main-
10 tains that the provisions of the statute are not an unconstitu-
11 tional delegation of a legislative function and that the statute
12 should be read as it stands, allowing the court to arrive at an
13 independent determination of the issues involved, giving due
14 deference, of course, to the fact that the action of the commis-
15 sion is deemed prima facie valid.

16 Relators strenuously assert that unless this court inter-
17 venes, they will be subjected to great expense in order to combat
18 the proposed testimony to be submitted by those seeking the
19 review in the district court, including the making of additional
20 tests and measurements, and that the cost of preparing this
21 evidence will exceed the sum of \$20,000.00; they also point out
22 that the testimony already adduced before the commission is in
23 the neighborhood of a thousand pages together with seventy-five
24 exhibits, and that the record which will be received in the
25 district court in addition to the commission testimony will be
26 extensive by reason of the fact that the case is expected to last
27 about three days; they also say that the delay will be costly
28 and that if the court receives the proposed testimony, of neces-
29 sity an appeal to this court will result, with attendant costs
30 for the preparation of the entire transcript on appeal.

31 In opposition, respondent points out that the original
32 order of the commission is now in effect and that relators will

1 be in nowise prejudiced because this is the very order which
2 relators seek to have sustained; that the cost of the transcript
3 of testimony taken before the commission is a relatively small
4 item because the same can be stipulated to, in order to present
5 the same to the supreme court should the case be appealed; and
6 that actually there is very little more to this case than an
7 ordinary lawsuit involving one or more controversial questions.

8 It might be considered that it is perhaps poetic justice
9 that the writer of this opinion was rather closely connected to
10 the case of State v. Carmody, supra. In that case, this court
11 exercised its superintending control for at least some of the
12 same reasons as are now argued by relators, including the matter
13 of possible delay and costs on appeal. However, the net result
14 of the aforementioned decision was that that litigation became,
15 if possible, even more involved, costly and considerably delayed
16 than it would have otherwise. See *Transcontinental Bus System*
17 *v. State Corp. Commission*, 1952, 56 N.M. 158, 241 P. 2d 829. In
18 the instant case, there is no apparent reason why the case could
19 not be tried in the district court and, even if appealed, dis-
20 posed of within a reasonable time.

21 Much as we appreciate the position taken by the relators
22 and the fact that, at least for the moment, it might seem that
23 it would be better for this court to render an opinion deter-
24 mining what may or may not be considered in a judicial review
25 from the Oil Conservation Commission, it is not felt that
26 relators' remedy by appeal is so inadequate as to warrant our
27 exercising the power of superintending control. It does not
28 appear to us that irreparable mischief will result, nor is there
29 any great, extraordinary or exceptional hardship involved insofar
30 as relators are concerned, any more so than might exist if the
31 situation as to parties were reversed. It should be mentioned
32 that, by reason of the seriousness of the question involved, it

1 is reasonable to expect that there will be an appeal to this
2 court, no matter who is successful in the court below. It
3 would appear that there may be some delay which, as relators
4 claim, will be costly; however, a great deal of the delay,
5 thus far at least, is by reason of the institution of this
6 particular proceeding. So also there may be some fairly
7 unusual burdens of expense which will have to be borne by
8 relators, but these are items which, though unfortunate, are
9 frequently a necessary adjunct to litigation of the type here
10 involved. Compare *State v. Carnody*, supra, at 378, which
11 sets forth the general grounds under which this court will
12 exercise superintending control.

13 We have not mentioned it before, but the respondent herein
14 is a trial judge of broad experience and well recognized
15 ability and he has specifically stated for the benefit of
16 counsel with respect to the proposed proof that the relators
17 will not be precluded from objecting to the proof when offered
18 and also that the respondent as the court is not precluded
19 from sustaining relators' objection. The trial judge will
20 now have the full benefit of the thorough briefing and
21 analysis of the authorities presented here, and, although
22 we cannot and do not anticipate what the final ruling of
23 the respondent may be, it is not outside the realm of
24 speculation that relators might be agreeably surprised
25 in the actual trial. We believe that the rights of all of
26 the parties will be protected and that it will make for a
27 more orderly administration of justice to allow the case to
28 proceed to trial, reserving unto this court on appeal, if
29 the same is taken, any questions with respect to the points
30 raised in this action.

31 From what has been said, therefore, the alternative writ
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1 of prohibition will be discharged as improvidently issued, and
2 IT IS SO ORDERED.

3 S/ David W. Carnody
4 Justice

5
6 WE CONCUR:

7 / Eugene D. Lujan C.J.

8 / Daniel W. Gadler J.

9
10 / J. J. Tompton J.

11 / Edwin L. Stepe D.J.

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13 McGHEE, J., not participating.
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